IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION

REPORTABLE
DATE DELIVERED: 9 March 2021
APPEAL CASE NO: CA 22/2020
CASE NO: 29/2007

MBIYOZO ZANODUMO TILAYI **APPELLANT**

AND

THE STATE **RESPONDENT**

FULL COURT APPEAL JUDGMENT

D VAN ZYL DJP:

[1] The appellant and his co-accused were indicted in the Mthatha High Court before Pakade J on a charge of murder (count 1), attempted murder (counts 3 to 6), attempted robbery with aggravating circumstances (count 8), and the unlawful possession of firearms and ammunition (counts 9 and 10) in contravention of the provisions of the Firearms Control Act.[1]

[2] The charges arose from what the State alleged to have been a conspiracy to commit an armed robbery. The plan was to intercept a cash-in-transit vehicle en route to deliver cash monies at a pension pay point. While the conspirators were lying in wait for the arrival of the money van, armed and on the ready, they were warned that the money van was accompanied by members of the South African Police Services. In response, they made the decision not to carry out their plan any further, and to leave the area. However, in making their escape they were spotted by the police. With the police in pursuit, the conspirators fled the area in two motor vehicles. During the car chase gunshots were fired at police officials, and again later, after the conspirators had abandoned their vehicles, and had fled into a nearby forest. A police official, Inspector

[1] Act 60 of 2000.

Gerhard Anton Maritz, sustained a gunshot wound, and he tragically succumbed to his injuries.

[3] With the exception of one of the counts of attempted murder (count 7), the appellant was found guilty as charged and he was sentenced to what amounted to long terms of imprisonment. On the count of murder, he was sentenced to undergo life imprisonment. He received a sentence of 15 years' imprisonment for the attempted robbery, and 18 and 8 years' imprisonment respectively on the remaining counts of attempted murder and those counts framed under the Firearms Control Act, which counts were taken together for the purposes of sentence.

[4] The appeal lies against both the convictions and the sentences imposed by the trial court. The appeal against the convictions essentially raises three issues: The first is whether or not the decision not to proceed with the plan to intercept the money van, exonerates the appellant from liability on the charge of attempted robbery. Secondly, and if so, whether it must also follow that he is not liable for any of the charges founded on the acts of violence perpetrated subsequently by members of the group who fired gunshots at the pursuing police officials. The third issue, is whether on the evidence, the appellant can be said to have been in possession of a firearm(s) and ammunition.

[5] In convicting the appellant, the trial court in summary found that the appellant was a participant in the planning of the robbery; that he was part of the group who were lying in wait for the arrival of the money van; that he was armed with a firearm; and that he was in one of the motor vehicles that fled from the scene, and from which gunshots were fired at police officials who were in pursuit. The court found that the actions of the appellant and his co-conspirators, before they had left the area where they were to intercept the money van, went beyond mere preparation, and that the appellant acted together with his co-accused in the furtherance of a common purpose.

[6] It was submitted before us that the conclusions drawn by the trial court from the accepted evidence cannot be sustained in law. The appellant placed reliance for this

submission on *S v Makamba and Others*.[2] In that matter, the full court sitting on an appeal against the convictions and the sentences of three of the appellant's co-accused, namely accused numbers 4, 5 and 6, found that, on an application of the relevant legal principles, the actions of the three accused at the moment of the interruption of the plan to rob the cash-in-transit vehicle did not constitute an attempt to commit robbery. It reasoned that the conduct of the accused did not progress beyond the point of preparation. Premised on this finding the court concluded that it must as a result follow **"… logically that if the robbery had been abandoned before consummation, the first and second appellants can also not be held criminally responsible for any acts committed by their co-conspirators during the shooting affray when their escape was thwarted by the police. Neither of them was present during the shooting affray, and since the planned robbery had been abandoned, the others were engaging in independent actions which had not been sanctioned by them."[3]** Premised on this finding, the full court proceeded to uphold the appeal, and it set the convictions and the sentences of the appellant's three co-accused aside. It was submitted before us that the position of the appellant is no different from that of the co-accused in *Makamba*, and that the aforementioned finding of the court must equally find application in this appeal.

[7] The trial court in our view correctly accepted the evidence of the state witnesses with regard to the manner in which the events unfolded prior to, and on the day of the planned robbery. Not unlike some of his co-accused, the appellant raised a defence of an alibi which the trial court justifiably rejected as false beyond a reasonable doubt. The uncorroborated and belatedly raised alibi, stood in stark contrast to the overwhelming and corroborated evidence of the witnesses Madwantsi, Mjali and Ntshinga, all three of whom were members of the group which had planned the robbery. The essence of their evidence was that the appellant was a participant in the plan, and that he was present on the day in question. Correctly so in our view, it was not submitted with any

[2] *S v Makamba and Others* (29/2007) ECD (20 September 2016).

[3] S v Makamba and Others supra at para [44].

conviction that there exists any reason to interfere with the factual findings of the trial court in this regard.

