THE NATURE OF ASSOCIATION AND DISSOCIATION FOR COMMON PURPOSE LIABILITY

by

PATERSO NKOSEMNTU MAKWANE

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SUPERVISOR: PROF C R SNYMAN

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SUMMARY

Since the pre-requisites for common-purpose liability where there was no prior agreement were laid down in *S v Mgedezi* 1989 (1) SA 687 (A), the appellate division has moved to resolve related controversial issues. These include the question whether a joiner-in is a perpetrator or accomplice, and whether he should be convicted of murder or attempted murder.

It is the question of dissociation which has remained elusive. Courts accept that a person should only be criminally liable when his dissociation from a common purpose takes place after the commencement of execution stage is reached. My submission is that whether one dissociates himself should be a question of fact, to be determined according to the circumstances of each case. Such determination should pay close attention to the doctrine of proximity. Where a person played a minor role, or acted under the influence of a dominant partner, this should be reflected in the punishment imposed.

**Key terms**

Accomplice, association, causation, commencement of execution, criminal law, culpability, dissociation, doctrine of common purpose, joiner-in, murder, participation, perpetrator, withdrawal.
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CHAPTER 1

INTRODUCTION

The doctrine of common purpose has been applied by the South African courts for some decades now.¹ It has through the years undergone evolution in which the courts have attempted to re-define its content and extent of application. The attempt has not always been successful because in their attempts to refine the doctrine the courts have at times unwittingly extended its scope.² However, the courts have in their latest decisions attempted to limit liability by emphasizing that:

(i) common purpose cannot extend to culpability.³ The *mens rea* of each participant must be determined independently and without reference to the mental state of the other participants.

(ii) a joiner-in, in those cases where common purposes has not been established, may be liable only for attempted murder.⁴

It is the practice of the courts to restrict active association within the pre-requisites as laid down in *S v Mgedezi*.⁵

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¹ One of the earliest cases in which the doctrine was applied was *R v Garnsworthy* 1923 WLD 17.
² This is arguably the case in *S v Nzo* 1990 (3) SA 1 (A).
³ CR Snyman *Criminal Law* 3 ed. (1995) 253. The author states that "The liability of an associate in a common purpose to commit an unlawful act depends upon his own culpability (intention)."
⁴ In *S v Khoza* 1982 (3) SA 1019 (A) Botha AJA stated that a joiner-in is an accomplice, not a perpetrator. This view was finally rejected in *S v Motaung* 1990 (4) SA 485 (A) at 520F-G where Hoexter JA held that where a joiner-in had done nothing to expedite the death of Y, he could not be found guilty of murder but only of attempted murder.
⁵ 1989 (1) SA 678 (A) at 705G - 706B. This matter is discussed in Chapter 2 C *infra*. 1
A The meaning of the doctrine

The doctrine has English origins, and was first introduced in South Africa through section 78 of the Native Territories Penal Code.⁶ This Act had limited jurisdiction as it did not apply to all areas or persons in the Cape Colony.⁷ Common purpose outside the jurisdiction conferred by this Act was first applied in South Africa in *R v Garnsworthy*⁸ and was formulated as follows:

"Where two or more persons combine in an undertaking for an illegal purpose, each one of them is liable for anything done by the other 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 probable⁹ result of their endeavouring to achieve their object. If, on the other hand what is done is something which cannot be regarded as naturally and reasonably incidental to the attainment of the object of the illegal combination, then the law does not regard those who are not themselves personally responsible for the act as being liable; but if what is done is just what anybody engaging in the illegal combination would naturally, or ought naturally to know would be the obvious and probable result of what they were doing, then all are responsible."

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⁶ Act 24 of 1886 (C).
⁷ The earliest application of the provisions of s 78 was in *R v Taylor* 1920 EDL 318, a case which involved participation in a strike by the students of Lovedale College in Alice.
⁸ *Supra* (n 1) at 19.
⁹ The courts have now substituted the word "probable" by "possible" in describing the nature of the result that must be foreseen. See *S v Malinga* 1963 (1) SA 692 (A).
The above formulation may have been appropriate for its time and for the facts of that case, but later developments have exposed its inadequacies. It has been criticised for introducing an objective test by using the phrases 'ought to have known' and 'probable' in place of 'possible'. The subjective test requires foresight that a possible (as opposed to probable) result might occur or a circumstance exist. The Garnsworthy formulation says much about the basis of liability of the participants in a common purpose, but little about a situation where some members subsequently dissociate themselves from the criminal conduct. Earlier cases also failed to address the vexing problem of causation in common purpose liability.

B The purpose of the doctrine

The plausible result of the doctrine is that it facilitates conviction where more than one person participates in criminal conduct. This is especially so where it is not easy for the prosecution to tell (in the case of, for example, murder) who actually caused the death of Y. Liability is simply founded on the principle of imputation. The acts of X are imputed to Z if both X and Z had a common design and the result of their criminal act falls within that common design. This is so even where causation has not been established.

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10 It should be noted, however, that at that time the courts had not yet clearly applied a subjective test for intention. With respect to intention dolus eventualis had not been developed as it is today.

11 This refers in particular to cases before S v Thomo 1969 (1) SA 385 (A). Botha JA in S v Safatsa 1988 (1) SA 868 (A) at 895D-I cited R v Malinga 1963 (1) SA 693 (A), R v Mgwebi 1954 (1) SA 370 (A) as well as R v Dladla 1962 (1) SA 307 (A) as examples where causation was required.

12 In S v Safatsa supra (n 11) at 900G-H the court said that causation is not a requisite.
In this discussion I hope to look closely at the concept of association to determine the extent of participation required before the accused will be held criminally liable. This involves establishing the stage at which common purpose actually arises, as well as a discussion of related concepts including culpability. The question which is seemingly difficult to resolve is whether all those who acted with a common purpose are accomplices or perpetrators. It is submitted that participants in a common purpose cannot be accomplices or accessories after the fact unless it is established that they cannot be held liable under the common purpose doctrine despite their involvement in the criminal act. In such an event it would be necessary to show that the accused:

(i) did not share a common purpose with his companion
(ii) acted independently, and that
(iii) no prior agreement or active association existed.

It is causation which leads some thinkers to argue that, because the causal link is not required in cases where common purpose is involved, some participants are accomplices and not perpetrators.

It is respectfully submitted that courts at times have abused the doctrine and extended liability to include instances for which the doctrine was obviously never intended. From the above it is discernible that

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13 Causation is discussed in Chapter 3A infra.
14 Implied in the views expressed by Snyman op cit (n3) at 256 is that people sharing a common purpose are perpetrators. He says "Thirdly if evidence reveals previous conspiracy between X and Z to kill Y, Z is guilty of murder...."
15 The case of S v Nzo supra (n2) is a clear example where, in my view, irrelevant issues were allowed to determine the fate of the accused. This case will be discussed infra Chapter 2C. However, in S v Safatsa supra (n 11) correct inferences forming the basis for conviction of the Sharpville Six were drawn.
common purpose, through the doctrine of imputation, serves to fill the gap created by the absence of causation in circumstances in which more than one person was involved in the commission of the crime. It imputes the conduct of one person to another so that all persons sharing a common purpose with respect to a particular crime will not escape liability.
CHAPTER 2

ASSOCIATION

A  Definition of common purpose.

It is the application, and not the definition, of common purpose that poses problems for the courts. In the English case of *Macklin, Murphy and others*\(^\text{16}\) Alderson J stated that "it is the principle of law, that if several persons act together in pursuance of a common intent, every act done in furtherance of such intent by each of them is, in law, done by all."\(^\text{17}\) Burchell,\(^\text{18}\) on the other hand states:

"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."

The above definitions clearly show that common purpose liability is based on an imputation of the acts of all the participants to each other.\(^\text{19}\) Burchell states that common purpose has the two crucial elements of prior agreement between, or active association of, two or more persons. Implied in both agreement and active association directed at the unlawful conduct is the element of intention. However, it is my submission that where X and Z have agreed to murder Y, but X does not turn up at the scene of the crime, Z

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\(^{16}\) 1838 2 Lewin 225, 168 ER 1136 1138.

\(^{17}\) MA Rabie "The doctrine of common purpose in criminal law" 1971 *SILJ* 227.


