COMMON PURPOSE:
THEBUS, MARIKANA AND UNNECESSARY EVIL

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ABSTRACT
This article will engage with the difficult question of whether common purpose could be successfully used to prosecute the surviving Marikana miners for the murder of their fellow miners, shot and killed by the police. It will conclude that this is entirely possible, on the law as it stands. However, I will argue that the law is not what it ought to be. I will argue that common purpose violates fundamental principles of criminal law, beyond the arguments traditionally raised. The one traditional argument raised and rejected by the Constitutional Court in Thebus, which bears repeating, is that it is a violation of the presumption of innocence to attribute causation and that this is not solved, as the Constitutional Court stated, by placing the issue of causation beyond questions of proof for both parties. I will note also that Thebus does not seem to answer the charge that common purpose violates the dignity of an accused. In addition, I will argue that, contrary to fundamental principles, common purpose punishes evil thoughts alone to the extent that it relies upon subjective thought to establish conduct, and it violates the requirement of voluntariness and capacity for self-control because it allows for liability where the accused did not, and could not, control the conduct in question. It allows for the resort to unreasonable force in response to an attack. Furthermore, I will argue that common purpose has an effect which can, in many instances, be met with a valid defence of mistake of law. I will conclude that, if principle is observed, and while fairly broad defences are conceivable, common purpose ought to be abolished as a deep source of embarrassment in our criminal law.

Key words: common purpose, Marikana, criminal liability, constitutionality, police use of force, criminal capacity, voluntariness, causation, dignity, mistake of law, alternatives

I  INTRODUCTION
The news that the National Prosecuting Authority (NPA) had decided to charge approximately 270 Marikana miners with the murder of their 34 colleagues shot dead by police, by relying on the criminal law doctrine of common purpose, caused outrage. The criticisms ranged from the suggestion that common purpose is an ‘outdated apartheid law [which] has been hauled out and dusted off to press [the] charges’,¹ that it ‘was discredited during the time of apartheid’,² to the effect that the charges were ‘bizarre and shocking’, without merit or any hope of success and must have been brought for other

¹ Legalbrief (31 August 2012).
² J Surju BBC’s Focus on Africa (30 August 2012).
nefarious purposes. These charges have since been withdrawn – although perhaps only provisionally.

This article will engage with whether indeed the doctrine of common purpose could sustain convictions of murder – on the law as it is. However, it will go further to engage with what is perhaps the most important question: whether this is what the law ought to be. I will begin with a brief description of the doctrine of common purpose and the effect it is supposed to have on liability and apply the doctrine to a version of events at Marikana on the day of the tragedy to consider whether the doctrine could sustain convictions of murder of the fellow miners for the deaths of the miners shot by the police. I conclude – rather controversially no doubt – that, given the law as it is, and under the assumptions made, the doctrine would sustain murder convictions. I turn then to consider why this should not be the case – as an inherent flaw in the doctrine itself, rather than its application to the problem of Marikana.

I will engage with some prominent criticisms of common purpose that have been made and dismissed, and others that, in my view still need to be raised, but have not yet been. I conclude that common purpose violates several fundamental principles of criminal law, that it is a violation of, at least, the right to be presumed innocent, and that it is anathematic to our criminal law in respect of which we should otherwise be proud.

II COMMON PURPOSE

(a) Effect of common purpose

It may be useful to observe what it is that the so-called doctrine of common purpose does. It allows a court to regard the conduct of every person in a common purpose, to be the conduct of every other person in that common purpose. The effect is that, for any person in a common purpose, our law takes the view that s/he did, naturally, what s/he actually did him/herself, but also what everyone else who s/he is in the common purpose with did. If A and B are in a common purpose to kill P, and, in pursuit of the common purpose, A holds P while B stabs P to death, our law will recognise that A

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3 P De Vos Daily Maverick (31 August 2012).
4 This focus precludes a discussion of the very worthwhile questions regarding the liability of Lonmin mine managers and security officials, police officials throughout the ranks, and anyone who foresaw the prospect that disproportionate and unreasonable force may be used. Liability could attach to such people if it can be shown that such force was used, and even if not, then on attempt liability. Ironically it seems that such people may also fall foul of the wide reach of common purpose – if it is to be used at all. However, this is the subject of another article.
5 Which assumes that the miners were in a common purpose, which included the prospect that someone may be killed and that someone or some part of the group did indeed attack the police, causing them to return fire.
6 With the exception of the defence of mistake of law, which may be raised, although, to my knowledge, has never been raised in the context of common purpose.
held P, but also regard A as having stabbed P. For B, the same will apply, that not only did B stab P, but that B also held P. The point is that, under common purpose, you do not have to do ‘the deed’ yourself. You merely need to enter into a common purpose with someone who does.

Common purpose may take one of two forms: prior agreement or active association. Common purpose by prior agreement arises out of agreement between the participants before the commission of the offence. This agreement comprises the group’s ‘mandate’ which contemplates the objective of the group’s criminal endeavours. It may be express (what was specifically agreed to) or implied (what was merely contemplated). The extent of the mandate is determined by reference to what is contemplated in the prior agreement. Where there exists a common purpose to commit a crime other than murder, such as robbery, a killing will be attributable as part of the common purpose, if it was foreseen as a possibility that ‘someone’ may be unlawfully killed in the execution of their plan. Thus the extent of the mandate and therefore whether conduct falls into the mandate and is attributable is determined by what the accused foresaw and therefore indirectly by the accused’s intention. Common purpose may also arise spontaneously, in the absence of a prior agreement – known as active association.

The requirements for active association were set out in *S v Mgedezi*. These requirements have now been endorsed by the Constitutional Court in *Thebus*.

In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the [offence]. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the [offence]. Fifthly, he must have had the requisite mens rea …

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8 Holmes JA in *S v Madlala* 1969 (2) SA 637 (A) 640–1. The court in *S v Nzo* 1990 (3) SA 1 (A) (Hefer JA, Nestadt JA concurring, Steyn JA dissenting), adopted Holmes’s dictum in *Madlala*: ‘... the parties to a common purpose are liable for every foreseen offence committed by any of them in the execution of the design ...’ (ibid 7).

9 Intention in South African criminal law is widely defined to include dolus eventualis – constructive intention. Dolus eventualis exists when an accused foresees that his/her conduct poses a risk that the prohibited consequence could occur (or a prohibited circumstance could arise), reconciles him/herself to the risk, and persists. (*S v Ngubane* 1985 (3) SA 677 (A); *S v De Bruyn* 1968 (4) SA 498 (A)). Academics have however been critical of this conception (RC Whiting ‘Thoughts on Dolus Eventualis’ (1988) 1 SACJ 440; PT Smith ‘Recklessness in Dolus Eventualis’ (1979) 96 SALJ 81; EM Burchell, J RL Milton & JM Burchell *South African Criminal Law and Procedure* General Principles of Criminal Law vol 1 2 ed (1983) 147ff).

10 *S v Safatsa* 1988 (1) SA 868 (A) 898.

11 1989 (1) SA 687 (A) 705ff.

12 *Thebus v S* 2003 (6) SA 505 (CC) para 50.