[8] Considering the nature of the defence raised by the appellant, and the absence of any countervailing evidence proffered by him, the facts are either common cause, or were not seriously challenged in argument. What follows is a summary of the evidence. The appellant was a member of a group of persons who carefully planned and made preparations to commit an armed robbery by intercepting and holding up a cash-in-transit vehicle belonging to Cash Paymaster Services. The vehicle was scheduled to deliver cash money at a pension pay-out point at Majavu village in the district of Tsolo on 15 September 2005. The conspirators held a meeting at which the robbery was planned. To that end they obtained heavy calibre firearms such as AK47, R4 and R5 rifles, as well as two motor vehicles, namely an Isuzu pickup truck and a Honda Ballade sedan. The sedan was a stolen vehicle. After a cleansing ceremony was held, the participants travelled in two groups to a predetermined point along the route of the money van.

[9] The money van was accompanied by two motor vehicles with employees of Cash Payments Services whose task it was to provide security. Along their way to Majavu village, the team leader of the group accompanying the money van received a message from a manager that two suspicious looking vehicles were spotted near Majavu. Acting on that information, they sought assistance from the South African Police Services, and the convoy was joined at Tsolo by a number of police vehicles. Along the way two vehicles matching the description given to them of the vehicles on which suspicion fell, namely an Isuzu truck and a Honda Ballade sedan, approached the convoy from the opposite direction travelling on the same road. The police were alerted to this fact. After the two vehicles had passed the convoy, the police turned their vehicles around and gave chase.

[10] After the group of conspirators had assembled at the prearranged place along the road to Majavu village, lying in wait for the arrival of the money van, they received

two phone calls. The one phone call was from a co-conspirator who was placed along the route near Tsolo as a lookout. He warned them that the money van was accompanied by police officials. A similar message was received from an informant, apparently an employee of Cash Paymaster Services, warning them that their presence on the road had been discovered, and that the police were present. Discretion being the better part of valour, the conspirators decided that they should leave the area. The only road leading out of the area was the one on which the approaching convoy accompanying the money van was travelling. After they had passed the convoy, they noticed that the police vehicles had turned around, and were in pursuit.

[11] With the police in hot pursuit the two vehicles sped off. In the course of the pursuit the occupants of the Isuzu vehicle fired shots at the police vehicle that followed immediately behind them. The Isuzu vehicle some time later came to a stop and some of the occupants alighted. They continued to fire shots at the police vehicle which was soon joined by other police vehicles. The occupants of the Isuzu got back into the vehicle and it again sped off. Soon thereafter the vehicle was abandoned. While continuing to shoot at the police, the occupants fled and made good their escape into a nearby forest. The occupants of the Honda vehicle had similarly abandoned their vehicle elsewhere along the route, and had fled on foot.

[12] Police officials, including the deceased Inspector Maritz, made an attempt to search the area of the forest where the occupants of the Isuzu had escaped on foot. The topography of the area made the search difficult and caused them to abandon the search. They instead sought the assistance of a police helicopter and awaited its arrival. The police officials remained at the abandoned Isuzu vehicle. After they had stopped a passing motorist, and were busy searching his vehicle as a precaution, shots were fired at them from the direction of the forest. In the skirmish that followed Inspector Maritz was fatally wounded.

[13] Is the appellant on these facts guilty of attempted robbery? An attempt to commit a common law or a statutory offence is punishable at law.[4] Where the activities of a person who intends to commit a crime is interrupted, the test is whether there has been, what is referred to as, **"the commencement of the consummation"** of the crime. The question is essentially whether the accused person unlawfully engaged in conduct that was not merely preparatory, but had reached at least the stage of the commencement of the execution of the intended crime.

"Clearly the decision in any particular case as to whether or not, at the moment of interruption or prevention, the conduct of the accused had progressed beyond the stage of preparation and constituted a commencement of the consummation must in the last resort become a factual enquiry in relation to the particular circumstances of the case in which the following factors, amongst others, would play a part: whether at that stage the accused had made up his mind to commit the crime, the degree of proximity or remoteness which that arrested conduct bore to what would have been the final act required for the commission of the crime and, generally, considerations of practical common sense. I doubt whether any greater precision than this can be achieved."[5]

[14] On the facts of this matter, all the preparations necessary to execute the robbery were completed. The question is whether by the time they were interrupted, the actions of the appellant and his co-conspirators went beyond the dividing line between that preparation, and the commencement of the execution of the robbery.[6] It is a factual question, and **"… a value judgment of a practical nature is to be brought to bear upon each set of facts as it arises for consideration …"[7]** Remoteness or proximity as a relevant factor must necessarily be a matter of degree that may vary, depending on

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[4] See section 256 of the Criminal Procedure Act 51 of 1977 and section 18 (1) of the Riotous Assemblies Act 17 of 1956. See also Snyman Criminal Law 6th ed at page 276.

[5] *S v Du Plessis* 1981 (3) SA 382 (A) at 399 H – 400 B.

[6] *S v MacDonald* 1980 (2) SA 939 (A) at 945 G.

[7] *R v Katz* 1959 (3) SA 408 (C) at 422 H.

the facts and the particular circumstances of each case. It must be considered in the context of the definitional elements of the crime in question itself, and the conduct prescribed by the crime being attempted. Robbery is the theft of property through the use of either violence, or the threat of violence. In the present matter the appellant and his co-accused did not take a step towards satisfying any of the definitional elements of the crime of robbery. There was no act that can be said to go towards the *actus reus* required for the crime of robbery[8]. At the relevant point in time they were still in control of the course of events, as the money van had not as yet arrived, and they still had the time and the opportunity to change their minds, which they in fact did when it turned out to be unsafe to carry out their plan to rob the money van.[9] On the facts I am of the view that at the time of interruption, the conduct of the appellant and the group did not amount to anything more than preparation. In the result, the appellant's conviction on the charge of attempted robbery cannot stand.