\(^{19}\) Courts have, however, not been consistent in the application of the doctrine. The court in *S v Nzo supra* (n 2) seems to have given a wide meaning to the concept of imputation.
should be solely liable for the murder of Y should he go ahead and murder Y. Equally, where X and Z, pursuant to their agreement, both turn up at the scene but then X persuades Z to abandon the plan and in fact refuses to participate therein, but Z nevertheless goes ahead and kills Y, this act of dissociation by X should exculpate X from liability. In the first scenario X should be liable for incitement or complicity to murder although he was not present at the scene of the crime. This is so because of the prior agreement and his failure to actively dissociate himself. This would be the case even where X was the dominant partner but did not do anything positive to frustrate the plan to kill Y by, for example, restraining X or even informing the police. Something more positive than merely not turning up at the scene is required to demonstrate that X dissociated himself from the original plan to kill Y. 20

B. Agreement

The basis of common purpose is prior agreement or active association. 21 The agreement may be express or implied. Snyman 22 has correctly pointed out that agreement is not the same as active association; "it is merely one form of active association." Matzikis 23 explains that express agreement involves articulated achievement of consensus ad idem 24 between the parties that one or more of them should bring about the death of the deceased. Implied mandate, on the other hand, is achieved

\[^{20}\text{Hales points out that where the accused dissociated himself, he will not be liable for offences committed after his withdrawal, provided that his dissociation was effective. See Hales "Effective dissociation from common purpose - a Zimbabwean view" 1982 SA CJ 187 188.}\]

\[^{21}\text{See Snyman op cit (n 3) 252 and Burchell op cit (n 18) 317.}\]

\[^{22}\text{Snyman loc cit.}\]

\[^{23}\text{NA Matzikis "The nature and scope of common purpose" 1988 SA CJ 226 231.}\]

\[^{24}\text{Matzikis loc cit. For a case where the death of Y fell within the mandate see S v Majosi 1991 (2) SACR 532 (A).}\]
through conduct and the granting of authority by one person in a superior position to another. The term 'mandate' has been criticised, rightfully, because:

- (i) it is a concept that is applied in the law of contract and which therefore cannot be suited to criminal matters; and
- (ii) implied mandate to commit a crime has no force or effect since it is contra bonos mores.

In *S v Yelani* it is not clear what the basis of liability was. The facts of the case are, briefly, as follows: The house of Mr and Mrs T was destroyed by fire allegedly caused by Y. A meeting was held by a group of people who conducted a "trial" at which accused no 6 presided. The trial court held accused no 6 guilty of murder and sentenced him to death, despite the exculpatory portion of the statement of accused no 6 to Toise, a witness:

"dat hy as 'n persoon wie die voorsittende beampte was in die saak, nie 'n besluit geneem het nie en as gevolg daarvan moes die saak uitgestel word."

It is my respectful submission that accused no 6 in *Yelani* did not actively associate himself with the conduct of those who had attacked Y. This is so because accused no 6 was not present at the scene of the crime. In the absence of active association, the only reasonable inference is that liability was based on prior agreement or on implied mandate.

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25 Snyman op cit (n 3) 251.
26 1989 (2) SA 43 (A).
27 *S v Yelani supra* (n 26) at 50F.
28 It has been stated in *S v Mgedezi* 1989 (1) SA 686 (A) 705I- 706C that in the absence of prior agreement, an accused will only be liable under this doctrine if certain requirements are met which are pointers to active association. One of these pointers is that he must be present at the scene of the crime.
29 See the criticism of implied mandate by Snyman op cit (n 3) 251.
The court *a quo* apparently relied on implied mandate to convict the accused. This is clear from the statement: "if a person ... passes or authorises what amounts to a sentence of death on another, with the subjective intention that the sentence will be carried out, he is liable for the ensuing death ... irrespective of whether he was present at the scene or not."\(^{30}\) Happily the sentence was overturned by the appellate division on the basis that the accused did not authorize or sentence the deceased to death as alleged. In other words there was neither prior agreement nor active association.

The issue of agreement also has a bearing on the question as to when culpability is to be assessed. Is it at the time common purpose was formulated, or at the time of the commission of the crime? *In S v Nkwenja*\(^{31}\) Jansen JA, Joubert JA and Grosskopf AJA were of the view that the correct moment for assessing fault was when the common purpose was formulated.\(^{32}\) Assuming that accused no 6 in *Yelani* was guilty on the basis of common purpose, his liability would have been based on the assessment of culpability at the time the common purpose was formed. This, I submit, is the correct approach. This approach has been criticised as failing to take into account the subsequent change of mind.\(^{33}\) This criticism is, with respect, unjustified. Any subsequent withdrawal would be indicative of dissociation from what was agreed to earlier.

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\(^{30}\) *Yelani* (n 26) at 46F-G. Also *R v Njenje* 1966 (1) SA 369 (RA) at 377B.

\(^{31}\) 1985 (2) SA 560 (A) at 572G-I.

\(^{32}\) The opposite approach was followed in *S v Mitchell and another* 1992 (1) SACR 17 (A) 22G-H. See N Boister "Common purpose: Association and mandate" 1992 SACJ 167 at 169.

\(^{33}\) Burchell and Hunt *supra* (n 18) at 314 suggest that assessment at the time common purpose was formulated involves a *versari*-type of liability. He is in full support of the dissenting minority view of Rabie CJ and Miller JA in *S v Nkwenja supra* (n 31). He argues that "The majority judgment, by not taking account of a subsequent change in the mental state of a participant in a common purpose before the completion of the crime, would involve a *versari*-type of liability."
The trial court in *S v Yelani* seemingly assessed culpability at the time of the formulation of common purpose to murder, but unfortunately concluded that there was such agreement when in fact there never was one. If assessment of culpability is made at the moment of murder\(^{34}\) as opposed to the moment when the alleged common purpose to kill came into being,\(^{35}\) this would lead to unacceptable results at times. Where X, for example, agrees with Z that the latter must murder Y, but X is not to be present at the scene (this may be because X is known to the would-be victim and wants to avoid possible identification) X would not escape liability. As soon as the commission of the crime reaches the "commencement of execution" stage, the prior agreement between X and Z should stand, and late withdrawal should not avail as a defence. The only advantage in the approach of assessment of culpability at the moment of murder is that those who dissociated themselves in time would escape liability.

**C. Active association**

It has been emphasised that active association is a wider concept than agreement.\(^{36}\) However, at times active association may be the result of prior agreement. The converse is not also true. Active association may also exist where there was no prior agreement. Even where there was no prior agreement, the liability of the parties may be based on active association as evidenced by the conduct of the parties.\(^{37}\)

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\(^{34}\) As was the case in *S v Mitchell supra* (n 32).

\(^{35}\) As was the case in *S v Nkwenja supra* (n 31).

\(^{36}\) Snyman op cit (n 3) at 252 correctly points out that agreement is merely one form of association. "Association in the common purpose leads to an imputation of the acts of all the participants to each other, and consequently renders the act of the principal offender the act of all." Sec W.A. Joubert ed. *The Law of South Africa* vol 6 (1996) at 125. In *S v Safatsa* (1988) (1) SA 868 (A) at 895 it was held that a causal connection between the offender's act and the deceased's death is not required.
In *S v Safatsa*[^38] a mob had attacked and killed Y, and some six members of that mob were charged with murder. It was established that they were part of a mob which had attacked Y, and the appellate division was satisfied that they all shared a common purpose to kill even though there was no causal link between the individual act of each accused and the death of Y.

Because the contribution of some of the accused was very limited and doubtful, this case has been subjected to strong but unjustified criticism[^39]. Botha JA pointed out that "all these accused had actively associated themselves with the conduct of the mob which was directed at the killing of the deceased."[^40] This, I submit, was correct.[^41]

In *S v Mgedezi*[^42] it was stated that in the absence of prior agreement[^43] an accused can be liable on the basis of common purpose only if certain pre-requisites exist. These pre-requisites are the following:

(i) he must have been present at the scene where violence was committed  
(ii) he must have been aware of the assault

[^38]: *Supra* (n 37).  
[^39]: See VVW Duba "What was wrong with the Sharpeville Six decision" 1990 *SACJ* 180 and E Cameron "Inferential reasoning and extenuation in the case of the Sharpeville Six" 1988 *SACJ* 243. Duba, however, correctly acknowledges that "the principles of the doctrine of common purpose were correctly set out but that their application to the facts of the case was, with respect, incorrect."[^40]  
[^40]: *S v Safatsa supra* (n 37) at 893G-H.  
[^41]: Unterhalter argues that common purpose derives from the exercise of each individual's will and not from transportation of the collective will on each individual. See D Unterhalter "The doctrine of common purpose: what makes a person liable for the actions of another" 1988 *SACJ* 671 676.  
[^42]: 1989 (1) SA 687 (A).  
[^43]: Maré states, correctly, that the accused in *S v Thomo* 1969 (1) SA 385 (A) neither associated himself with the perpetrator's crime nor consciously shared with the perpetrator a common purpose to kill the deceased. See MC Maré "The liability of the joiner-in for murder" 1990 *SACJ* 25 38.
(iii) he must have intended to make common cause with those who actually perpetrated the assault

(iv) he must have manifested his sharing of a common purpose by himself performing some act of association with the conduct of others

(v) he must have had the requisite mens rea.