13 *Mgedezi* (note 11) 706. It seems that the fifth requirement of mens rea is better understood as a requirement for liability, rather than for common purpose.
There is a troubling tendency by some to treat the formation of a common purpose as the relevant conduct in question.¹⁴ This treats common purpose liability as creating some form of ‘liability cloud’.¹⁵ There are a number of problems with this. It is effectively to treat common purpose as an instance of antecedent liability – having derived from actio libera in causa. But there is no magic in the operation of antecedent liability. It is simply an application of the contemporaneity principle – which requires that all elements of criminal liability (the actus reus and mens rea) must coincide in time.¹⁶ Jonathan Burchell reiterates:

The basis of actio libera in causa liability is a prior voluntary act (accompanied by the requisite fault element) which is causally linked to the unlawful consequence. All of the elements of criminal liability are present. The actio libera in causa form of liability is, therefore, neither a form of strict liability nor an application of the rejected versari doctrine.¹⁷

The problem will inevitably be that this conduct is too remote from the prohibited consequence for it to offer a viable basis for liability. The formation of a common purpose is, of course, conduct, but it is unlikely conduct, which, in the context of consequence crimes, can be regarded as sufficiently closely connected to any prohibited consequence – as required by Mokgethi.¹⁸

Also, that the accused had not yet done any act by which s/he intended to kill.¹⁹ Presumably an accused does not foresee that, upon entering into an agreement to kill the victim that the act of agreement may kill the victim – presumably the accused expects that the execution of the agreement will kill the victim.

Furthermore, the formation of a common purpose is personal conduct – conduct which is not imputed. It would be plainly wrong to treat the conduct committed by each common purpose perpetrator, in the formation of the common purpose, as imputed to all others in the common purpose who must perform their own conduct in forming a common purpose. A related problem is that, if common purpose served as some mechanism to analyse the actual conduct of the accused in the formation of common purpose – as the conduct

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¹⁴ This appears to have been the approach of the court in Nkwenja (S v Nkwenja 1985 (2) SA 560 (A)) regarding the finding of culpable homicide of two assailants who agreed to rob the occupants of a car, and in so doing, one assailant struck and killed one of the occupants. Proceeding on the basis that the two had a common purpose, the court found that, at the time of their conduct of entering into the common purpose, they were negligent in respect of the death of the occupants, and thus liable for a conviction of culpable homicide. This all seems straightforward at first, except, upon analysis, it unravels spectacularly. I must credit these insights to Andrew Paizes. If, as the court concluded, there was no foresight of the death of either of the occupants at either the time of the formation of the common purpose, or its execution, a killing could not have fallen in to the mandate of the common purpose (see note 8 above). As such, there could not be convictions for any form of homicide. The case is therefore a poor lesson in the proper application of common purpose. It is nevertheless useful because it reveals an instance in which the formation of common purpose is treated as conduct upon which a court may attach criminal liability.

¹⁵ I use this phrase as a bookmark to which I will cross refer the reader.

¹⁶ Burchell (note 7 above) 70–1.

¹⁷ Ibid 71.

¹⁸ S v Mokgethi 1990 (1) SA 32 (A).

¹⁹ S v Goosen 1989 (4) SA 1013 (A); Paizes (note 7 above).
in question – it would serve no purpose. Ordinary principles of liability apply. As Paizes notes:

The whole point about the doctrine of common purpose in a ‘consequence crime’ is that a remote party (as the appellant was in this case), in respect of whom there is no causal nexus between his own conduct and the prohibited result (in this case the death of the victim), has, in appropriate cases, attributed to him the conduct of an immediate party that is so linked to that result.20

Thus the work that common purpose does is to attribute to each member of a common purpose, the conduct of the others. When invoking common purpose, this is the conduct in question.

Beyond this problem, it is worth noting that common purpose only attributes conduct. It does not affect the enquiry into culpability which, as I have argued above, must be applied to the (attributed) conduct in question. The enquiry into capacity and fault proceeds without interference, as one would ordinarily, as if common purpose has not been used to establish the accused’s conduct.21

One final point must be observed. While common purpose relieves the prosecution of proving individual causation, it is not relieved of having to prove that actual conduct of someone in the common purpose, or of the group jointly, or of a sub-group of the group acting in common purpose, must satisfy the causation requirement.22 Thus, properly understood, however dogmatic common purpose may seem, it nevertheless requires that someone or some group within the common purpose, satisfies the causation requirement.


21 ‘It is … only X’s act which is imputed to Z, not X’s culpability. Z’s liability is based upon his own culpability (intention)’ original emphasis, CR Snyman Criminal Law 5 ed (2008) 266. ‘The liability of an associate in a common purpose to commit an unlawful act depends upon his own culpability (intention)’ ibid 268. ‘[S]o far as the fault element (mens rea) is concerned, the liability of an individual participant in a common purpose is assessed in the same way as an individual who is not a party to a common purpose … There is, therefore, nothing special about common-purpose liability in regard to fault (mens rea), original emphasis, Burchell (note 7 above) 504. ‘Now the liability of a socius criminis is not vicarious but is based upon his own mens rea. The test is whether he foresaw (not merely ought to have foreseen) the possibility that his socius would commit the act in question in the prosecution of their common purpose’ (original emphasis, S v Malinga 1963 (1) SA 692 (A)).

22 In Safatsa (note 10 above) the court, the Appellate Division, held that causation may be imputed together with conduct and that it is not at all necessary for the prosecution to prove that each individual accused in a common purpose caused the death of the victim. This ruling is prone to misunderstanding because it may be given two possible interpretations: (1) That causation is irrelevant in a consequence crime when common purpose is invoked. This is a misunderstanding of what common purpose permits and of the Safatsa judgment; and (2) The second, correct interpretation is that, although each individual accused need not have actually caused the death of the victim, s/he must be deemed to have caused it through the conduct that is imputed to him/her. This requires in turn, that the conduct which is imputed to the individual must satisfy the causation requirement, and that the actual conduct of someone in the common purpose, or of the group jointly, or of a sub-group of the group acting in common purpose, must satisfy the causation requirements. See Burchell (note 7 above) 489.
(b) Marikana and common purpose – on the law as it is

Some incredulity has been expressed at the notion that a party to a common purpose to attack and kill a third party, can be guilty of the murder of a co-perpetrator, where the co-perpetrator is killed by the third party in response to the attack.

I do not mean to imply here that I am of the view that the miners did indeed attack the police, or that they did not. The facts seem complicated and it seems sensible to await the findings of the Marikana Commission of Inquiry. What I want to answer is the theoretical question of whether they can be convicted of murder, under common purpose, assuming it can be proved that they had formed, by prior agreement or active association, a common purpose to attack and kill members of the police service, and that they, or some of them, did attack the police.

Clearly, for common purpose by prior agreement it will have to be proved that they planned to attack the police, and that it was contemplated that someone may be killed.\(^\text{23}\)

For common purpose by active association, they must satisfy the requirements of common purpose as set out in \textit{Mgedezi} and endorsed in \textit{Thebus}:\(^\text{24}\) they must have been present at the scene, aware of the attack on the police, intend to associate with those attacking the police, and manifest their sharing of the common purpose by some act; and then, they must have foreseen the (substantial) possibility that someone may be killed. It is not impossible that this may be proved – perhaps not in respect of the entire group, or even a large part of the group, but, again on the assumption that it may be proved that part of the group were attacking the police, it is possible that these requirements may be met. Assuming again, other requirements of criminal liability (such as unlawfulness and capacity),\(^\text{25}\) it is then possible that a part of the group could be found to have been in a common purpose to attack and kill members of the police. The question remains though, how would that common purpose to kill police rebound to include the killing of co-perpetrators.