[15] That brings me to the murder and attempted murder convictions. As stated, the appellant was convicted by the trial court on these charges on the basis of the common purpose doctrine. The reason for the trial court applying the doctrine is simply that the State was unable to prove the identity of all of the co-conspirators who fired gun shots at the police officials, and in particular, the gun shot that fatally wounded the deceased. Consequently, the State had difficulty in proving the necessary causal connection between the individual conduct of each of the conspirators, and the commission of these offences. The submission before us is that the appellant's convictions on these charges cannot be justified on an application of the common purpose principle. It was argued that, once it is accepted that the appellant and the other conspirators had withdrawn from the commission of the planned crime of robbery, he could no longer be held liable for the subsequent actions of any of his co-conspirators. As stated earlier, counsel for the appellant found support for this argument in the findings in *Makamba* that the act had been abandoned before its consummation, and that accused numbers

[8] Compare the factual scenarios in the cases referred to by Snyman op cit at page 280.
[9] *R v Schoombie* 1945 AD 541 at 547 – 548.

4 and 5 could not be held liable for any of the later actions perpetrated by their co-conspirators in their absence.

[16] As a general proposition, this argument has no legal basis and is without merit. It suggests two things: Firstly, that the disassociation or the withdrawal of an accused person from the crime that is the subject matter of the common purpose (and which arises from a conspiracy to commit that crime), brings the common purpose itself to an end. Consequently, any criminal act committed by any one or more of the group of co-conspirators thereafter, can no longer give rise to criminal liability on the basis of common purpose. The short answer to this is that it is not disassociation with the crime of robbery itself that would release the appellant as a participant in a common purpose from liability for the acts of any of his or her co-accused, but rather his or her disassociation from the common purpose itself. This proposition further negates the fact that the common purpose may be expanded, or that the disassociation from the common purpose, which has the robbery as the subject matter and objective, does not exclude the coming into being of a common purpose with a different purpose or objective which would encompass the criminal acts performed subsequent to the termination of the initial common purpose.

[17] Secondly, the argument raised suggests that the absence of an accused person, who is a co-conspirator, from the scene at the time of the commission of a crime other than the one which they had conspired to commit, will exonerate that accused from any liability for that other crime. The answer to this suggestion, is that it gives no consideration to the form of common purpose that finds application, and that it is the nature of the common purpose that finds application on the facts, that is determinative of whether or not the appellant, or for that matter, any of his co-conspirators, would be exonerated from liability should it be found that they were not present at the scene of the crime. To fully explain the fallacy that underlies the argument raised, it is necessary to understand the principles that underlie the legal doctrine of common purpose as it exists in our law.

[18] The essence of the common purpose doctrine is that the conduct of persons who act in concert, is as a matter of law imputed to one another, regardless of their actual degree of participation or causal contributions. It provides for a form of complicity, and finds application in group based criminal activity where it dispenses with the need to provide proof that the conduct of each participant contributed causally to the ultimate unlawful consequence. The doctrine is of general application,[10] but is mostly couched in terms which relate to consequence crimes, such as murder, where it is often very difficult to determine which offender's actions were causally responsible for the death of the deceased.[11]

[19] In *S v Thebus*[12] the Constitutional court gave recognition to the fact that a common purpose (**"a joint criminal enterprise"**) has two forms. **"The first arise where there is a prior agreement, express or implied, to commit a common offence. In the second category, no such prior agreement exists or is proved. The liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind."** Thebus, with approval, referred to the following two definitions of the doctrine of common purpose by Burchell and Milton, and Snyman respectively:

"Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their "common purpose" to commit the crime."[13]

And

"The essence of the doctrine is that if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, then the conduct of each of them in the execution of that purpose is imputed to the others."[14]

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[10] S v Thebus and Another 2003 (2) SACR 319 (CC) at para [18] fn 19. See also *Tshabalala v S; Ntuli v S* 2020 (5) SA 1 (CC) at paras [46] and [47].

[11] Burchell and Milton: Principles of Criminal Law 5th ed at page 483. See also Snyman op cit at page 258.

[12] Supra at para [19].

[13] Burchell and Milton op cit at page 477.

[14] Snyman op cit at page 257.

[20] Expressions and terminology such as common design; common endeavour; common objective; common intention; joint design, and acting in concert, are used interchangeably with the term common purpose. These all bear the same meaning, and refer to the arrangement or the understanding of two or more persons to participate in a common criminal endeavour. As stated, our law recognises two forms of common purpose. A common purpose may arise either from association by agreement, or from the active association of one or more persons with the unlawful conduct of another person(s). Terms such as common design or joint venture, are probably more descriptive of the true nature of a common purpose which arises from an agreement, while acting in concert best describes the second form of common purpose.