While the Mgedezi formula\(^{44}\) is most welcome, it does not necessarily follow that compliance with those requirements will always lead to a verdict of guilty unless they are found to exist all at the same time. This is clear where, for example, X is a passive spectator.\(^{45}\) Manete, a witness in the Safatsa case, was present at the scene of the crime, but was not for that reason held to have actively associated himself with the accused.\(^{46}\) While presence at the scene of the crime will not necessarily lead to liability, it is equally true that absence at the scene of the crime, where there was a prior agreement, will not save the accused from conviction.\(^{47}\) The qui facit rule\(^{48}\) ensures that a person who procures another to commit the crime will not escape conviction on the basis that he was not present at the scene. He may be held responsible as if he committed the crime himself.

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\(^{44}\) Mgedezi supra (n 42) at 705G-706B. Criterion (iv) implies that a passive spectator cannot be guilty since he does not share in the common purpose to commit the crime.

\(^{45}\) In S v Memani 1990 (2) SA 4 (Tk) 8 it was held that the mere fact of presence where there was no act of association is insufficient for liability.

\(^{46}\) See S v Safatsa op cit (n 38) at 872B-D.

\(^{47}\) This explains why in S v Yelani supra (n 26) accused no 6 was held liable by the court a quo although he was never present neither at the second meeting nor at the scene of the crime.

\(^{48}\) This rule essentially means that he who commits the crime through another commits it himself.

"Qui facit per alium facit per se." This maxim was obviously applied by the trail court in S v Yelani supra (n 26).
A case which seems to have puzzled most writers, and which was justly criticized, is that of *S v Nzo*. In this case the actual perpetrator fled to Lesotho and was never brought to justice. Instead, two people who were not at the scene of the crime and who, according to the evidence, were not even aware that Y was to be killed, were nevertheless convicted by the court *a quo* under the common purpose doctrine. The appellate division correctly accepted that the appellants could not be found guilty as co-perpetrators since neither of them had taken part in the killing of Y. There was no evidence of a common purpose among the appellants to kill the deceased. There was no prior agreement, mandate of any kind or active association with respect to the specific crime of killing Mrs T. The immediate question that comes to mind is: why were they then convicted by the trial court? Why was the appellate division prepared to allow the appeal in the case of the first appellant, and confirm the conviction of murder in the case of the second appellant? The trial court clearly accepted that the accused had actively associated themselves with the commission of the crime. On appeal it was held that the first appellant, who was the leader of the ANC cell in Port Elizabeth, had subsequently effectively dissociated himself. The evidence, however, did not indicate an existence of any prior agreement or active association with respect to murder by either appellant. What is it, then, that first appellant dissociated himself from?

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49 1990 (3) SA 1(A). Also see J Burchell "Criminal Law: Strafreg" 1990 SACJ 345 at 348 where he points out that "in this case there was no prior agreement to kill the deceased ... in the absence of prior agreement, presence at the scene was required for the common purpose principle of imputing the acts of the perpetrator to the other parties to a common purpose."

50 This case has been severely criticised by almost all writers. See Duba op cit (n 39). See also Burchell (n 52) *infra* where he points out that there was no manifestation of a sharing of a common purpose with the perpetrator of murder by performing "some act of association with the conduct of the murder."

51 The African National Congress will always be referred to as the ANC in the discussion to follow.
The court, in a decision which, it is submitted, is clearly wrong, concluded that there was "common purpose on the part of the accused to commit acts of sabotage and that fatalities must have been foreseen and, by inference, were foreseen by the participants"\textsuperscript{52} This decision is unfortunate and, looked at from any perspective, simply leads to untenable results. It is nothing but the application of the \textit{versari} doctrine.\textsuperscript{53} Since both appellants were held liable by the court \textit{a quo} on the basis of common purpose, the appellate division equally misdirected itself in allowing the appeal in respect of the first appellant on the grounds that he had subsequently dissociated himself. His dissociation was, in my opinion, neither genuine nor voluntary. He decided to "talk" because he had been discovered. He conveniently tendered information to protect himself from possible assault by the police. If he was aware of the roadblock ahead, he would have alighted from the vehicle earlier, to avoid detection. His contact with the police is not what he wanted. Given the opportunity, the appellant would have avoided arrest. His dissociation is questionable, considering that at the very moment of arrest he was on an illegal mission to Lesotho. His dissociation was nothing but cowardly capitulation especially considering that:

(i) he was the leader of the ANC cell in Port Elizabeth, and

(ii) it was a late withdrawal at a stage when the life of Mrs T could not be saved.\textsuperscript{54}

\textsuperscript{52} See Burchell "S v Nzo 1990 (3) SA 1 (A). Common purpose liability" 1990 \textit{SACJ} 345 at 346.

\textsuperscript{53} \textit{Versari in re ilicita omnia imputantur quae ex delicto sequuntur} - it means that whoever indulges in unlawful conduct has to bear the consequences of all harm ensuing from his wrongdoing, even if those consequences are unintended.

\textsuperscript{54} A leader, to effectively dissociate himself, must do something more positive, e.g. notify the police. See Hales "Effective dissociation from a common purpose - a Zimbabwean view" 1992 \textit{SACJ} 187. Appellant's reporting to the police was both involuntary and too late to be useful in saving Mrs T. His last minute withdrawal should not have saved him at all.
In any event, the question of dissociation does not arise at all here because both appellants never actively associated themselves in the first place. There was also never a prior agreement with Joe (the perpetrator) that Mrs T should be killed. One appellant was, admittedly, aware that a threat to kill Mrs T had been made by Joe. This surely does not amount to agreement. It is submitted that both appellants should have been found not guilty of the crime of murder. Their membership of the ANC had only indirect bearing on the crime of murder. Alternatively, they should both have been convicted. It is incorrect that the court could have allowed the appeal of one appellant on the basis of dissociation.

Steyn JA, in a compelling dissenting judgement, rightly argued that neither of the appellants was guilty of murder since

"die bestaan van die bree algemene, of oorkoepelende gemeenskaplike doel om sabotasie in die Port Elizabeth gebied te pleeg is, na my oordeel, nie genoegsaam om appellant sonder meer regtens aanspreeklik te hou in die moord op die oorledene nie."

They had not agreed to murder the deceased and had not done anything to help the perpetrator. He explained that the common purpose doctrine had in English law application to a small group of persons and was based on the principle of proximity of the participant to the commission of the crime.

55 S v Nzo supra (n 49) at 12C-17F. See also Burchell and Hunt op cit (n 18) at 310 where Burchell expresses full agreement with the dissenting judgement of JA Steyn.

56 JA Steyn's reasoning suggests that he would have held accused no 6 in S v Yelani supra (n 26) not guilty.

57 The principle of proximity is important as it limits liability and confines the doctrine within manageable bounds. This principle is discussed in Chapter 5 infra.
S v Mitchell is another example of a case in which the doctrine was, with respect, incorrectly applied. The accused, X and Z, stopped at a café. An agreement was reached that they would collect stones which they would throw at pedestrians from the back of their vehicle when their journey had resumed. They collected stones in pursuance of this objective, including a paving-brick which X also collected. The stone-throwing resulted in the death of a pedestrian. The agreement between X and Z involved the collecting and throwing of stones, and this did not include the throwing of paving bricks, so the trial court argued.

My own interpretation of the above agreement is that in it is included the agreement to collect and throw anything capable of being thrown including oranges, stones, paving bricks and even the remnants of what they were eating. This latter approach accords with the approach adopted by the court a quo. It found Z guilty of murder. Z successfully appealed against this conviction.