As indicated above,\(^\text{26}\) under common purpose, you do not have to do ‘the deed’ yourself, but only enter into a common purpose with those who do. In the context of murder, which is defined as the unlawful intentional causing of death of another human being, this takes on an extended meaning. It means that one need only form a common purpose with those who cause the death of another person. Thus if one, through a common purpose, causes the death of someone, anyone, with the foresight of this risk,\(^\text{27}\) one may be convicted of murder – even if the person killed is your co-perpetrator. This is not only theoretically possible, but the Appellate Division (now the Supreme Court of Appeal) has already given an indication that it would impose this sort of liability.

\(^\text{23}\) Per \textit{S v Madlala} 1969 (2) SA 637 (A); and \textit{S v Nzo} 1990 (3) SA 1 (A) – discussed in note 8 above.
\(^\text{24}\) Discussed above, see notes 12 & 13 and associated text.
\(^\text{25}\) Which I will question later, see part II s (c)\(^\text{ii}\).
\(^\text{26}\) Under the heading ‘Effect of Common Purpose’ in part II s (a).
\(^\text{27}\) See note 9 above.
In *S v Nkombani*\(^{28}\) a party (Hung) to a common purpose to rob, which included the prospect of killing, who dispatched two co-perpetrators to rob a filling station, was convicted of the murder of one of the co-perpetrators who, during the course of the robbery, was shot and killed by the other co-perpetrator.\(^{29}\) Significantly, the causing of death of the co-perpetrator was imputed to Hung.

In *S v Nhlapo*\(^{30}\) the Appellate Division convicted co-perpetrators of the murder of a guard, killed during the commission of a robbery, by a fellow guard. Van Heerden AJA (Wessels JA and Muller JA concurring) stated:

> The robbers knew that they would have to attack and overpower guards who were armed for the specific purpose of using their fire-arms to thwart any attempted robbery. It may be conceded that they hoped to overpower the guards without a shot being fired by the latter, but they must have known that the guards would endeavour to use their firearms when attacked. It follows that they must have known that their attack on the guards could lead to a gun battle during which *anybody, be it a guard, one of the robbers or an innocent bystander*, might be killed in the envisaged cross-fire. Consequently, they also foresaw the possibility of one guard being killed by a shot fired in the direction of the robbers by another guard or, for that matter, a person such as a staff member of [the store] witnessing the attack. In sum, the only possible inference, in the absence of any negativing explanation by the appellants, is that they planned and executed the robbery with *dolus indeterminatus* in the sense that they foresaw the possibility that *anybody involved in the robbers’ attack*, or in the immediate vicinity of the scene, could be killed by cross-fire.\(^{31}\)

The point here is that common purpose allows for the conduct of every member of the group in the common purpose to be attributed to each member.

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\(^{28}\) 1963 (4) SA 877 (A).

\(^{29}\) Rumpff JA (Holmes JA concurring, Steyn CJ dissenting) stated: According to the facts, insofar as it relates to the robbery of garages on that particular evening, Hung had *dolus indeterminatus* in the sense that he foresaw the possibility that anyone who was, or could have been, involved in the robbery, could have been killed by the revolvers of the robbers, and he was indifferent as to who could die (own translation, original emphasis ibid 892).

\(^{30}\) 1981 (2) SA 744 (A).

\(^{31}\) Bold emphasis added, ibid 750–1. Compare the provincial division decision in *S v Mkhwanazi* 1988 (4) SA 30 (W) in which the court found that two surviving members of a group of perpetrators acting in common purpose to rob a post office, could not be held liable for the murder of a co-perpetrator killed by a third party on the basis that the co-perpetrators did not harbour the requisite intention in respect of the killing (ibid 34). The co-perpetrator who died was shot and killed by a third party acting in private defence in response to the attack by the group. Also, the court held, the two surviving perpetrators were not the legal cause of the death of the perpetrator because the conduct of the third party was the proximate cause (ibid 34). It is notable that proximate cause has now fallen out of favour and was specifically rejected in *S v Daniëls* 1983 (3) SA 275 (A). It has rightfully fallen out of favour on the basis that it requires one to identify the equivalent of ‘the straw that broke the camel’s back’. Of course, it is the combined weight of all the straws that ‘broke the camel’s back’. Additionally, legal causation is now decided by reference to the flexible approach of whether there is a sufficiently close connection between the conduct in question and the prohibited consequence (*Mokgethi* (note 18 above); *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A)). Significantly, the court distinguished the case of *Nhlapo* on the basis that: ‘The nature of the gun battle in *S v Nhlapo* was such that it was impossible to attribute any particular cause to a particular result. In short, on the matter of causation, the death of the deceased was the result of the gun battle and those who were responsible for having instigated the gun battle were responsible also for his death’ (*Mkhwanazi* 34). This attempted distinction begs the question whether the co-perpetrator’s attack on the post office was not ‘responsible for having instigated’ the act of private defence of the third party who shot and killed the ‘co-perpetrator’.
but also that, in the context of a consequence crime, it is perhaps not so much common purpose as causation that extends liability. This is what critics of the NPA decision to charge the fellow miners with murder (now withdrawn) seem to be missing. It is the interaction of common purpose with causation that extends the net of liability sufficiently widely to make common purpose perpetrators liable for the death of a fellow perpetrator.

Pierre De Vos has argued that for a successful prosecution based on common purpose, the NPA would have to show that the miners were in a common purpose with those who killed their fellow miners – the police. This is not at all necessary. All that must be shown to convict any member of a (presumed) common purpose is that the conduct (actual or imputed) of each miner in the common purpose caused the death of their fellow miners.

For this exercise, it is unnecessary to even invoke the use of common purpose – at least not to answer the causation question. We may imagine away the prospect of common purpose altogether, and imagine that only one single person (A) from within the group of miners, attacked the police – by for instance, firing a weapon at the police, or perhaps by running at the police wielding a spear or panga. In turn, we need to imagine only that the police responded, and killed a fellow miner (B).

The crisp question then is whether, on the law as it stands, the conduct of A caused the death of B. We must consider the law on causation for this. Is it a factual cause – on an application of the sine qua non test? Apparently yes – it appears to be a sine qua non of the death of B. If A had not fired at the police, they would (presumably) not have returned fire.

Is it a legal cause – is there a sufficiently close connection (Mokgethi) between the conduct of A and that of the police shooting and killing B? Into this enquiry one must consider the previous tests of legal causation as factors. Is it an adequate cause: when one shoots at police, does it ordinarily happen that they will shoot back and that these shots may kill one or anyone standing nearby?