[21] When the common purpose is founded on an agreement, the agreement need not be express. It may be implied, in that it is inferred from all the circumstances.[15] An agreement to commit an offence **"… is generally a matter of inference deduced from certain acts of the parties accused, done in pursuance of a criminal purpose in common between them."[16]** A common purpose may consequently be found to have arisen extemporaneously.[17] Its existence is inferred from the fact that a number of persons act together in circumstances which are indicative of an intention to achieve a single common objective.

[22] Common purpose based on an agreement comprises the group's common design or intention. It is the agreed course of conduct in the furtherance of the criminal purpose which the agreed course of conduct intends to achieve. The specific offence which the group agreed to commit is simply the reason for, or the purpose of the group's agreed course of conduct. The question when the doctrine is applied, is whether the act(s) that forms the criminal act (the *actus reus*) as a definitional element of the offence in question, falls within the agreed course of conduct. If so, the doctrine makes one

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[15] *Tshabalala* supra at para [49].

[16] *S v Moumbaris and Others* 1974 (1) SA 681 (T) at 687 A, and *S v Sibuyi* 1993 (1) SACR 235 (A) at 249 h.

[17] *S v Mambo and Others* 2006 (2) SACR 563 (SCA) at para [17], and *S v Maelangwe* 1999 (1) SACR 133 (NC) at 150 i-j.

party liable for the criminal act of another party to the agreement. It is important to emphasise that the doctrine does not discharge the State from having to prove fault (*mens rea*) as a necessary and separate constituent element of the offence. The doctrine simply imputes the conduct of one person to another, and not also fault.[18] This conforms with the principle of individual criminal responsibility in terms of which culpability is based on the criminal intent of each individual participant to the criminal design.

[23] In the absence of an agreement, express or implied, a common purpose may arise from an act of association if the requirements constituting an active association have been individually satisfied. The requirements for this form of common purpose were determined in *S v Mgedezi*,[19] and confirmed in *Thebus*. They are the following:

(a) presence at the scene where the ultimate unlawful consequence was being committed;
(b) awareness of the ultimate unlawful consequence;
(c) intention to make common cause with those who were actually perpetrating the ultimate unlawful consequence;
(d) manifestation of a sharing of a common purpose with the perpetrators of the ultimate unlawful consequence by performing some act of association with the conduct of the others; and
(e) the requisite fault.[20]

[24] The fact that the doctrine of common purpose is comprised of two distinct forms, does not mean that the two forms are mutually exclusive. In other words, a finding that the unlawful act in question falls outside an existing prior agreed to common design, does not mean that it cannot also be found to have been done in the furtherance of a

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[18] **"The liability of an associate in a common purpose to commit an unlawful act depends upon his own culpability"** Snyman op cit at page 261 and the cases referred to in footnote 44.
[19] 1989 (1) SA 687 (A) at 705 I – 706 C.
[20] As correctly pointed out in *S v Mzwempi* 2011 (2) SACR 237 (ECM) at para [72], the fifth requirement of *mens rea* is a definitional element of any crime which must be proved in any event, and that consequently, it is not truly a requirement for the existence of common purpose in its form of active association.

common purpose that arose spontaneously, or by active association before, during or after the execution of the earlier agreed to common design. Furthermore, the execution of the agreed common purpose may also satisfy the requirements for active association. *S v Nkabinde and Others*[21] provides an example of this. In that matter a number of crimes were committed in the execution of a planned robbery. The court found that even if the acts of violence, which included the shooting of innocent bystanders, were not part of the agreed attack on the cash-in-transit vehicles, the liability of the co-conspirators for the unlawful acts was established on the basis of active association, in that "…**the evidence conclusively shows that the appellants were present at the first scene where the said acts of violence were being committed; that therefore, they knew or must have been aware of these attacks; that they intended to make common cause with the robbers who committed those acts; and that they manifested this intention by themselves performing acts of association with the conduct of the other robbers."**[22]

[25] An accused person can only be held liable for the criminal conduct of a co-accused or other participant in the common purpose which falls within the ambit or the scope of the common purpose.[23] What falls within the common design arising from an agreement is a factual question that must be determined on the facts of, and in the circumstances of each particular case. Founded on agreement, the scope of the association of the participants in the common purpose is naturally primarily derived from the express or implied terms of the agreement. Determining what the content of the agreed common purpose is, is invariably a matter of inference. However, it would encompass not only acts which were expressly or impliedly agreed upon, but also acts which were necessary to give effect to the common objective, or which are the natural consequences of the execution of the common unlawful enterprise.[24] The reason is that

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[21] (115/16) [2017] ZASCA 75 (1 June 2017).

[22] At para [41].

[23] *S v Robinson* 1968 (1) SA 666 (A) at 673 D – F.