The appellate division found that Z was incorrectly convicted of murder; he had not agreed to the throwing of paving bricks. Their common purpose was limited to the throwing of stones. It is submitted that this literal interpretation is unusual and fails completely if the Mgedezi formula were to be applied. On the Mgedezi formula Z should have been convicted of murder if there was prior agreement to attack pedestrians or, in the absence of such agreement, if Z actively associated himself with the commission of the crime on the basis that (i) he was present at the scene of the crime; (ii) he was aware that X had picked a paving brick in pursuance of their agreement to throw stones at pedestrians, (iii) he intended to make common cause with

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58 1992 (1) SACR 17 (A).
X, the perpetrator; (iv) he manifested his sharing of common purpose by himself performing some act of association with the conduct of X; and (v) he had the necessary mens rea. 59

It is submitted that all these requisites were present, and that Z did foresee the possibility that the throwing of projectiles at persons might have fatal consequences, but reconciled himself to this possibility. He had dolus eventualis. There is nothing to indicate that Z dissuaded, or attempted to dissuade X against picking up or using a paving brick (as opposed to using a stone). The argument of Nestadt JA that there was no common purpose because of the marked difference in size between the stones collected and the brick that was thrown does not hold. A stone can be bigger in size than a paving brick. The argument that the agreement to collect and throw stones necessarily excludes the picking of a paving brick is not convincing, especially because the agreement as to the size of material to be collected was never canvassed. Boister 60 argues that there was no intention by Z to kill:

"It was not enough that Z had to foresee the use of the brick and the resulting death. He did not and thus was not liable. Without the requisite intention to kill there could be no imputation."

The second premise in Boister's statement is questionable. I respectfully submit that Z did foresee that the use of a paving brick might result in death. His intention to kill was in the form of dolus eventualis. It is

59 See 1989 (1) SA 687 (A) at 705G - 706C.
60 N Boister "Common purpose: association and mandate" 1992 SACJ 167 168 where he says that "... the form of common purpose specified in Mgedezi as the mandate situation, did not extend to throwing of the brick and thus the conscious decision to participate in the throwing of stones could not be the basis for imputing X's actions to those party to the original agreement."
not necessary that the requisite intention should be in the form of *dolus directus* where there is a common purpose.\(^{61}\) All that Z lacked was *dolus directus*, but he had *dolus eventualis*. In *S v Nkwenja*\(^{62}\) Jansen JA, Joubert JA and Grosskopf AJA shared the view that "the critical moment for assessing the *mens rea* of a participant in a common purpose was when the common purpose was formulated."

Rabie CJ and Miller JA in the *Nkwenja* case were of the opinion that the critical moment for assessing *mens rea* was when the unlawful conduct of the actual perpetrator was committed.\(^{63}\) Burchell\(^{64}\) argues that "the majority judgement, by not taking account of subsequent change in the mental state of a participant in a common purpose before the completion of the crime, would involve *versari-* type liability."

This conclusion cannot be supported.\(^{65}\) If Z's *mens rea* is assessed at the time of formulation, he did have intention. As explained earlier,\(^{66}\) the prior agreement in *S v Mitchell*\(^{67}\) was about "the collecting and the throwing" of stones at pedestrians and here I am in full agreement with what was said in *R v Shezi and others*,\(^{68}\) namely that "the liability of parties to a common purpose depends on whether the result produced by the perpetrator of the act falls within the mandate and is not concerned with the means by which the result is produced."

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\(^{61}\) *Dolus eventualis* may suffice. See Burchell *op cit* (n 18) 313.

\(^{62}\) *Supra* (n 31) at 572G-I.

\(^{63}\) *Nkwenja* 1985 (2) SA 560 (A) at 572G-I.

\(^{64}\) *Op cit* (n 18) at 314.

\(^{65}\) The reason for rejecting the minority view will be discussed in Chapter 3B *infra*.

\(^{66}\) See discussion in text starting opposite note 57 *supra*.

\(^{67}\) *Supra* (n 58).

\(^{68}\) 1948 (2) SA 119 (A) at 128.
Nestadt JA in *S v Mitchell*\(^{69}\) ignored the mandate referred to above, and paid undue attention to the means. As pointed out above the agreement of collecting and of throwing stones cannot exclude the collection and throwing of other throwable objects including oranges, stones, bricks and even remnants of the food they had bought at the café. Besides mandate and prior agreement, there was also association, which is evidenced by participation in stone throwing. On the *Shezi* formula the means are irrelevant.

Active association will, therefore, always exist where there was conduct which can be described in terms of the formula in *S v Mgedezi*.\(^{70}\) Burchell\(^{71}\) submitted that in the light of the unfortunate decision in *S v Nzo*\(^{72}\)

"Continued membership of an organisation which adheres to the policy that violence is permissible in order to achieve certain political ends will not only expose its members to prosecution and conviction for treason but also for murder, in terms of the common purpose principle, if a killing is perpetrated by one of its members in furtherance of the objectives of the organisation."\(^{73}\)

\(^{69}\) *Supra* (n 58).

\(^{70}\) *Mgedezi supra* (n 59) at 705G-706B.

\(^{71}\) *Burchell op cit* (n 18) at 317.

\(^{72}\) *Nzo supra* (n 49).

\(^{73}\) See *Burchell supra* (n 18). The same statement is repeated in *Burchell op cit* (n 52) at 349. It is submitted that this view cannot be supported because, firstly, it does not form part of our law and, secondly, it militates against the spirit of tolerance and reconciliation in the new South Africa.
CHAPTER 3

CAUSATION AND CULPABILITY

In materially defined crimes, such as murder, the accused will be liable only where his conduct is causally linked to the forbidden consequence.\(^7^4\) X will be liable for murder only where his attack caused the death of Y. Where X attacked Y but Y did not die, X cannot be convicted for murder\(^7^5\) because X's conduct did not cause the alleged consequence, namely death. In all result crimes the courts must be satisfied with the existence of causation before they will hold the accused liable. Furthermore, even if the accused did cause the death of Y, he will not be liable unless his conduct is blameworthy or culpable as well. This explains why a toddler or the mentally ill person may at times escape liability. It is because of their criminal incapacity and the fact that they are incapable of intending, in the legal sense, the consequences of their acts, that such persons are not criminally responsible for the consequences of their acts.

A  Causation

Although it is now settled law that causation is not required for common purpose liability,\(^7^6\) the courts have in the past failed to address the question whether or not the causal link between conduct and consequence is required.\(^7^7\)

\(^7^4\) For a clear discussion of causation see Snyman op cit (n 3) 69-87.
\(^7^5\) He might, however, be charged with assault or attempted murder.
\(^7^6\) See S v Sefasto 1988 (1) SA 868 (A) at 897A-B. Botha JA's conclusion that causation was not required was based on the formulation by Holmes JA in S v Madlala 1969 (2) SA 637 (A) at 640F-H.
\(^7^7\) For cases where there was a conviction without proof of causation, see R v Mgwitty 1954 (1) SA 370 (A); R v Dladla and others 1962 (1) SA 307 (A) and S v Malinga 1963 (1) SA 692 (A).
In *R v Sikepe*\(^78\) the court was satisfied that, although it was not clear who had strangled the deceased, the accused shared a common purpose to murder. They had all been present at the scene of the crime. There was also a possibility that some among the accused had not even entered the house, but had kept guard. There was therefore active association. The court did not require proof of a causal link between the act of strangling and the resultant death, or to identify the actual strangler, but convicted them of murder in terms of the common purpose doctrine.

Snyman\(^79\) correctly points out that "in a charge of having committed a crime which involves the causing of a certain result (such as murder) the conduct imputed includes the causing of such result." If it is established that the accused all agreed to commit a crime or actively associated themselves with the commission of the crime by one of their members and each had the requisite *mens rea*, then the act of the member who actually causes the consequence is imputed to the other perpetrators. In *S v Malinga*\(^80\) Holmes JA said the following: "Hence, 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." The common purpose doctrine was introduced apparently for the very purpose of by-passing causation by allowing imputation to fill the gap left by this concept. The courts cannot allow parties to escape liability

\(^{78}\) 1946 AD 745.

\(^{79}\) Op cit (n 3) at 249.

\(^{80}\) Supra (n 9) at 695A-B.
simply on the ground that it cannot be determined which of the many persons sharing a common purpose actually inflicted the fatal wound. If it can be shown that all the parties to a common purpose individually had mens rea in respect of the result, and that there was prior agreement or active association, then all will become liable even if no causal link between the act and the consequences is established. This is well put in LAWSA\textsuperscript{81} where it is stated:

"It is a mechanism which the courts apply to offences requiring intention, where, upon proof of the required intention, all the participants in the common purpose are found guilty, without it being necessary to prove that each participant committed the act which constitutes the offence,\textsuperscript{82} or even that he was present at the scene of the crime.\textsuperscript{83} Association to a common purpose leads to an imputation of the acts of all the participants to each other, and consequently renders the act of the principal offender the act of all the others.\textsuperscript{84} The result caused by one is imputed to others as well."