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33 As discussed above under the heading ‘Effect of Common Purpose’, and particularly note 22.
34 Here we may imagine that the police acted lawfully or unlawfully – without any substantive difference on the question of causation. One may suppose that an unlawful response by the police would affect the enquiry, but there is no necessary connection – the enquiry into causation turns, ultimately upon whether there is a sufficiently close connection between the conduct in question and the prohibited consequence, see Mokgethi (note 18 above).
35 Minister of Police v Skosana 1977 (1) SA 31 (A) paras 33–5 & 43–4; Daniëls (note 31 above) paras 324 & 31; S v Haarmeyer 1971 (3) SA 43 (A) 47; Mokgethi (note 18 above) 39. I anticipate that the judgment from Lee v Minister of Correctional Services (Dudley Lee v Minister of Correctional Services [2012] CCT 20/12 ZACC 30) will not find application in the criminal law on the basis that it appears to disengage the enquiry into causation from an accused’s conduct or does not alter our law. At first sight, the case of Dudley Lee appears to represent a possible departure from this dominant approach to factual causation, in terms of which, the problems of causation which common purpose addresses, seem to entirely disappear – at least on what appears to be the ratio. In what appears to represent the ratio, Nkabinde states: ‘There was thus nothing in our law that prevented the High Court from approaching the question of causation simply by asking whether the factual conditions of Mr Lee’s incarceration were a more probable cause of his tuberculosis, than that which would have been the case had he not been incarcerated in those conditions. That
near? There seems to be little room to respond in any way other than positively here.

Is there an nova causa interveniens? Can the conduct of the police be considered a nova causa interveniens? It is itself a factual cause, and intervening in time. However, it is arguably not in the least abnormal, must have been foreseen, and it is certainly not ‘completely independent’ of the conduct in question, as required by Grotjohn\textsuperscript{36} – therefore there is no identifiable nova causa interveniens.

It is not the proximate cause – which is the conduct of the police – but, as discussed, this test has fallen out of favour and was specifically rejected in Daniëls.\textsuperscript{37}

Taking account of all of this, what does fairness and justice demand – as Mokgethi requires we ask? Arguably that A should be regarded as the factual and legal cause of the death of B, and therefore, assuming that A foresaw that B may be killed, A appears guilty of the murder of B.

Once it has been established that A’s conduct caused the death of B, the conduct of A may be attributed to anyone who was in a common purpose with A, which included the prospect that someone may be killed.

It is therefore not by virtue of a simple application of common purpose that the miners of Marikana could be held liable for the murder of their fellow miners, shot by the police, but by an application of common purpose and causation. Thus, on the law as it is, it does appear theoretically possible for any miners who were in a common purpose with any who did attack the police, to be held liable for the murder of the miners who were killed by the police in response to the attack on them.

The decisions in Nkombani\textsuperscript{38} and Nhlapo\textsuperscript{39} could be distinguished from the facts presented by the Marikana scenario, and so it was arguable that the theory would never be allowed to translate into practice. However, since then, a magistrate has convicted a poacher of the murder of his fellow poacher, shot and killed by game rangers.\textsuperscript{40} The prospect of a conviction for murder, in circumstances such as Marikana, is not just an academic machination.

\textsuperscript{36} The Appellate Division held in Ex parte Die Minister van Justisie In re S v Grotjohn 1970 (2) SA 355 (A) that an intervening event cannot count as a nova causa interveniens, unless it is completely independent of the conduct in question.

\textsuperscript{37} Daniëls (note 31 above).

\textsuperscript{38} Note 28 above.

\textsuperscript{39} Note 30 above.

\textsuperscript{40} RS Umar ““Milestone” Verdict in Poacher Murder Case’ IOL News (20 June 2013).
III CRITICISMS OF COMMON PURPOSE

Common purpose has a controversial history. I do not intend this to comprise a survey of all the arguments that have ever been raised against common purpose. I will not repeat criticisms here that I regard as without substance or strained. I intend instead to focus on those which seem entirely justified and inescapably impugn the doctrine of common purpose – several now, well known, and others that can be raised. The criticisms are not academic niceties, they are attempts to give expression to deeply-seated intuitive concerns about holding people liable for conduct they – by definition – did not actually commit, but are deemed, by operation of law, to have committed. These intuitions include well-known criticisms regarding how the prosecution could be relieved of its onus to prove individual causation in these special cases, and why the law allows the myth when perfectly acceptable alternatives – that are accurate reflections of what the accused did actually do – are available. They include also the intuition that it is unfair to hold someone liable for something that they did not do. But there are some intuitions that are deeper, and have not yet been voiced. They are the intuitions that it is deeply unfair to hold someone liable for conduct attributed to them based on their mental state and which therefore effectively punishes mere mental states; and possibly even more fundamental, the intuition that it is unfair to punish someone for something that s/he did not know was prohibited, or over which, at the relevant time, s/he had no control. I will take each of these in turn.

(a) Punishing thoughts

It is trite that an accused can only be punished for what s/he did, as opposed to what s/he merely contemplated – however evil those thoughts might be. Our criminal law requires, at least, some objective physical manifestation of the accused’s evil state of mind. This may take the form of mere words, but what is clear is that evil thoughts alone are not enough to attract liability. Common purpose violates this principle in at least two respects.

41 See Burchell (note 7 above) 490 & 1 referring to the cases of Safatsa (note 10 above) & Nzo (note 8 above); Thebus (note 12 above) 50.
42 It seems that Lewis JA gave expression to this intuition when she sentenced the accused in Thebus in the SCA (S v Thebus 2002 (2) SACR 566 (SCA)). Lewis states that, for the purposes of sentencing, the accused did not shoot a firearm: ‘Their participation in the actual shooting was not a direct cause of the death of the deceased or the injuries to the complainants. That they are legally responsible for the death and injuries that resulted is not in question. Nor is their moral responsibility doubted. They participated in violent action that they must have known could lead to injury and death. But they did not actually shoot, and neither was seen using a firearm. Such a difference in the degree of participation is not marginal – it is, in my view, significant’ ibid para 22. Yet, this is precisely the effect of common purpose – that the law regards the accused as having shot the girl. If the law is right in doing so, it would be right to sentence the accused accordingly. It seems though that the intuitions of Lewis are that it is not right to regard the accused as having done what they did not actually do.
44 Such as for incitement.
Both forms of common purpose allow for liability to be imposed for conduct which the accused did not commit, but is deemed to have committed, by virtue of having an evil mental state in respect of that conduct. In the case of common purpose by prior agreement the conduct of the accused is determined by reference to the extent of the mandate, which is, in turn, determined by what the accused contemplated. The mens rea of the accused determines both, naturally, his/her mens rea, but also the conduct of the accused. Thus the (extent of) conduct of the accused is determined by his/her mental state and s/he is therefore liable for having evil thoughts.

It is true that in the case of active association the rules of Mgedezi (endorsed in Thebus) require that the accused must have manifested his/her evil intention, but this then allows us to pretend that they did whatever evil thing they contemplated – rather than what they did. This is, of course, significantly different from the liability that our law recognise when it is satisfied by ‘slight’ actions, such as mere words of encouragement – as in the case of incitement. The difference here (for liability based on actual ‘slight’ conduct) is that the accused is liable only for whatever crime that (actual) conduct constitutes. Significantly, even though one may incur liability for relatively minor conduct, it is that conduct that is prohibited. Committing the relatively minor conduct does not trigger liability for some more serious offence, as if you can now somehow be deemed to have done all the evil that might fill your mind. Yet this is precisely what common purpose allows. It is an outrageous violation of the principle that one should only be punished for what one (actually) does wrong.

