

Guilt by association: the over-extension of the doctrine of common purpose

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Introduction

What is the criminal liability of the members of a group in a situation where some of the group members cause the death of a person? There is no problem in deciding upon the criminal liability of the members who actually carry out the killing; they are guilty of murder provided they satisfy the essential ingredients of the crime of murder. They must have caused the death with actual intention to kill or must have continued with their attack realising the real possibility that their attack might cause death. What is more difficult to decide is whether the other members of the group are guilty of murder on the basis of the doctrine of common purpose.

This article warns against the danger of extending the doctrine of common purpose too far. It points out that this danger is particularly pronounced when the group involved is comprised of many people.

The common purpose doctrine

The doctrine of common purpose is used both in Zimbabwe and post-apartheid South Africa. If a murder is carried out by one or more members of a group of persons the question that arises is whether some or all of the other members of the group can be found guilty of murder on the basis of the doctrine of common purpose. The justification for applying the doctrine of common purpose to this situation is set out by Snyman *Criminal Law* Fifth Edition p 263. He points out that under the doctrine of common purpose it does not have to be proved that the co-perpetrator did something that causally contributed to the outcome. Thus in a murder case does not need to be proved that the co-perpetrator did something that contributed to the death of the victim. Where a group of people, particularly a large group, acting together attack a victim with murderous intent, it is often difficult to determine member or members of the group actually caused the death of the victim. If the person who for instance shot dead the victim, that person can be charged with murder as the actual perpetrator. But if that person cannot be identified, the members of the group should not be able to escape criminal responsibility for their joint murderous attack simply because the person who was causally responsible for the death cannot be identified.

The mental element (the *mens rea*)

In South African law a person can be convicted under the common purpose doctrine on the basis of *dolus eventualis*. The Constitutional Court unanimously ruled in *Thebus* 2003 (6) SA 505 (CC) that this was not unconstitutional if the limits set out in the *Mgedezi* case 1989 (1) SA 687(A) were adhered to. The latter case lays down that a person can be convicted of murder on the basis of the common purpose

doctrine if he intended that the actual perpetrator would kill, or he must have foreseen the possibility of the victim being killed and performed his own act of association with recklessness as to whether or not death was to ensue.

By contrast in English law, from which system the South African and Zimbabwean law was derived, the mental element of the doctrine of common purpose has been narrowed down. In the case of *R v Jogee* [2016] UKSC 8; [2016] WLR (D) 84 the Supreme Court unanimously decided that—

The requisite conduct element was that the accessory had assisted or encouraged the commission of the offence by the principal. The mental element was an intention to assist or encourage the commission of that crime. Foresight that the principal might commit the offence charged was not to be equated with intent to assist. The correct approach was to treat foresight as evidence, for the jury to consider, of intent to assist and encourage. The law had taken a wrong turn in *Chan Wing-Sui v The Queen* [1985] AC 168, when it had equated foresight with intent to assist, as a matter of law. It was not legitimate to treat foresight as an inevitable yardstick of common purpose; in doing so the law had departed from the rule which had been well established over many years that the mental element required for accessory liability was an intention to assist or encourage the principal to commit the offence charged.

The physical ingredient (the *actus reus*)

The test to determine whether a person had common purpose with the actual perpetrator of a murder is usually expressed as being that the person must have actively participated in the murder. However, Burchell in *Principles of Criminal Law* pp 488-489 maintains that the concept of active participation is inherently vague and argues that that Alkema J in *Mzwempi* 2011 (2) SACR 237 (ECM) is correct when he says that ... “association with the general design in the absence of a prior agreement is insufficient; to qualify as an *actus reus* it must be an active association with the particular conduct which caused the death or other consequence crime.” (emphasis added). Burchell then says this:

...if X merely associated with the general activities of a group of persons (say, by being a member of a political party, faction or tribe that sanctioned non-criminal as well as criminal activity, even perhaps violence), does not inevitably amount to active association in a specific killing that another member of the group may commit in the name of the group, especially where A is not present at the killing and has not been party to any prior agreement, expressed or implied, to kill.

The doctrine of common purpose thus must not be stated in a manner that creates the risk that it will be applied too widely. In a recent Zimbabwean case which involved a murder during a political gathering, the judge described the doctrine of common purpose as follows:

...the law ascribes joint criminal responsibility to people who collude or act with a common intent in furtherance of the commission of a crime regardless of who the actual perpetrator of the crime is. What this means is that every associate in crime is

criminally liable for the criminal compatriot in crime. This is meant to discourage and punish fellowship in crime. The underlying principle is that he who does a thing through another does it himself.¹

The judge should have made it clear that the association has to be of a direct and active nature. Also the term “fellowship in crime” needs to be far more precisely articulated. Mere collusion or association with others cannot be an appropriate basis for liability for the most serious crime of murder. Conviction should follow only if they play an active role in the commission of the murder, for example, by inciting or encouraging the killing. Where the degree of participation of the individual members of the group is unknown, and it is also not known what the intention or agendas of the individual members were, there is no room for applying the doctrine of common purpose. The approach that what you do through others you do yourself can only apply where you give a specific mandate to another to do the specific deed.