In the pre-Safatsa case of \textit{S v Thomo}\textsuperscript{85} Steyn CJ required that on a charge of murder it was necessary to prove that the accused was guilty of unlawful conduct which caused or contributed causally to the death of the deceased. Although Steyn CJ was a party to decisions both in \textit{S v Thomo}\textsuperscript{86}

\textsuperscript{81} Op cit (n 37) at 125.
\textsuperscript{82} See \textit{R v Mashotonga} 1962 (2) SA 321 (SR) 327E-F.
\textsuperscript{83} See \textit{Nhiri v S} 1976 (1) H104 (RA).
\textsuperscript{84} In \textit{S v Safatsa supra} (n 37) at 897A-B it was held that there does not have to be a causal connection between an offender's conduct and the cause of death where common purpose exists. The same view was held in \textit{S v Nkwenja} 1985 (2) SA 560 (A) and \textit{S v Khoza} 1982 (3) SA 1019 (A).
\textsuperscript{85} 1969 (1) SA 385 (A) at 399B-E.
\textsuperscript{86} Supra (n 85).
and S v Madlala, he concurred in the judgement of the latter case although no reference was made to causation. It has to be noted, as Mare points out, that the case of Thomo in fact dealt with the situation of a joiner-in involved in an independent venture for which common purpose was not required, and for which causation had to be established. Rabie and Matzukis share the view set out in S v Safatsa that in a common purpose situation a causal link need not be proved, and that active association is sufficient to render the accused criminally liable.

It is submitted that causation that is imputed is based upon the concept of active association. The question of causation will hopefully not arise again because, as Snyman puts it, "the conduct imputed includes the causing of such result." Common purpose would lose its meaning if causation had to be proved. It must be imputed to the accused who shared a common purpose with the actual perpetrator because of his active association in the criminal conduct.

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87 1969 (2) SA 637 (A).
88 MC Mare "The liability of the joiner-in for murder" 1990 S4CJ 24 25.
89 Supra (n 85). Botha AJA pointed out in S v Khoza supra (n 84) that the dictum relating to the liability of the joiner-in had been obiter.
90 MA Rabie "Kousaliteit en 'common purpose' by moord" 1988 S4S 234.
92 Supra (n 76).
93 Snyman op cit (n 3) 250. The value of the doctrine lies in the fact that whenever a group of people, intending a particular consequence, eg the death of Y, act together in order to achieve their goal, the prosecution is relieved of having to prove whose blow actually caused the death of Y. If the causal link had to be established, all members of the group sharing a common purpose might escape liability because the causal link between each member's act and Y's death cannot be proved.
B **Culpability or fault**

An accused will be liable only for acts for which he can be blamed. There can be no liability without fault.\(^{94}\) Fault will be in the form of intention or negligence.

Where the basis of liability is intention (as opposed to negligence) such intention will be in the form of *dolus directus*, *dolus indirectus* or *dolus eventualis*. If the accused means to do the prohibited act or to bring about the prohibited result, the accused has *dolus directus* because it was his aim and object to do the unlawful act or to bring about the consequence.

*Dolus eventualis*, on the other hand, exists where the accused does not mean to bring about the unlawful circumstance, or to cause the unlawful consequence, but foresees the possibility of the circumstance existing or the consequence resulting but nevertheless proceeds with his conduct.\(^{95}\) *Dolus eventualis* would exist where, for example, X intends to kill Z but the bullet misses Z and hits Y. If Y in fact dies from the shot fired by X, in law X does intend Y's death if he did foresee the death of Y as a possible result of shooting Z and reconciled himself to this possibility.

In a common purpose situation *dolus eventualis* may exist where X and Z agree to commit robbery. If X is not aware that Z is carrying a gun, X will not be liable for murdering Y. If he was aware of this fact, he will not

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\(^{94}\) This principle is expressed in the maxim *actus non facit reum, nisi mens sit rea*. Snyman op cit (n 3) at 131 for good reasons prefers the term 'culpability' to 'mens rea.'

\(^{95}\) For an exposition of the various forms of intention see Burchell op cit (n 18) 222-240 and Snyman *supra* (n 3) at 168-174.
be guilty of murder if the agreement to rob did not include the possible use of the gun under any circumstances, and the death of Y is a result of an independent act of Z for which no express or implied agreement between X and Z existed.

This clearly demonstrates that X will only be liable if he foresaw the possibility that "the act of the participants with whom he associates himself may result in Y's death and reconciles himself to this possibility." 96

Imputation on the basis of common purpose is, therefore, limited to causation and does not extend to culpability. Writers 97 generally agree that the culpability of each party has to be determined individually. Rabie 98 states that the liability of a party to a common purpose is not vicarious, and that "it accordingly does not follow that where a common purpose has been established, the same intent must be imputed to all who take part in its execution." 99

A person who is present at the scene of the crime will not be criminally liable if he seemingly actively associated himself with the commission of the crime but in fact lacked the necessary culpability. A person may be present at the scene in order to gather evidence or to facilitate identification of the actors or even to gather news as a reporter. In S v Magwaza 100 the court was of the view that the appellant knew that his companion was in possession of a firearm which he might use in the

96 See Snyman op cit (n 3) at 253.
97 Eg Snyman loc cit.
98 In LAWSA op cit (n 37) at 132.
99 Snyman supra (n 96) states that the liability of an associate in a common purpose to commit an unlawful act depends upon his own culpability. Also see S v Memani 1990 (2) SACR 4 (Tk A) 7B.
100 1985 (3) SA 29 (A) at 41B.
execution of the robbery. However, the court was not convinced that the appellant "knew as a fact" that his companion's firearm was loaded. This approach is correct. The subjective test of intention should lead to liability only where X subjectively foresaw that the gun might be used with fatal results. "Knowing as a fact" alluded to in the above case is, in my opinion, nothing other than a requirement of dolus directus. However, in most instances dolus eventualis would suffice. The test for culpability does not apply differently when common purpose is involved. Burchell correctly states that there is "nothing special about common purpose liability in this regard." 101

The only point of argument with regard to culpability is the correct moment for assessing fault, 102 and whether a party to a common purpose can be found guilty of culpable homicide. It cannot be denied that where X and Z assault Y with no intention to kill, the accused will not be liable for murder if Y dies. This is so because, firstly, they had no common purpose to kill Y and, secondly, they might only be negligent with respect to the death of Y. In such a case they may be liable for culpable homicide. 103 It should always be clear that each person's culpability is determined independently. It is causation, and not culpability, that will be imputed to the accused. It is "the perpetrators' act of causing the death" 104 that will be attributed to the other members in terms of the doctrine of common purpose.

101 See Burchell op cit (n 18) at 313. However, he does comment that "there is a good deal of practical common sense in confining the common purpose principle to cases where dolus directus is present."

102 See discussion in Burchell supra at 314.

103 Snyman op cit (n 3) at 254 and Burchell loc cit both accept that the negligent causing of death may lead to a conviction for culpable homicide.

104 See Snyman op cit (n 3) at 254.
The majority of the court in *S v Nkwenja*\(^{105}\) held that the critical moment for assessing 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. Rabie CJ and Miller JA, on the other hand, were of the view that *mens rea* should be assessed at the moment of the actual commission of the unlawful act. Burchell\(^{106}\) supports the minority judgement. His argument is essentially that if culpability is assessed at the formulation stage, any subsequent change of mind is not accommodated in the court's minority view. This minority view, with respect, cannot be supported. Assessment at the formulation stage does not ignore the subsequent change of mind. Where X subsequently decides on the abandonment of his unlawful conduct, such withdrawal will mean that he no longer can be liable because, after all, as a result of the change of mind he will not have committed the crime. Subsequent change of mind may be dissociation before the "commencement of execution" is reached, for which an accused cannot be liable.

C  **The joiner-in**

Where X, acting independently and with intent to kill,\(^{107}\) joins in an attack by Z on Y after Z has inflicted a fatal wound but while Y is still alive, X will be described as a joiner-in. The joiner-in situation only arises where the wound inflicted by X does not hasten the death of Y in any way.\(^{108}\)

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\(^{105}\) 1985 (2) SA 560 (A).

\(^{106}\) Op cit (n 18) at 314.

\(^{107}\) Mare op cit (n 43) 24 describes the joiner-in as referring to somebody who, with intent to kill, joins a murderous attack after the victim has already been mortally wounded but while he is still alive and whose conduct does not causally contribute to the victim's death.