(b) Police use of force

Common purpose also seems to carry implications for the use of force by the police. Common purpose gives rise to a fiction which would entitle the police to use lethal force against someone who is actually unarmed and who is not actually committing any form of attack on anyone.

This follows from the recognition that an attack by a large group of people, armed with say, sticks, as opposed to a single person armed with a stick, may objectively be considered to present a far graver risk to a victim’s life and bodily integrity. An attack by such a group may well be considered a grave threat to one’s life – against which one may legitimately resort to lethal force in response. The problem that common purpose creates is that it allows for the fiction that, even if one person in a group is actually, in reality, attacking a victim, where they are in a common purpose, each and every one is deemed to be attacking the victim. Each one is deemed to be doing what everyone is

45 See note 8 above and associated text.
46 In Nkomo the court said: ‘… the parties to a common purpose which embraced the strangulation of the deceased which, as pointed out earlier, in itself evidenced an intention to kill’ (S v Nkomo 1966 (1) SA 831 (A) 833).
47 Note 11 above.
48 Note 12 above.
doing. Thus, the victim may apparently resort to lethal force whereas s/he would otherwise not.

The anomaly is apparent when one considers the question as to whether the police acted with excessive force at Marikana. Again I am assuming that a few members of the group of miners did attack the police. Let’s presume for these purposes that one of the miners was armed with a gun and fired a shot at the police. I am also assuming, uncontroversially I expect, that the more miners that attacked the police, the greater the degree of force would be justified in response. If the 270 other miners were in a common purpose with the miners who (I presume) shot at the police, then – as a function of common purpose – all 270 miners shot at the police. This attack, of all 270 miners, would be unlawful, as positive conduct without any apparent ground of justification. This dramatically alters the nature and degree of the attack that the police had to respond to. If the police were under attack, by gunfire, from 270 miners, I expect that far greater force in response would be justified – perhaps, just perhaps, even the extent of force that we saw on our televisions – all-out war.

Thus, even if all 270 miners had concluded a common purpose to attack the police, but only one was armed and shot at the police, the police may respond against everyone as if each one fired upon them. This is, of course, outrageous, but is just one more anomaly that the doctrine of common purpose permits.

(c) Voluntariness and capacity

The requirement of causation has been raised by accused persons charged under the doctrine of common purpose and judged to be unnecessary to establish against each individual accused. However, the fundamental requirements of voluntariness and capacity have not, to my knowledge, been raised, considered or declared dispensable. It is instructive to recall Moseneke J’s comments in *Thebus*:

Common minimum requirements of common law crimes are proof of unlawful conduct, criminal capacity and fault, all of which must be present at the time the crime is committed.

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49 See part II s (a) under the heading ‘Effect of Common Purpose’. This may be worth clarification. The effect of common purpose is to attribute the conduct of each person in a common purpose to everyone in the common purpose. One may object that this cannot have a multiplier effect. It does not make it the case that, if, in reality, only one member of a group of say, ten, in a common purpose to murder someone, shot the victim, that the victim was shot ten times. Regrettably, it must – and this is the consequence of interfering with reality. Common purpose requires that we regard each one as having shot the victim – at what point can we say: ten people shot the victim, but the victim was only shot once. The absurdity is permitted by common purpose. The victim, at the point in time that one of the group point a gun at him, is under attack by all ten. On the law every one of the ten is pointing a gun at him. He may, of course, take appropriate action in private defence against the ten people pointing guns at him.

50 It is imputed, together with the conduct that did cause the death (*Safatsa* (note 10 above); *Thebus* (note 12 above). Note though that someone or a sub-group within the group must have caused death and this conduct must be imputed in order for causation to become unnecessary to prove on an individual basis (see part II s (a) under the heading ‘Effect of Common Purpose’, particularly note 22 and the associated text).

51 Note 12 above para 37.
There seems to be every reason to believe that they could not be declared dispensable.

(i) Voluntariness

Voluntariness is the requirement that one’s conduct must be subject to one’s will.\textsuperscript{52} Here is the problem: if, under common purpose, one is deemed to have done what someone else did, how can it ever be said that this (deemed) conduct was ever subject to one’s will. One’s mind must control one’s own bodily movements – but it is anathematic to suggest that one’s mind must or can control other bodies – indeed, it is absurd.

Is there a conceivable response to this? Could it be argued that since conduct is attributed, and that conduct is, by definition, the voluntary conduct of some other person, the voluntariness of the conduct is imputed with the conduct? Perhaps it is this simple and that is why it has never been raised. But the problem is that voluntariness is a property of a movement (or a failure to move) that describes the relationship between a person’s mind and his/her own body.\textsuperscript{53} If the other person’s body was indeed under the control of his/her mind, it must be true that the mind of the person to whom the movement is imputed also controlled this movement, and the body of the other. Thus, two minds controlling, simultaneously, the body of the person whose conduct is to be imputed. Remarkable – and of course, absurd. Voluntariness cannot be imputed.

(ii) Capacity for self-control

Similarly for capacity, at least for capacity for self-control – and here there can be no suggestion that capacity somehow forms part of the conduct being imputed.\textsuperscript{54} As indicated above,\textsuperscript{55} only conduct is imputable, not capacity or fault.


\textsuperscript{53} This discussion relies on a distinction between voluntariness and capacity for self-control and is somewhat controversial. Navsa JA in S\textsuperscript{v} Eadie (2002 (1) SACR 663 (SCA)) rather cryptically stated that the two requirements are the same, but that both should be retained – without any clear reason why (ibid paras 58, 60 & 70). Snyman is critical of Navsa’s failure to distinguish these requirements (Snyman (note 21) 168–9). Burchell also distinguishes the two requirements (note 52 above 183). Grant argues that Navsa was right in his ambivalence although unclear in his reasons. He argues that the two requirements seem the same because they partly overlap. Voluntariness refers to whether an accused actually controlled his/her conduct; the capacity for self-control is a much larger question, extending from whether the accused was ‘reason sensitive’ and able to respond to his/her circumstances in the way a responsible person would, but including whether s/he actually controls his/her conduct. J Grant ‘The Responsible Mind in South African Criminal Law’ unpublished PhD thesis, University of the Witwatersrand (2012) 211–8.

\textsuperscript{54} See above under the heading ‘Effect of Common Purpose’.
Capacity for self-control, technically the capacity to conduct oneself in accordance with an appreciation of the wrongfulness of one’s conduct, cannot, exist in respect of the conduct of some other person. This is not even because of linguistic hurdles that it is not ‘one’s conduct’ – because it is deemed to be. The insurmountable hurdle is that, no matter that the conduct is deemed to be that of the accused, it is conduct over which the accused could never exercise the control necessary for there is no semblance of the capacity of the accused to control or direct the conduct that is imputed to him/her. Any suggestion that this is possible requires us to accept that somehow, during the execution of a common purpose, the various minds of the various accused simultaneously were capable of control over the various bodies of the various accused. What is required is a scenario which, if claimed by an accused in a trial, that his body was possibly under the control of others and that s/he was able, in turn, to control the body of these others, would see a swift referral to a mental institution for observation. The same should, of course, hold for any lawyer who makes such an argument.