[24] With reliance *inter alia* on *Mzwempi* supra at para [53] Snyman is of the view that by contrast, if reliance is placed on active association as the form of the common purpose, the scope of the criminal design is narrower, and limited to the specific conduct that constitutes the *actus reus* of the crime in question. (at page 260). It is unnecessary in the context of this case to express an opinion in this regard.

acts that flow from the execution of the criminal design may be foreseeable as a possible incident of the criminal enterprise, and would consequently fall within the scope of that enterprise. That the criminal conduct of one participant in a common purpose, that falls outside the immediate scope of the agreed common purpose, may be imputed to another participant to the criminal enterprise as a foreseeable possibility, was confirmed by the Appeal Court in *S v Madlala:*[25]

"Generally, and leaving aside the position of an accessory after the fact, an accused may be convicted of murder if the killing was unlawful and there is proof –

(a) …

(b) …

(c) that he was a party to a common purpose to commit some other crime, and he foresaw the possibility of one or both of them causing death to someone in the execution of the plan, yet he persisted, reckless of such fatal consequences, and it occurred; see *S v Malinga and Others* 1963 (1) SA 692 (A) at 694 F-H and 695; …"[26]

[26] The scope of the common purpose would accordingly not only include the primary criminal act which was pertinently agreed upon (in this case the robbery), but would extend to also include criminal acts constituting other offences which were within the contemplation of the participants to the common purpose as a possible incident, or a consequence of the execution of the primary act. It goes without saying, as is clear from the above extract from *Madlala*, that where intention is the requisite mental element (*mens rea*) necessary for criminal liability for the offence in question, the State must prove that the accused had subjective foresight of the possibility, and that he reconciled himself with it.[27] It is not necessary that each participant must know or

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[25] 1969 (2) SA 637 (A) at 640 F - H.

[26] See also *S v Majosi and Others* 1991 (2) SACR 532 (A) at 536 j – 537 b; *S v Molimi and Another* 2006 (2) SACR 8 SCA at para [35], and *Nkabinde* supra at para [40].

[27] *S v Malinga and Others* 1963 (1) SA 692 (A) at 694 – 695; *S v Maxaba* 1981 (1) SA 1148 (A) at 1156; *S v Petersen* 1989 (3) SA 420 (A) at 425 E-F; *S v Nzo and Another* 1990 (3) SA 1 (A) at 7 C-D; and *Majosi* supra at 537 d.

foresee in detail the exact manner in which the unlawful act and consequences will be brought about.[28]

[27] There are marked differences between the two forms of common purpose. As Snyman[29] points out, if reliance is placed on active association, there must be proof that the accused person associated himself, not with a wide and general common design, but with a specific act whereby the other participant(s) committed the crime in question. This form of common purpose commonly arises when a number of persons join in the commission of an unlawful act(s), and liability arises from the active association of the accused with the actions of the group. Otherwise than a common purpose that arises from active association, if liability is based on a prior agreement, the accused need not be present at the scene of the crime at the time of the commission of the crime.[30] This second form of common purpose usually arises in the situation where two or more persons, in pursuit of a criminal enterprise (usually to commit a specific offence), commit one or more secondary unlawful acts. Liability for the actions of the individual members of the group arises from the accused's association with the criminal enterprise.

[28] From these principles it is evident that in a case where the state seek to place reliance on the doctrine of common purpose, the trier of fact will be required to determine the nature of the common purpose relied upon, what the scope of that common purpose happened to be, and whether the accused was a participant, and remained a participant to the common purpose. I cannot agree more with van Der Merwe[31] the importance of the need to identify the form of common purpose that finds application on the facts of any particular case, and to ask the right questions. The two forms apply to different sets of circumstances, have different conditions for their

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[28] *S v Maelangwe* 1999 (1) SACR 133 (NC); *Makhubela v S, Majeke v S* 2017 (2) SACR 665 (CC). Also *R v Shezi* 1948 (2) SA 119 (A); *S v Mgxwiti* 1954 (1) SA 370 (A), and *R v Motaung* 1961 (2) SA 209 (A) at 210 H – 215 A.

[29] Op cit at page 260.

[30] *S v Lungile and Another* 1999 (2) SACR 597 (SCA) at 602 d. Also Mzwempi supra at para [54] and Snyman op cit at page 260.

[31] Steph van der Merwe **"Why do we so often get common purpose wrong?"** Criminal Justice review No 2 of 2017.

application, and must not be invoked when those circumstances and conditions are not present.

[29] In this matter, on the evidence in its totality, and the facts as they appear therefrom, the agreement to hold up the cash-in-transit vehicle gave rise to, and was the primary source of a common purpose. The group, acting in concert, collaboratively planned to rob the Cash Paymaster cash-in- transit vehicle on its way to Majavu village. The area along the road where the vehicle was to be intercepted was predetermined. The participants in the planned robbery were recruited beforehand. They gathered to plan the execution of the robbery. The manner in which the cash-in-transit vehicle would be intercepted was discussed, including the manner of use of firearms, and the role to be played by the participants. It was agreed that vehicles and firearms should be acquired to carry out the plan. According to Madwantsi and Mjali the plan was to use the two vehicles to block the path of the money van, and to shoot at it in order to subdue the crew and overcome any resistance.

[30] The appellant was a party to that agreement, and he actively associated himself in its execution. He was present at the meeting where the robbery was planned. According to the accomplice Madwantsi, the appellant played a leading role in its planning. The task assigned to the appellant was to watch over the guards while the other participants removed the money from the cash-in-transit vehicle. The appellant accompanied the group, first to the cleansing ceremony, and then to the prearranged place on the road to Majavu. He travelled in the Isuzu vehicle and he was armed. He remained with the other occupants of the vehicle during the car chase until they abandoned the vehicle and fled into the forest. The evidence of the accomplice Mjali was that the appellant was one of the occupants of the Isuzu who fired shots at the police, and again when they abandoned the vehicle and fled into the forest. He throughout remained an occupant even after the vehicle had first stopped and the occupants had alighted and had shot at their pursuers. The appellant was clearly a participant in the common purpose and would consequently be liable for any act

committed by him or any of his co-conspirators which fell within the scope of the common purpose.