\(^{108}\) See discussion in Snyman op cit (n 3) 256-7 and in Burchell op cit (n 18) at 321-2. Where X's attack in fact hastens Y's death, X will be guilty of murder.
Although X has no previous agreement with Z to attack Y, X shares a common purpose based on active association if he joins before the fatal blow has been inflicted but by his own act hastens Y’s death. In this latter situation he is not a joiner-in but becomes liable as the perpetrator in his own right. From the above it can be concluded that Z only becomes a joiner-in if he:

(i) joins in the attack after the fatal wound has been inflicted, and  
(ii) does not hasten Y’s death, and  
(iii) does not share a common purpose with Z to kill Y.

In other words, X must be acting independently of Z.

The question that was not settled until the decision in *S v Motaung* was whether the joiner-in is liable as an accomplice or as a perpetrator. It is argued by Whiting that there can be no accomplice liability to murder because it is conceptually impossible to further the commission of the crime without at the same time causing or contributing to the death of the deceased. In *S v Mgxwiti* Schrenier JA was of the view that even the joiner-in should be guilty of murder when he stated 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

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110 In *S v Khoza* 1982 (3) SA 1019 (A) at 1054 Botha AJA said that where the accused joins after the fatal wound has been inflicted, but while the victim is still alive, he is an accomplice. This view is no longer accepted as it is not possible to be an accomplice to murder. See Snyman op cit (n 3) at 261.
111 "Joining in" 1986 *SALJ* 38 at 54. See also MC Mare "The liability of the Joiner-in for Murder" 1990 *SACJ* 24.
112 1954 (1) SA 370 (A),382D-E.
be guilty if the injuries already received at the time can properly be described as mortal or fatal."

This approach is obviously incorrect. Both Khoza,\textsuperscript{113} in which a joiner-in was regarded as an accomplice, and Mgxwiti,\textsuperscript{114} where a joiner-in was regarded as perpetrator, have now been rejected by the court in S v Motaung.\textsuperscript{115} Liability based on common purpose will always arise where there was a prior agreement or active association. Common purpose does not presuppose the presence of a joiner-in.\textsuperscript{116}

Concerning the question of which crime a joiner-in must be convicted was finally settled in S v Motaung,\textsuperscript{117} in which it was 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. It is the latter situation which calls for the application of the common purpose doctrine because in this case, even in the absence of prior agreement, active association while the victim was still alive can be proved. If the victim was already mortally wounded when X joined, X, being the joiner-in, will be convicted of attempted murder because he perpetrated the crime when the victim could no longer be murdered. This would be no different from an

\textsuperscript{113} 1982 (3) SA 1019 (A).
\textsuperscript{114} 1954 (1) SA 370 (A).
\textsuperscript{115} Supra (n 109).
\textsuperscript{116} See Snyman op cit (n 3) 256. He says that, "first if the injuries inflicted by Z in fact hastened Y's death, there can be no doubt that there is a causal connection between Z's acts and Y's death and that Z is therefore guilty of murder. Secondly, if Z's assault on Y takes place after Y has already died from the injuries inflicted by X or his associates, X cannot be convicted of murder."
\textsuperscript{117} Motaung supra (n 109) at 520F-G. Also see N Boister "Joining in is clearly less than murder" 1991 SaCJ 378.
attempt to commit the impossible because legally murder is limited to the killing of a human being and cannot extend to "the killing" of a corpse.

Where prior agreement existed or, as Snyman puts it,\(^{118}\) "the evidence reveals a previous conspiracy between X and Z to kill Y," there clearly exists a common purpose. It becomes irrelevant at what stage X "joined in." He should be liable for murder since he is not a joiner-in.

\(^{118}\) Snyman op cit (n 3) at 256.
CHAPTER 4

DISSOCIATION

Where X and Z had a common purpose to commit a particular crime, and X subsequently decides against continuation with the criminal conduct, the latter may be said to have dissociated himself. Dissociation is nothing other than voluntary withdrawal. Whether X had dissociated himself is a question of fact to be determined in the light of surrounding circumstances. Snyman correctly points out that "it is however, not any kind of withdrawal which has this effect."119 This essentially means that under certain circumstances the accused may be liable although he did dissociate himself from the common purpose.

Hales120 points out that where the accused dissociated himself he will not be liable for offences committed after his withdrawal, provided that "his dissociation was effective." There can be no dissociation if there never was prior agreement or active association. It will be the level of participation which will determine the degree required for one's effective dissociation.121 In the same way that association must be active and effective, it is equally necessary that the person who dissociates himself should, if he wants to escape liability, actively and effectively dissociate himself.

It is the concept "effective dissociation" that courts find difficult to

119 Snyman op cit (n 3) 254. The same principles that apply to voluntary withdrawal with respect to attempt apply equally here.
120 L Hales "'Effective dissociation' from common purpose - a Zimbabwean view" 1982 S4CJ 187 188.
121 SK Parmanand "Dissociation in common purpose-a view from Venda" 1992 S4CJ 180 183 states: "Dissociation, depending on the facts, will always be a question of degree."
define further. The following questions are pertinent:

(i) does a mere subsequent change of one's mind suffice?
(ii) is mere running away from the scene sufficient?
(iii) would a person who dissociates himself, but does not leave the scene, be deemed not to have dissociated himself?
(iv) must dissociation be express or implied? 
(v) at what stage must one dissociate oneself in order to escape conviction?

Snyman\textsuperscript{123} has pointed out that to escape liability on the ground of withdrawal, (i) X must have a clear and unambiguous intention to withdraw from the common purpose; (ii) X must perform a positive act of withdrawal;\textsuperscript{124} (iii) the withdrawal must be voluntary; (iv) the withdrawal must take place before events have reached what may be called the "commencement of the execution"; and (v) the type of act required for an effective withdrawal depends upon the circumstances. It is submitted that the last point summarizes the requirements for withdrawal. What amounts to withdrawal in one case will not be so in another, as the cases that will be discussed, show.

In \textit{S v Ndebu}\textsuperscript{125} two appellants went at night with the intention of committing housebreaking. One appellant, X, had a gun, a fact of which Z,
the other appellant, was fully aware. Z knew that the possibility of the gun being used existed and did not care whether fatal consequences ensued or not. As they entered the house, a woman saw them and screamed to a man who was in the room. The man approached X and he was shot and killed. The second appellant's evidence was that he fled as soon as the woman had screamed and was outside the gate when the fatal shot was fired. The question to be answered was whether this last minute withdrawal amounted to effective dissociation. The court concluded that his last minute flight from the scene did not amount to dissociation. McNally JA stated as follows:

"On the facts of this case it will be apparent that the second appellant subjectively foresaw the possibility of the killing ... his flight neither averted the danger nor purged the recklessness. I have no doubt that in such circumstances mere flight was not dissociation, any more than hiding under the bed would have been."\textsuperscript{126}

The court went on to state that he should have taken a positive step and dissuaded his companion. McNally JA\textsuperscript{127} further stated that a last minute withdrawal could operate as a mitigating factor, but that on its own it could not exculpate the accused.

In \textit{R v Chinyerere}\textsuperscript{128} a contrary view was taken. The court held that the man who ran away because he allegedly got scared while the group was attempting to break into a store, having not taken part in the theft which followed, had dissociated himself before the intended crime of theft was

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\textsuperscript{126} \textit{S v Ndebu supra} at 137D-H.
\textsuperscript{127} \textit{Loc cit.}
\textsuperscript{128} 1980 (2) SA 576 (RA).
\end{flushleft}
committed. In the language of Snyman, the accused withdrew "before the course of events [had] reached what may be called the 'commencement of execution', ...a stage when it is no longer possible to desist or frustrate the commission of the crime."\footnote{129} This decision can be distinguished from the previous decision in that in the Chinyerere case the accused withdrew before the commission of the crime, while in Ndebu he dissociated himself at a stage when his dissociation could no longer influence the events at all.