One response may be anticipated: that the accused acted voluntarily and possessed the required capacity when entering the common purpose, and that is where the required voluntariness and capacity may be located. This is to treat common purpose as a ‘liability cloud’ – and so raises all of the objections discussed above.

There is one problem that does need to be taken seriously arising out of the implications of what I have argued. I have argued against the conception of common purpose as some sort of ‘liability cloud’. I have argued that, to be liable for whatever is perpetrated in the common purpose on the basis of the formation of a common purpose, the formation must satisfy the requirements of criminal liability.

However, what about the position of agency liability? Would I suggest that the conduct of the agent cannot be imputed to the instructing principal on the basis that the conduct of the agent, though voluntary for the agent, is not voluntary for the principal once it is imputed to him/her? This is significant, because it arises by necessary implication of what I have otherwise argued – that conduct of co-perpetrators in a common purpose cannot have the voluntary conduct of their fellow perpetrators imputed to them without violating the requirement of voluntariness and capacity. This is true and it is what I would maintain – for common purpose – and for agency. But here I think there is again a distinction that may validly be maintained between common purpose and agency.

The action of the poison, assassin or a vicious dog you may have set on someone is a simple extension of your conduct – and provides no (obvious) problems of remoteness. The agent is as much a tool as is the poison or the

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56 Under the heading ‘Effect of Common Purpose’ – see note 15 and associated text.
57 Aside from, in the case of an assassin, the argument that the conduct of the assassin is the proximate cause of the death of the victim. Yet, as discussed above (see note 31), the proximate cause test is not, and does not, deserve to be taken seriously.
vicious dog. Of course one may seize on this and argue that one's perpetrators in a common purpose are one's tools, but this is disingenuous and will invariably not work. In the case of agency there will invariably be no problem of remoteness from the dispatch of the agent; in the case of common purpose, there is every reason to expect problems of remoteness from the act of forming the common purpose and in the case of common purpose, the act of the formation of the common purpose cannot be construed as the act by which the accused intends to kill.

In conclusion, criminal liability based upon the attribution of conduct over which an accused had no control is a violation of the requirements of voluntariness and capacity. As such it permits for the conviction of offences whereas no such offences exist – every offence in South Africa requires voluntariness and capacity. In consequence, convictions based on common purpose are a violation of the constitutional right 'not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted'.

(d) Causation

A well-known criticism of common purpose is the argument made in *Safatsa* that it relieves the state of the burden of having to prove causation in respect of each individual in the common purpose. This was rejected in *Safatsa*, and again, when raised in the Constitutional Court in *Thebus*. Moseneke J disposes of the argument as follows:

> [T]he doctrine of common purpose does not relate to a reverse onus or presumption which relieves the prosecution of any part of the burden. The appellants argued that the substantive effect of the doctrine of common purpose is to dispense with the requirement of a causal nexus between the conduct of the accused and the criminal result. As found earlier, the doctrine of common purposes sets a norm that passes constitutional scrutiny. The doctrine neither places an onus upon the accused, nor does it presume his or her guilt. The state is required to prove beyond a reasonable doubt all the elements of the crime charged under common purpose. In my view, when the doctrine of common purpose is properly applied, there is no reasonable possibility that an accused person could be convicted despite the existence of a reasonable doubt as to his or her guilt. In my view, the common purpose doctrine does not trench the right to be presumed innocent.

However, Burchell makes the obvious point. Moseneke J’s logic is that common purpose does not give rise to a reverse burden, but does something far worse: it places the issue of the proof of causation beyond any proof that an accused could raise. It permits a court to assume it against an accused and therefore unquestionably allows for a conviction of an accused despite

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59 Note 10 above.
60 Ibid.
61 Note 12 above.
62 Emphasis added, ibid para 43.
63 Without meaning to detract from the credit due to Burchell (note 7 above) 502 for recognising this and making the point.
the existence of reasonable doubts in the accused’s favour. It allows for the conviction of an accused, even where there is every doubt that s/he causally contributed to the death of the victim. As such it is a clear limitation on the right to be presumed innocent.\(^64\) It would be another matter entirely to recognise this limitation, but upon a limitations analysis, conclude, possibly, that this intrusion upon individual rights is reasonable and justifiable. My sense is that it is not – for reasons I will elaborate upon below. I will argue that it is, at least, not a necessary infringement, nor is it the least possible in the circumstances.\(^65\)

Also, if the difficulties in proof justify relaxing the requirement of proof, or removing the requirement that must otherwise be proved, why do we not do this then whenever proof of a particular requirement is difficult. Proving the absence of consent in rape cases is notoriously difficult – does the logic of Moseneke J not permit us to dispense with this requirement?

It is also notable that the justifications of common purpose refer to the difficulty of proof of causation in mob-attack situations – of active association.\(^66\) This is because it is often unclear which of the accused in the group committed conduct which was a necessary (factual) cause of the victim’s death. While this may be so, and while the court in \textit{Thebus} was concerned with just such a circumstance of active association, the same does not apply to the other well recognised form of common purpose – by prior agreement. In these cases an agreement is formed prior to the execution of the common purpose and there is no special difficulty in establishing, if someone was killed in the execution of the common purpose, who killed this person. The justification that we cannot know who caused the death of the victim so that everyone may ‘get away with murder’ does not apply – and yet we permit the law to pretend none-the-less that, in the instance of a common purpose to rob a bank, where one identifiable party enters the bank and kills the guard, that the driver of a get-away vehicle and the lookout, neither of whom even entered the bank, also killed the guard.

One may be forgiven for wondering what we are trying to achieve. My sense is that we have come to think that if we do not convict the participants in a common purpose of all that falls within the common purpose, they will all walk free. Certainly this is the intuition that the mob-attack scenario triggers. Moseneke J suggests that group criminal activity is more offensive than individual criminal activity: ‘Group, organised or collaborative misdeeds strike more harshly at the fabric of society and the rights of victims than crimes perpetrated by individuals.’\(^67\) Certainly the gravity of the harm is often greater.

\(^{64}\) Contrary to \textit{S v Bhulwana; S v Gwadiso} 1996 (1) SA 388 (CC); and \textit{S v Coetzee} 1997 (3) SA 527 (CC).

\(^{65}\) As required by s 36 of the Constitution.

\(^{66}\) See Snyman (note 21 above) 263–4.