[31] That leads to the next question. What was the scope of their agreed common purpose? Over and above any actions that were necessary to execute the objective of the common purpose (that is the actual robbery), the execution of their common design would have required the appellant and his co-conspirators to drive in motor vehicles to the place where they had planned to intercept the money van, and after having executed the robbery, to safely make good their escape by again leaving the area. That the appellant and his co-conspirators found it necessary to have a person on the inside of Cash Paymaster Services, and to also place a person along the route which the money van would travel on, and to remain in telephonic contact with him, is indicative of the fact that they had considered and anticipated that the execution of the robbery may not go according to plan, and that the need may arise for them to adjust their plan, or even to abort it. They did not have to foresee the exact manner in which the plan to rob the cash-in-transit vehicle would be thwarted, or what it would take for them to evade being apprehended**. "It has long been accepted that the operation of the common purpose doctrine does not require each participant to know or foresee in detail the exact manner in which the unlawful consequence occurs. Were it otherwise, it would not be possible to secure a conviction simply on the basis that some event had happened during the execution of the common purpose that all the participants in the common purpose had not more or less planned for. All that is required for the state to secure a conviction on the basis of common purpose is that an accused must foresee the possibility that the acts of the participants may have a particular consequence, such as the death of a person, and reconciles himself to that possibility."**[32]

[32] The appellant and his co-conspirators were all armed with heavy calibre firearms which they agreed would be used in the event of resistance being offered. On this

[32] *S v Molimi and Another* (249/05) [2006] ZASCA 43 (29 March 2009), referred to with approval by the Constitutional Court in *Makhubela* supra at para [35].

evidence, the inescapable inference is that the scope of their common purpose was to include, as a foreseeable possibility, that they may be met with resistance at any of these different stages of the execution of their criminal design, that they may have to use violence to make good their escape with the assistance of one another, and that persons may be seriously injured, that may in some way or the other result in the death of the victim. It will include the possibility that persons may be killed in the cross fire.[33] **"Generally speaking, the fact that the first appellant had prior to the robbery made common cause with his co-robbers to execute the crime, well-knowing that at least two of them were armed, would set in motion a logical inferential process leading up to a finding that he did in fact foresee the possibility of a killing during the robbery and that he was reckless as regards that result."[34]**

[33] The conduct of the appellant was consistent with the plan to use violence, and is indicative of the fact that he did foresee the possibility of a shooting affray, that he stood reckless to the eventuation thereof, and continued to act in accordance with the common design. He accordingly had the necessary *mens rea* in the form of *dolus eventualis* in respect of counts 1 and 3 to 6. I may add that, as in the case of Nkabinde and Others,[35] I am of the view that the facts of this case also satisfy the requirements for common purpose in its active association form. The accepted evidence conclusively shows that the appellant was present on the scene where the acts of violence were being committed; he intended to make common cause with his co-conspirators at that time; and he manifested that intention by performing an act of association with their conduct by also shooting at the police.

[34] The finding that the actions of the appellant and his co-conspirators after they had left the place where they planned to execute the robbery fell within the scope of their common purpose, effectively disposes of the submission that the appellant's liability for the death of the deceased and the attempted murder charges must be excluded simply by reason of his and the other co-conspirators withdrawal from the

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[33] Such persons may include the killing of a conspirator by a gunshot by a fellow conspirator, or a policeman killed by a shot fired by another policeman. See *S v Nkosi* 2016 (1) SACR 301 (SCA) at paras [10] to [13].

[34] *S v Lungile and Another* supra at para [17], quoted with approval in *Nkosi* supra at para [7].

[35] Supra at paras [40] to [41].

robbery. The question is not whether appellant had effectively withdrawn from the robbery, but rather whether he had withdrawn from the common purpose.[36] The robbery was the objective of the arrangement or the criminal design that constitutes the common purpose. It was the reason for the coming into existence of the common criminal design, which design included a number of other criminal or unlawful acts that were necessary, incidental or foreseeable in the execution of that common purpose. In the execution of their criminal design the appellant and his co-conspirators committed the act of conspiracy.[37] Conspiracy is in itself a punishable offence.[38] They further armed themselves with illegal firearms and proceeded to commit further unlawful acts after they had withdrawn from the robbery. Those were criminal acts separate from the intended robbery from which criminal charges and liability may follow because it forms part of the criminal design that arose from the agreement to commit the robbery. It is this common purpose that constitutes the basis for the reciprocal attribution of the acts of one participant to another.

[35] Whether or not there was a disassociation or a withdrawal from the common design is a factual question which will depend on the particular facts and the attendant circumstances, such as the scope of the common purpose, the manner and degree of an accused person's participation, and on how far the execution of the common purpose had proceeded.[39] Snyman[40] formulates the relevant factors as follows: (1) the accused must have a clear and unambiguous intention to withdraw; (ii) the accused

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[36] Snyman op cit at page 263. See also *S v Nduli and Others* 1993 (2) SACR 501 (A) at 506 j – 507 a, and *S v Nube* (091/15) [2015] ZASCA (30 September 2015).