The above discussion indicates that flight from the scene will not always necessarily amount to dissociation. It will amount to dissociation only where it can be described as active or effective. Of relevance is also the role of the accused. Where he is the dominant member, an instigator or a man of influence, the court would hold him liable if he merely ran away from the scene without taking any positive steps to dissuade the others from carrying on with a plan in which he played a major role when it was formulated. However, a junior member of the group may, depending on the circumstances, not be liable and in his case running away may amount to effective withdrawal.\footnote{130}

The role played by the accused up to the stage of dissociation is clearly explained in \textit{S v Singo}.\footnote{131} X had been part of a mob that had attacked an old woman whom they believed had bewitched a young girl. After having thrown stones, X was himself injured, and consequently

\footnote{129} Op cit (n 3) at 254. See also Hales op cit (n 120) at 187.
\footnote{130} In \textit{S v Nomakhala} 1990 (1) SACR 300 (A) at 304A-D, discussed infra, it was held that a person who played an inferior role in the planning may easily escape liability. The same view is expressed in \textit{S v Nduli} 1993 (2) SACR 501 (A) at 504.
\footnote{131} 1993 (1) SACR 226 (A). This case is also discussed by SK Pannanand in "Dissociation from common purpose-a view from Venda" 1992 SACJ 180. Also L Hales \textit{supra} (n 120) at 188.
decided to leave the scene in order to go home. X was, along with seven other young men, convicted of murder. The question on appeal was whether X had effectively dissociated himself when he had initially played an active role in the initial assault when, after being struck by a stick, he retired to go to sleep. The appellate division held that X had effectively dissociated himself by leaving the scene of the crime and abandoning his intention to kill.\textsuperscript{132} In this case common purpose was based upon active association and not upon prior agreement.

In \textit{S v Nomakhala}\textsuperscript{133} X and Z, who were convicted of murder, were members of a group who had stopped Y's motor car and had driven Y to a rugby field where he was killed. X had been instructed to stab Y with a knife, but he refused to do so and immediately withdrew from the scene of the crime. X and Z appealed against their convictions of murder. Grosskopf JA,\textsuperscript{134} in his judgement, pointed out that X "by refusing to stab the deceased, clearly indicated that he wanted no part in the attack of the deceased." His appeal against conviction was upheld.

It could be argued that he should not only have refused to comply, but also have attempted to dissuade his companions. However, this argument fails when we consider the fact that the appellant was not a "comrade", did not share in their political thinking and his influence was obviously minimal. Grosskopf JA in \textit{Singo}\textsuperscript{135} correctly pointed out that \textit{S v Nomakhala} was not

\textsuperscript{132} At 232E Grosskopf JA pointed out that "if the appellant had effectively dissociated himself from the common purpose prior to the infliction of the fatal injuries on the deceased, he could not be convicted of her murder."

\textsuperscript{133} Supra (p 130).

\textsuperscript{134} Supra at 304 C.

\textsuperscript{135} Supra (n 131) at 233F-G.
really a case of dissociation from a common purpose, because X had never associated himself with a common purpose to kill Y. His dissociation from the action of the murderers served to demonstrate his lack of association with the common purpose rather than to constitute dissociation therefrom.

In *S v Nzo*\textsuperscript{136} the first appellant, a leader of a group of members of the African National Congress operating in Port Elizabeth, had overheard Mrs T, the wife of another ANC member, threatening to report her husband to the police for harbouring an ANC member. The first appellant reported this threat to Joe, another ANC member, who warned that if Mrs T reported the matter to the police as threatened, she would be killed. Mrs T was subsequently killed.

Sometime before the murder, the second appellant removed explosives from the house in which he was staying to another house. The first and the second appellants were subsequently charged with the murder of Mrs T. Joe had meanwhile escaped to Lesotho. The trial court found both appellants guilty of murder. On appeal it was held that the first appellant had effectively dissociated himself from the common purpose because he had before the murder voluntarily given evidence to the police about his involvement in the ANC. This dissociation was based on the fact that the first appellant was intercepted by police in a road-block while he was on his way, illegally, to Lesotho. He was arrested because his identity document had apparently been forged. It is only at this stage that the first appellant volunteered information about his involvement in the ANC.

\textsuperscript{136} 1990 (3) SA 1 (A).
It is, in my submission, difficult to determine what the first appellant dissociated himself from. He could not have dissociated himself from a common purpose to murder Mrs T for the following reasons: First, there was no prior agreement between Joe and himself to murder the deceased. Secondly, the first appellant never actively associated himself with the commission of the crime of murder. According to the formula in S v Mgedezi, in the absence of prior agreement there must be active association. Thirdly, he was not present at the scene of murder.

Any dissociation which did not directly bear on the death of Mrs T is irrelevant: the accused were charged with the specific crimes of murdering Mrs T and of treason, and not the one of membership of the African National Congress. It is also debatable whether the first appellant's withdrawal was voluntary because dissociation only took place when he became aware "that the police had uncovered the plot." His withdrawal should not have constituted a defence.

Using the formula introduced by Snyman it is easy to conclude that the first appellant did not have a clear and unambiguous intention to withdraw. He failed the Mgedezi test for active association simply because that test was not applicable in that case. Active dissociation assumes that there initially was in existence active association. If there was never active association, there will be nothing to dissociate from. In

\[\text{\footnotesize 137 Op cit (n 44) at 705G-706B.} \]
\[\text{\footnotesize 138 Discussed infra.} \]
\[\text{\footnotesize 139 Supra (n 137).} \]
effective withdrawal was demonstrated by informing the police of a conspiracy. This cannot be equated with what took place in S v Nzo. First appellant in the last case referred to was influenced by events which he no longer could control. He talked because he had to.

The above discussion is an attempt to show that withdrawal from the common purpose may, in certain circumstances, negative liability. Snyman advances propositions which fairly reflect our law on the subject of dissociation. These are the following: First, in order 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. Secondly, in order to succeed with a defence of withdrawal, X must perform some positive act. Mere passivity on his part cannot be equated with withdrawal. Thirdly, the withdrawal must be voluntary. If X withdraws after becoming aware that the police had uncovered the plot, the withdrawal is too late and does not constitute a defence. Fourthly, the withdrawal will amount to a defence only if it takes place at the stage of preparation, that is, before the course of events have reached what may be called the "commencement of execution." In S v Ndebu the second appellant failed in his appeal because his last minute withdrawal did not amount to effective withdrawal. He withdrew from the plan at a stage when execution had commenced, that is at a stage when it was no longer possible to frustrate the commission of

140 1963 (1) SA 692 (A).
141 In S v Nzo first appellant only reported to the police after he had been taken to the police station for questioning. Contrary to the general view, it is my strong belief that his actions were never voluntary, but that in fact he took the safest option in the circumstances. If he had not talked he might have exposed himself to brutality at the hands of the police.
142 Snyman op cit (n 3) 254-6. For the discussion below I relied heavily and exclusively on this writer.
143 See Snyman loc cit and Burchell op cit (n 18) for a full discussion of voluntary withdrawal.
144 1986 (2) SA 133 (ZS).
the crime. Firstly, the type of act required for an effective dissociation depends upon a number of circumstances. For example, X's chances of succeeding with the defence of withdrawal are better if he informs his companions of his withdrawal and, if he does this, his chances of succeeding are stronger if he also endeavours to persuade his companions to desist from their plan.

In *S v Beahan* the appellant had been convicted in the Zimbabwean High Court of contravening section 50 of the Law and Order (Maintenance) Act Chapter 65 (2), arising from a conspiracy involving the appellant and other individuals to release certain prisoners from the lawful custody of the Zimbabwean authorities.

The appellant, a former mercenary soldier, had been offered substantial monetary reward should he participate in the plan. The appellant also played a role in the recruitment of participants and the co-ordination of the enterprise. During the course of implementation of their plan the appellant and one other participant were apprehended by the Zimbabwean police and customs officials. However, the two managed to escape into Botswana from where appellant telephoned to tell his superiors that their part of the mission had been unsuccessful. However, the remaining participants pursued the rescue plan but were thwarted by the police after a security guard had been shot and a stolen helicopter extensively damaged.

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145 Snyman op cit (n 3) comments that "merely to run away (because of timidity or otherwise) after the victim has been physically caught but before he is killed does not qualify as effective withdrawal from a common purpose to murder."

146 In *S v Nzio supra* (n 136) X confessed the whole plan to the police without informing his companions. This was considered to have amounted to effective dissociation.

147 1992 (1) SACR 307 (ZS).
The appellant was later arrested in Botswana and brought before court in Zimbabwe. He appealed on the grounds of lack of jurisdiction as well as his alleged dissociation from the common purpose. It was argued for the appellant that he had withdrawn from the plan, was not present at the scene of the crime and that, by his telephone call to his superior, he had effectively dissociated himself.

The court pointed out that a person who had conspired with others to commit a crime but had not commenced an overt act towards the successful completion of that crime could effectively withdraw upon timely and unequivocal notification to the co-conspirators of his decision to abandon the common purpose. Where, however, there had been participation in a more substantial manner, something further than a communication of intention to dissociate was necessary: a reasonable effort to nullify or frustrate the effect of his contribution was required.\textsuperscript{148}

The court concluded that the appellant's absence from Zimbabwe when the freeing of prisoners was carried out, and his notification that the mission had failed, did not satisfy the test. Appellant's contention that he had withdrawn from the enterprise was accordingly rejected.