The onus of proof

The onus rests squarely on the State to prove beyond reasonable doubt the essential ingredients to establish liability for murder on the basis of common purpose. The judge was therefore wrong where in a recent case in which one of the accused was charged, he said that the onus was on the accused to satisfy the court that “his association was innocent.”²

Agreement or plan to murder

If a group of persons agree that they will go together to murder a person, the member of the group who does the actual killing is guilty of murder and the rest of the group members may be found guilty on the basis that they assisted in the perpetration of the murder.

The assistance may take various forms; it may be direct physical assistance, for instance, by holding down the victim to enable the actual perpetrator to carry out the killing. It may take other forms such as directing, inciting or encouraging the actual perpetrator to kill the victim after he or she had been located or simply being present at the scene of the murder to give support, if necessary, to the perpetrator in carrying out the murder. In all these instances, the members of the group have participated in the murder with actual intent to kill.

Another common situation is where people go to carry out a robbery and all the gang members carry loaded firearms to enable them to carry out a robbery. If one of the robbers shoots and kills a person who puts up resistance, the actual perpetrator will be guilty of murder but so will the others – either on the basis that they agreed in advance of the robbery that they would shoot and kill any person who tried to stop their robbery, or that although they did not specifically discuss this before the

¹ *S v Madzokere & Ors* HH-523-16

² *S v Madzokere & Ors* HH-523-16

robbery, by carrying loaded firearms, they had all envisaged that the firearms would be used to shoot and kill if necessary. If only one of the robbers was armed with a loaded firearm but the other robbers know that one of their numbers has a loaded firearm and the armed robber shoots and kills someone during the course of the robbery, the fellow robbers are likely to be found guilty of murder. The basis of their conviction would be they participated in a robbery when they knew that the armed robber would be likely to kill anyone who put up resistance.

The plan to murder does not necessarily have to be formed in advance; it may be formed at the location where the murder occurs. Thus if a group of persons spot a person whom they hate, they may decide then and there to attack and kill that person. Those group members who physically cause the death intending to do so are guilty of murder and those members who participated in the killing in various ways intending that the victim will be killed may also be guilty of murder on the basis of the common purpose doctrine.

The problem with large groups

The above situations are reasonably straightforward. What is far more difficult is where a large group of persons are gathered together and some members of the group take it upon themselves to engage in violence that results in the death of a person.

Burchell Principles of Criminal Law Fifth Edition at pp 488-489 argues that the doctrine of common purpose should not be applied to a situation where a large amorphous group of people (such as protestors on a march that turns violent or where at a gathering of a political organisation some members engage in violence) who may have “varied agendas, diffuse intentions and different levels of participation”. He argues that if the perpetrators are identified they should be charged with murder but if this cannot be proven, participants should not be charged with murder if their participation in the murder cannot be proven. The other participants should only be charged with offences that relate to what can be proven against them such as public violence.

Take, for instance, a situation where fifty members of a political party are gathered together for a rally and some party members spot members of another political party who appear to want to disrupt the gathering. Some of the members then attack and kill one of the members of the rival party. Another situation could be where police officers arrive and order the fifty members of the political party to disperse and some members of the party members attack the police and cause the death of one of the police officers.

If the attackers have acted unilaterally without being ordered to carry out the attack or incited or encouraged to do so, and none of the other members participated in the attack, only the attackers can be held liable for the murder.

What if the members of the party gathered together were addressed by a party leader who ordered them to kill any member of another party who tried to disrupt the rally? The leader is guilty of murder if some of his party members do what they were instructed to do. But it would be impermissible to convict all the other members of murder simply on the basis that they did not express disagreement with this order and failed to prevent the actual perpetrators from carrying it out. The other members must have done something active such as inciting or encouraging the actual perpetrators to commit the murder. The uttering of threats against the intruders is not enough to amount to incitement or active participation in the murder.

Another possible situation is that at the start of the rally the members discussed and agreed that if people tried to disrupt their rally he or she must be physically attacked, and they went as far as to agree that they should be killed. If when the murder was perpetrated, the members did not in any way participate: could they be convicted of murder on the vague basis of the initial agreement? What if the members charged say that they did not agree with the plan to murder but simply pretended to agree so they would not be condemned by the other members for their “weakness”?

Certainly the other members cannot be found guilty of the murder simply because they were present at the gathering when the murder took place. Obviously, it would be completely wrong to seek to impose collective responsibility on all the others for the actions of the perpetrators. The guilt of the other members would have to be considered individually. Each member can only be convicted of murder if they actively associated with the actual perpetrators intending that they would kill the victim.

The fiasco that occurred in the *Marikana* case in South Africa illustrates the absurd lengths to which the common purpose doctrine can be taken. At the *Marikana* Mine, striking mine workers confronted the police and the police responding by shooting dead 34 of the workers. The 270 workers who were arrested after these disturbances were then charged with the murder of the 34 dead workers on the basis of the common purpose doctrine. Fortunately, sense finally prevailed and these ridiculous charges were withdrawn by the National Prosecuting Authority. None of the police officers who were involved in the shooting have been charged with murder.

Conclusion

The doctrine of common purpose should not be over-extended. There is a danger of persons being unfairly convicted if the doctrine is invoked to make liable for murder persons who participate in the activities of a large group that results in the death of a person.