[37] The criminal act (*actus reus*) of the offence of conspiracy consists of the concluding of an agreement to commit a crime. See *S v Ngobese* 2019 (1) SACR 575 (GJ) at para [12].

[38] Section 18 (2)(a) of the Riotous Assemblies Act. It reads**:**

"(2) Any person who –

(a) conspires with any other person to aid or procure the commission of or to commit; or
(b) …;

any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable."

[39] *Nduli* supra at 504 e – f, and *Nube* supra at para [20].

[40] Op cit at page 263.

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

[36] The list is not exhaustive. Generally, the court will proceed from the premise that **"… the greater the accused's participation, and the further the commission of the crime has progressed, then much more will be required of an accused to constitute an effective disassociation. He may even be required to take steps to prevent the commission of the crime or its completion. It is in this sense a matter of degree and in a borderline case calls for a sensible and just value judgment."**[41]

[37] The appellant's conduct, after they had left the scene where they were lying in wait for the cash-in transit van, shows that he remained a willing participant in the joint venture. When they were pursued by the police in their attempt to leave the area, the appellant and his co-conspirators attempted to evade lawful arrest by fleeing the scene, and used their firearms to shoot at the police. The appellant continued to remain with his co-conspirators, even after their vehicle had come to a stop, and the occupants had alighted therefrom, and continued shooting at the police. The occupants of the vehicle, which included the appellant, then boarded the back of the vehicle, and it once again drove away. The vehicle was only abandoned some distance further away where the occupants fled into the forest, but not before they again shot at their pursuers.

[38] The appellant's departure from the place of the intended crime is a neutral factor, and was not done voluntarily and with the intention to withdraw from the overall common objective. It was motivated by flight, intended to evade detection and apprehension.[42] He consequently remained responsible for all the acts done by his co-conspirators which fell within the scope of the common design. Another feature in this

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[41] *S v Musingadi and Others* 2005 (1) SACR 395 (SCA) at para [39].

[42] *Nzo* supra at 10; *Lungile* supra at 603 g – h, and *Musingadi* supra at 408 I – j.

context is that the role played by the appellant in the venture was not insignificant.[43] As, stated earlier, the evidence was that he was present at the meeting where the robbery was discussed and agreed upon. According to the witnesses Madwantsi, the appellant and accused number 6 were the main planners of the robbery. He was also one of the persons who organised the Isuzu vehicle, in which he eventually travelled to the place where the plan was to hold up the money van.

[39] It is clear in my view from the evidence that the appellant did not disassociate himself from the common purpose. That leaves the charges under the Firearms Control Act. It is again clear from the evidence that the appellant was himself in possession of a firearm and its ammunition which he had used to discharge shots at the police officials who were in pursuit of him and his co-conspirators. It is accordingly not necessary to consider whether he was also a joint possessor of any of the firearms used by any of his co-conspirators, or whether there existed a common purpose between the members of the group to possess all the guns.[44]

[40] It is a question that presents a number of difficulties, both conceptual and on a practical level. In *S v Nkosi*[45] two requirements were formulated for the possession of firearms by a group in the context of common purpose: (a) the intention of the group to exercise possession of the firearms through the actual detentor, and (b), the intention of the actual detentor to hold the firearms on behalf of the group. What this means, according to the Constitutional Court in *Makhubela*[46], is that because the offences of unlawful possession of firearms and ammunition are circumstance offences, possession has to be personal or joint, and that it is **"… not enough to establish joint possession that the firearm was possessed by only one member in a criminal group in the furtherance of a criminal purpose with others."** The application of the two requirements has resulted in startling findings, like the one in *S v Kwanda*[47] that:

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[43] *S v Beahan* 1992 (1) SACR 307 (ZS) at 324 g.
[44] *S v Makhubela and Another* 2017 (2) SACR 665 (CC) at para [46].
[45] 1998 (1) SACR 284 (W). See also *S v Mbuli* 2003 (1) SACR 97 (SCA) and *S v Ramoba* 2017 (2) SACR 353 (SCA).
[46] Supra at para [48] quoting with approval from Burchell and Milton op cit at page 484.
[47] 2013 (1) SACR 137 (SCA) at para [5].

“The fact, that the appellant conspired with his co-accused to commit robbery, and even assuming that he was aware that some of his co-accused possessed firearms for the purpose of committing the robbery, does not lead to the inference that he possessed such firearms jointly with his co-accused.”