\(^{67}\) \textit{Thebus} (note 12 above) para 40.
The obvious question remains though whether the law is not capable of dealing with these circumstances without pretending that people do what they do not do. The answer is a resounding yes: our law punishes conspiracy, incitement, attempts, accomplice liability, and public violence – as will be discussed below.\(^{68}\)

(e) Dignity

It is not clear that Moseneke J dealt with the complaint that common purpose is a violation of the right to dignity. The appellants (accused) argued that common purpose is a violation of the right to dignity on the basis that it has the effect of treating accused people as faceless, nameless individuals.\(^{69}\)

Moseneke J’s response is to point out, briefly, that the Constitution clearly contemplates that people may be prosecuted and convicted for criminal activity:

> I am unable to agree that the doctrine of common purpose trenches upon the rights to dignity and freedom. It is fallacious to argue that the prosecution and conviction of a person de-humanises him or her and thus invades the claimed rights. The entire scheme of sections 35 and 12(1) of the Bill of Rights authorises and anticipates prosecution, conviction and punishment of individuals provided it occurs within the context of a procedurally and substantively fair trial and a permissible level of criminal culpability.\(^{70}\)

This does not seem to answer the complaint which was not that one may be prosecuted and convicted for criminal activity but that when prosecuted and convicted under common purpose, that one is stripped of one’s personal identity. It seems that this complaint may be supplemented by the argument that if the right to dignity requires that all people are treated as human beings and not as mindless zombies, then common purpose also violates the right to dignity on this basis. As indicated,\(^{71}\) common purpose has the effect of making one liable for the conduct of others in respect of which one’s mind is disconnected. Under common purpose, not only do you do what you actually do, but you also do what others, in a common purpose with you, do, in respect of which one’s mind is entirely disconnected. One’s attributed conduct is the conduct of a mindless zombie. It may be argued, in response, that common purpose does not treat a person as a mindless zombie, but only attributes to him or her the conduct of others in a common purpose. But this is the problem. The moment one pretends that someone does something that they do not actually do, she/he is acting, in respect of that conduct, as a mindless zombie.

It is doubtful that the right to dignity could countenance this.

\(^{68}\) See under the heading ‘Alternatives’ in part III s (g).

\(^{69}\) ‘The appellants argue that the doctrine of common purpose undermines the fundamental dignity of each person convicted of the same crime with others because it de-individualises him or her. It de-humanises people by treating them “in a general manner as nameless, faceless parts of a group”. On this contention, a crime like murder carries a stigma greater than a conviction on an alternative charge or competent verdict such as public violence, conspiracy, incitement, attempt and accomplice liability’ Thebus (note 12 above) para 35.

\(^{70}\) Footnote omitted, ibid para 36.

\(^{71}\) Discussed above under the heading ‘Voluntariness and Capacity’ in part III s (c) above.
(f) Mistake of law

Another possible defence appears when one considers that our law recognises mistakes of law. The defence was recognised in De Blom, in which the court held:

If the accused wishes to rely on a defence that she did not know that her act was unlawful, her defence can succeed if it can be inferred from the evidence as a whole that there is a reasonable possibility that she did not know that her act was unlawful; and further, when culpa only, and not dolus, is required as mens rea, that there is a reasonable possibility that juridically she could not be blamed, ie that, having regard to all the circumstances, it is reasonably possible that she acted with the necessary circumspection in order to inform herself of what was required of her ...\(^\text{72}\)

The effect of this is that the principles that apply to mistakes of fact, now apply to mistakes of law. The principles bear repeating: (a) Where the offence requires fault in the form of intention, a mistake relating to whether the conduct in question was prohibited in law, will exclude that intention, and therefore liability. This includes all offences for which intention is required, for instance, murder, theft, assault, robbery; and (b) Where the offence in question requires fault in the form of negligence, a reasonable mistake relating to whether the conduct in question was prohibited in law will exclude negligence, and therefore liability.

This is perhaps trite. However, what may not be trite is that the attribution of conduct under the doctrine of common purpose is a function and question of law. It is certainly not a matter of fact that someone does what another does. This is, of course, a policy choice, and a decision of law.

A mistake regarding its legal function is a mistake of law, and, depending on the form of fault, may lead to a complete acquittal.

If an accused charged with murder, under common purpose, was ignorant in respect of the functioning of common purpose, that is, s/he did not know (or foresee)\(^\text{73}\) that, as a function of law, the conduct of the others in the group may be attributed to him/her, s/he makes a mistake of law, and must be acquitted. Similarly for any other offence requiring intention – as a function of ordinary principles.

If charged with culpable homicide, an accused labouring under such a mistake of law will escape a conviction to the extent to which the mistake/ignorance was reasonable.

It is entirely conceivable that an accused person may be mistaken or entirely ignorant of the existence of the doctrine, and if not, then at least about the proper function of the doctrine. The effect is that these accused persons have a valid and complete defence against a charge relating to a crime requiring intention.

The effect of this mistake on a charge in respect of which negligence is sufficient is not as straightforward. The mistake or ignorance must be


\(^{73}\) See note 9 above.
reasonable. The problem arises as to what is a ‘reasonable’ mistake, or ‘reasonable’ ignorance. It must, of course, be a mistake a reasonable person, in the circumstances of the accused, would make.

Ordinarily, the reasonable person has no special knowledge or skill, other than that which is demanded by the task in which the accused engages. There may not at first appear to be any relevance for a person charged with having committed a crime by common purpose. Indeed, the question may seem absurd. If an accused, on a charge of murder by common purpose, made a mistake of law relating to the operation of common purpose, the mistake must have been reasonable for the accused to avoid a conviction (assuming all else is proved) of culpable homicide. Is this the sort of mistake a reasonable person (in the circumstances of the accused) may make?

The question, when contextualised, is as follows: would the reasonable person, engaged in the commission of a robbery or an assault upon someone, with others, foresee that, in law, s/he will be regarded as having done what anyone else, who commits the offence with him/her, does? The answer to this seems an emphatic no. The workings of common purpose are highly refined, technical, and unquestionably exceedingly complicated.

However, the court in De Blom qualified the position of an accused seeking to rely on a reasonable mistake of law. It adopted a passage from an article by Botha, discussing the implications for our law of the decision in the case of Tsochlas, as follows:

In our case law there are at present at least two guidelines for determining culpa in respect of the lawfulness of the wrongdoer’s conduct. In Wandrag’s case [1970 (3) SA 151 (0)] the Court held that an employer in the building industry could reasonably be expected to keep abreast of the law relating to the employment of employees in the building industry. If he neglects to do this, his consequent ignorance of the law may give rise to the blame of carelessness. The

74 S v Southern 1965 (1) SA 860 (N); R v Mhombela 1933 AD 269; Ngubane (note 9 above).
75 In circumstances in which an unskilled person has engaged in an activity that requires special skill and knowledge, such as medical surgery, the conduct of the accused is compared to that of a reasonable person who possesses the requisite skill (R v Van Schoor 1948 (4) SA 349 (C), S v Van As 1976 (2) SA 921 (A)). Additionally, our law may attribute actual knowledge an accused has, to the reasonable person, for the purposes of comparison (ibid; S v Ngema 1992 (2) SACR 651 (D)).
76 It may be objected that this is inconceivable: that the reasonable person could ever commit a prohibited act, or be about to do so. Yet, on reflection, it may be observed that the enquiry is not even unfamiliar let alone inconceivable. To begin, we must recall that while the reasonable person always does what is reasonable, s/he does not always do what is right. Paizes notes: ‘… even a reasonable man may engage in unlawful conduct …’ (A Paizes ‘Unreasonable Conduct and Fault in the Criminal Law’ (1996) 113 SALJ 237). We may conceive of circumstances in which even a reasonable person would, for instance, intentionally and unlawfully kill another. Paizes offers several circumstances in which a reasonable person may commit unlawful conduct, including killing an abusive spouse (ibid 248); Paizes 242.
77 S v Tsochlas 1974 (1) SA 565 (A).
same will presumably apply to a person in the modern state, where numerous facets of a legal subject’s conduct are regulated by legal provisions, who is occupied in a specific field. It can surely reasonably be expected of a garage owner to be acquainted with legislation regulating his sphere of operations and it can surely be expected of an angler to ascertain what the regulations affecting angling are. A person who wants to conclude a transaction in respect of diamonds and who knows that the diamond industry is strictly controlled by legislation, can justly be blamed if he, like Tsochlas …, fails to obtain legal advice and consequently acts unlawfully.78

Thus a person may be expected to know the law relating to his/her specific field of occupation or sphere of operation. Yet, as Burchell notes, we are not left with any great deal of clarity regarding what will be considered one’s sphere of operation or activity, and then, what will fall within that specific field of occupation or sphere of operation.79

Do the directives issued in De Blom80 (that the reasonable person knows the law relating to his or her sphere of activity/operation) change what we may expect of an accused engaged in a common purpose?