It is submitted that had the appellant attempted to frustrate the plan by reporting the matter to the police, or by successfully dissuading his co-

\textsuperscript{148} These views are shared by Parmannand \textit{op cit} (n 131) at 185, Snyman \textit{op cit} (n 3) at 254-6 and Khuluse \textit{op cit} (n 122) at 173. Parmannand states that "unwillingness to participate in the common design together with the presence at the scene could equally be indicative of dissociation, if he has regard to the idea of active dissociation \textit{vis-à-vis} passive dissociation." Also see \textit{S v Ndebu supra} (n 125), \textit{S v Nduli supra} (n 130) and \textit{S v Nomakhlala supra} (n 130).
perpetrators against going ahead with the original plan, this action would have amounted to dissociation from the common purpose.
The doctrine of common purpose serves a useful purpose. It assists the court where a number of persons, by prior agreement or through active association, commit a crime in which it becomes difficult to determine who caused the death of the deceased. Where it can be so determined, the companions of the perpetrator should not escape liability, because what was done by one person was done for the benefit of all members sharing the common purpose. It makes sense, therefore, to impute the actions of one to all of one's companions, provided that each had culpability with respect to the crime committed.

It is unfortunate that such imputation was stretched beyond its limits in *S v Nzo.*\(^{149}\) It is also unfortunate that the court accepted that common purpose was present in circumstances where the facts of the case clearly pointed to the absence of common purpose. It is apparent that in an attempt to cast the net too wide in order to ensure that no one will escape, the court overlooked the role of the concept of proximity. This is surprising because the trend in our law is towards excluding remote possibility even where *dolus eventualis* is under consideration. The judgement in *S v Nzo*\(^{150}\) is at

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\(^{149}\) 1990 (3) SA (1) A. In this case the only evidence against the first appellant was that he overhead and reported Mrs T's threats to lay a charge against her husband for harbouring an ANC member. There was no evidence of common purpose with respect to the crime of murdering Mrs T. The only evidence against the second appellant was that he removed the weapons to another place of safety. This does not point to active association at all.

\(^{150}\) Loc cit.
variance with this trend because there was clearly no evidence whatsoever to implicate the appellants in the killing of the deceased.

This doctrine has the unpleasant effect where a person who played a relatively minor role gets treated on an equal footing with the dominant partner who may have hatched the plan and persuaded the others to join in. It is further submitted that in case of assault resulting in death the accused whose intentional assault resulted in an unintended death should at most be liable for culpable homicide. After all, the common purpose was in such a situation formed with respect to assault, and not murder. The decision in *S v Nkwenja* is to the effect that the common purpose doctrine can be applied in cases of culpable homicide as well. However, in these cases the imputation is with respect to causation, and not culpability. Further, this approach limits liability to the lesser offence of culpable homicide, as opposed to the more serious crime of murder.

Before the judgement in *Motaung* in 1990, there was great confusion as to whether the common purpose doctrine can be applied to a "joiner-in." A joiner-in is one who, in the absence of common purpose to kill but with intent to kill, joins in a murderous attack after the victim has been lethally wounded but while still alive, and whose conduct does not

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151 See *S v Nomakhalala supra* (n 130). The only consolation is that the minor role played by one accused may be a mitigating circumstance and affect the punishment to be imposed.  
152 As Snyman op cit (n 3) 253-4 points out, it is impossible to intend to be negligent. To some people this may suggest that the doctrine can never apply to culpable homicide. However, as is clear from *S v Nkwenja* 1985 (2) SA 560 (A), the doctrine is applicable in a charge of culpable homicide.  
153 Loc cit. In *S v Kwadi* 1989 (3) SA 523 (NC) at 524C-D the court stated that common purpose can be applied in respect of culpable homicide but only with reference to causation and not to blameworthiness as well.  
154 1990 (4) SA 485 (A).
causally contribute to the death of the victim. In Motaung the appellate division clarified the issue. A person is only liable for murder where there was a common purpose to commit murder as evidenced by active association or prior agreement. Where X joins in a murderous attack before the fatal wound has been inflicted, he may be liable as a perpetrator on the ground of active association, because he fulfills all the requirements of the crime of murder. Where, however, he joins after the fatal wound has been inflicted but while the victim is still alive, he cannot be a perpetrator unless he hastened the death of the victim. Assuming that his act had not precipitated the victim’s death, he can be convicted of attempted murder only. In either case there can be no common purpose unless there is evidence of prior agreement or active association, in which case the doctrine of imputation with apply.

It is submitted that the courts have successfully refined the doctrine. However, it is clear that in the case of S v Nzo and S v Yelani courts went too far and allowed collateral issues to slip into their enquiries. I respectfully submit that it would assist matters greatly if the following principles were strictly adhered to:

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155 See Burchell op cit (n 18) 321.
156 Supra (n 154).
157 On the discussion of a joiner-in also see N Boister "Joining in is clearly less than murder" 1990 SACJ 24; Mc Mare "The liability of the joiner-in for murder" 1990 SACJ 1 and R Whiting "Joining-in" 1986 SALJ 38.
158 This welcome approach was finally settled in S v Motaung 1990 (4) SA 485 (A) at 521A-B where the appellate division rejected the rule in S v Mgerwiti 1954 (1) SA 370 (A), which involved an application of retrospective criminal liability. Where the accused acceded to the common purpose after the victim has been fatally wounded, the accused will be guilty of attempted murder.
159 Nzo supra (n 49). Some writers argue that S v Sefatsa supra (n 37) was also badly decided. See Duba op cit (n 39) 181.
160 Yelani supra (n 26). This case is discussed in 2 B supra. Yelani cannot be faulted only because it was decided before the formula for active association was laid down in Mgedezi.
(i) Where the consequence occurs in a manner which differs markedly from the way in which the accused foresaw the causal sequence the courts should find that the element of intention is not satisfied. This approach was adopted in S v Goosen.  

(ii) The joiner-in must be convicted of attempted murder if the wound inflicted by the joiner-in does not hasten the death of Y. If it does, X should be convicted of murder.  

(iii) The pre-requisites with respect to active association formulated in S v Mgedezi must be followed.  

(iv) Those who played a minor role and enjoyed little influence over the other members of the group sharing a common purpose should be treated more leniently where it appears that they did dissociate themselves. This leniency should be reflected in the punishment imposed.  

The above would ensure that problems created by the decision in S v Nzo will not re-surface. If the above principles are adhered to, this would greatly assist in ensuring that liability based on the common purpose principle is limited to those instances for which the doctrine was originally intended. The principle of proximity would also regain its rightful role of limiting the scope of liability.

161 1989 (4) SA 1013 (A) 1026H-J.  
162 This was laid down in S v Motaung supra (154) 500F-I.  
163 Mgedezi supra (n 42) 705G-706B.  
164 See S v Nomakhala supra (n 130) at 304C. If these principles are adopted, liability based on common purpose would be limited rather than extended.  
165 Supra (n 149).
The principle of proximity derives from the rules relating to attempt. In uncompleted or interrupted attempts\textsuperscript{166} the problem is to determine whether the accused's act amounts to, or falls short of, an attempt.

An objective test is applied to answer this question. The test requires that the acts of the accused in pursuance of his intention must have progressed some way towards the completion of the crime before he can be liable. This test distinguishes between acts which are remote from, and those which are proximate to, the commission of the crime. Remote acts do not attract liability even if they are accompanied by intention. They are regarded merely as acts of preparation. It is acts which are proximate to the commission of the completed crime for which the accused becomes liable. These acts have gone beyond the preparation stage and have reached the stage of "commencement of execution."\textsuperscript{167} These acts attract liability because they are proximately linked with the commission of the crime since the accused has reached a stage where it could be said it is too late to withdraw. Late withdrawal which falls within the "commencement of execution" stage cannot save the accused.

It is respectfully submitted that the second appellant in \textit{S v Nzo}\textsuperscript{168} would not have been held liable for acts which were remotely connected with the commission of the crime if the doctrine of proximity was applied. Membership of the ANC and the ammunition that was discovered were not

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{166} See \textit{R v Schoombie} 1945 AD 541 at 545-6 for an exposition of completed and uncompleted attempts.
\item \textsuperscript{167} See Snyman op cit (n 3) at 272-6; Burchell and Milton op cit (n 18) at 345-9.
\item \textsuperscript{168} 1990 (3) SA 1(A).
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proximately linked to, in particular, the crime of murder. They were, I submit, proximately linked only to the acts of sabotage.
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