[41] As a legal concept, possession consists of two core elements, the exercise of physical control (*corpus*) over an article with the intention (*animus*) to do so. The concept of possession in a criminal context as an element (the *actus reus*) of the offence in question is no different. In short, it is the exercise of the required degree of control over an object, direct or mediate through another, together with the intention to do so.[48] Possession is a factual question. Like any other fact, in can be established by circumstantial evidence, or by a combination of direct and circumstantial evidence.[49] There will seldom be direct evidence that the group had the intention to exercise possession of a firearm through the actual detentor, or that the latter had the intention to hold it on behalf of the group. Intention is a state of mind that can be inferred objectively from the conduct of the accused and his co-perpetrators. The existence of the requisite intention is a question of fact and degree, and in most cases the outcome will inevitably depend on an inference drawn from other facts found to have been proved.[50]

[42] It matters not that those facts may also be relevant to establish the existence of a common purpose in relation to crimes other than the unauthorised possession of a firearm and ammunition. It is not the fact that an accused shared a common purpose with his co-perpetrators to commit a crime that proves that he also jointly possessed a firearm and ammunition with his co-perpetrators. The common purpose is a fact that forms part of the body of evidence. The question is whether the facts found to have

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[48] *S v Adams* 1986 (4) SA 882 (A) at 890 G-H.
[49] *S v Hoosain* 1987 (3) SA 1 (AD) and *S v Humphreys* 2013 (2) SACR 1 (SCA) at para [13].
[50] *See Nkosi and Mbuli* supra.

been proved justify an inference, by applying the test in *R v Blom*,[51] that the accused had the requisite *animus* to establish joint possession as envisaged in *Nkosi*.[52] The finding made must account for all the relevant evidence, including the evidence of the accused, or the lack thereof, which may be relevant to his state of mind. There is no reason why that evidence should not also include evidence of what the terms and the ambit of an agreed criminal design were in any particular case.

[43] On the facts of the present matter, I am of the view that the inescapable inference that must be drawn from the evidence as a whole is that the group and the individual participants in the common purpose had the necessary intention (*animus*) and control required for a conviction on the basis of joint possession as postulated in *Nkosi*. The group agreed to acquire firearms that were to be used in the execution of the primary offence of robbery, the elements of which offence required the theft of the money by means of an act of force. The firearms were necessary instruments in the execution of the robbery in the manner it was planned.

[44] Conceptually the question must be asked whether joint possession and the requirements formulated in *Nkosi* must at all find application in the context of an application of the principles underlying the common purpose doctrine. In the context of the present matter the right question to ask may accordingly be whether the possession of the firearms and the ammunition by one member of the group is a criminal act (*actus reus*) that falls with the scope of the group's common design, and must as a result be imputed to all the other members of the group. The doctrine after all rests upon the legal fiction that by association one member of the group is held liable of the criminal act (*actus reus*), of another. Liability for the act of another arises by operation of law, and is not based on the individual acts of the participants in the criminal design. A factual scenario that often seems to be the cause of befuddlement is where it is not established on the evidence that one or more of the members of a group were aware of another's possession of a firearm. The answer to that question, it is suggested, will inevitably lie

[51] 1939 AD 188 (at 202 to 203).
[52] Supra at 287 b-c.

in the scope of the common purpose, and the element of *mens rea* as it applies to every other definitional element of the crime in question. Ultimately the question in every case remains whether or not it can be concluded on the evidence beyond a reasonable doubt that each individual accused had the required *mens rea* for the offence in question.[53]

[45] As stated, it is not necessary on the facts of this case to say anything further in this regard. Accordingly, the appellant's convictions and the sentence imposed on counts 9 and 10 must also stand. That finally brings me to the question of sentence. In argument the issue was confined to whether or not the trial court erred in failing to depart from the prescribed minimum sentence on the murder charge. The remainder of the sentences were quite clearly appropriate in the circumstances of the matter, and it was not suggested that there exists any reason to interfere therewith.

[46] In terms of section 51 of the Criminal Law Amendment Act[54] a sentencing court is obliged to impose a mandatory sentence of life imprisonment for murder under certain circumstances, unless it is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence. Part I of Schedule 2 of the Act includes the circumstance where a law enforcement officer was the victim, and the offence was committed in the execution of a common purpose.

[47] It was submitted that the prescribed sentence is excessive, and that the trial court should have found that the fact that the appellant had no previous convictions, and that he had spent 6 years in custody before his trial was finalised, constituted substantial and compelling circumstances. It is evident from its reasons for sentence that the trial court gave consideration to both these factors. I am not persuaded that the trial court in any way misdirected itself in the enquiry as envisaged in section 51 of the Criminal Law Amendment Act. Considering the personal circumstances of the appellant weighed against the serious nature of the crime, the interests of society and the other factors relevant to the imposition of the sentence in this matter, the prescribed sentence

[53] *S v Adams* supra at 891 H – I.
[54] Act 105 of 1977.

cannot be said to be disproportionate to the crime, or put differently, inappropriate, in that its imposition would amount to an injustice.

[48] In the result it is ordered that:

[48.1] The appeal against the conviction of the appellant on the charge of attempted robbery with aggravating circumstances (count 8) is upheld, and the conviction and the sentence of 15 years' imprisonment that was imposed in respect thereof, is set aside.

[48.2] The appeal against the convictions and the sentences imposed on the charges of murder (count 1), attempted murder (counts 3 to 6), and the unlawful possession of a firearm and ammunition (counts 9 and 10), is dismissed, and the said convictions and the sentences are confirmed.

D VAN ZYL
DEPUTY JUDGE PRESIDENT

I agree:

I SCHOEMAN
JUDGE OF THE HIGH COURT

I agree:

P H S ZILWA
JUDGE OF THE HIGH COURT

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Date Heard:	28 October 2020
Judgment Delivered:	9 March 2021