The answer seems to be that it may – to the extent that the commission of offences, in a common purpose with others, may be regarded as any accused person’s field of occupation or sphere of operation or activity. This is not impossible, but it seems unlikely. There seems an inescapable and inherent difference between committing offences in common purpose, and dealing in gem stones, running a garage, being a motorist, or a fisherman.

In application to Marikana – the accused here are miners – presumably not career common purpose offenders. Would the reasonable miner know that, if s/he engages in an attack upon someone, together with others, s/he will be regarded as having done what everyone of the others did? Again, the answer here seems to be an emphatic no.

In conclusion, it does not seem a stretch to argue that if an accused did not know the effect of common purpose, then s/he may raise the defence of lack of fault.

Thus, it seems, that on a proper application of the defence of mistake of law alone, the Marikana miners ought not to be convicted under common purpose.

(g) Alternatives

Moseneke J dismissed the validity or viability of accomplice liability in Thebus on the basis that:

The argument on the relative degree of the invasiveness of common purpose in comparison to other forms of liability such as accomplice liability and competent verdicts is, in essence, a proportionality argument. It rests on the assumption that common purpose invades a constitutionally protected right to a degree disproportionate to the need and objective of

79 Burchell (note 7 above) 444.
80 Applied in S v Du Toit 1981 (2) SA 33 (C).
crime control. In the light of the finding in this judgment that the doctrine of common purpose does not limit any of the rights asserted by the appellants, this contention need not detain us.\(^{81}\)

It appears however, that common purpose does indeed violate the presumption of innocence in that it relieves the prosecution of having to prove individual causation, but also, as I have argued, relieves the prosecution of having to prove voluntariness and capacity. It also appears that common purpose violates the right not to be convicted of an offence which is recognised as such,\(^{82}\) and the right to dignity.\(^{83}\) This would require a limitation analysis in terms of s 36 of the Constitution, and a consideration of whether there are any less restrictive means.\(^{84}\)

The answer to this is – as alluded to above – that there certainly is. It would seem that accomplice, attempt liability, public violence,\(^ {85}\) conspiracy (in the case of prior agreements), and incitement are all competent verdicts which may well give expression to the need for liability to attach to the conduct of the accused – and what’s more – attach to what the accused actually did.

Public violence is committed when a number of accused acting in concert, unlawfully and intentionally commit sufficiently serious acts which are intended to forcibly disturb the public peace or security, or to violate the rights of others.\(^ {86}\) This crime is invariably committed in mob-attack scenarios.

Attempts are committed where an accused, with the intention to commit an offence, proceeds beyond mere acts of preparation to commit the offence and begins with the execution of the offence – but of course, fails to achieve his/her objective. An accused engaged in a mob attack may fail to achieve his/her purpose of causing the death of the victim,\(^ {87}\) but may well have done enough to be convicted of attempted murder.

Conspiracy and Incitement are governed by s 18(2) of the Riotous Assemblies Act 17 of 1956.\(^ {88}\) Conspiracy is inevitably committed in the formation of common purpose by prior agreement, and incitement may well be committed in circumstances of active association.

Accomplice liability consists in the intentional unlawful furthering of the commission of a crime by some other person.\(^ {89}\) It is difficult to conceive of an offender who would be convicted as a common purpose perpetrator, who could not be convicted as an accomplice.

\(^{81}\) Note 12 above 48.
\(^{82}\) Constitution s 35(3)(l), discussed above under part III s (c).
\(^{83}\) Ibid s 10, discussed above under the heading ‘Dignity’ in part III s (c).
\(^{84}\) Constitution s 36(1)(e).
\(^{85}\) Burchell (note 7 above) 500.
\(^{86}\) Burchell (note 52 above) 867.
\(^{87}\) At least, from the perspective of the prosecutor – given the difficulties of proof discussed above under the heading ‘Causation’ in part III s (d).
\(^{88}\) As follows: ‘Any person who –
\(\text{(a)}\) conspires with any other person to aid or procure the commission of or to commit; or
\(\text{(b)}\) incites, instigates, commands, or procures any other person to commit, 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.’
\(^{89}\) Burchell (note 7 above) 515–6; S v Williams 1980 (1) SA 60 (A) 63.
It may be objected that these offences do not permit the same degree of punishment – to which the answer is, almost invariably: they do. The offences of attempt to commit a statutory crime, incitement, and conspiracy, all permit courts to impose the same extent of punishment as if the offender was convicted of the ‘main’ offence.  

In respect of attempts to commit common law crimes and accomplice liability – punishment will depend – as it ought to – on what it is that the accused actually did. In the case of attempts to commit common law offences, a lesser punishment may be appropriate given that the accused has done less harm. In respect of accomplice liability though – but again in line with the principle that it depends on what the accused actually did – the punishment may be less or more than the perpetrator (the person who actually commits the main offence). Punishment may be greater than that of the perpetrator where, for instance, the accomplice played a more substantial role than the perpetrator.

The concern with offenders ‘getting away with murder’ or receiving inadequate sentences appears entirely misplaced. If Mosebenzi J had done a limitations analysis, it seems he would have been driven to accept that far less invasive means exist to achieve the required ends.

IV CONCLUSION

It does seem entirely theoretically possible that – on certain presumptions – the doctrine of common purpose could be engaged to obtain convictions against some miners for the murders of their fellow miners killed by the police.

Common purpose is justified as a necessary evil on the basis of crime control in respect of joint criminal ventures. However, as I have argued, it is not so much necessary as it is evil.

The controversy it attracts is undoubtedly because it offends our deepest intuitions that it is only fair to punish people for what they do wrong, when they know they are doing wrong, and in respect of conduct over which they have control.

Common purpose punishes, or at least triggers the punishment of mere evil thoughts. It permits the police to resort to lethal force against unarmed people who are not attacking anyone or anything – except under the strained legal construction of common purpose. It punishes people for the conduct of others over which they have no control. It relieves the prosecution of the burden of proving causation and leaves an accused in a position that s/he can be convicted of murder even where s/he can show that s/he did not cause the

90 The Riotous Assemblies Act s 18(1) & (2).
91 Snyman (note 21 above) 294.
92 Burchell (note 7 above) 522.
93 Which I have declared to enable this analysis: that a group of miners has concluded a common purpose to attack the police, which included the prospect that someone may be killed, and that, at least, someone from within the group, or a sub-group of the group, did attack the police.
94 Burchell (note 7 above) 494.
death of the victim in any way. It strips people of their identity and makes them liable for the conduct of their co-accused, who it treats as mindless zombies.

It seems inescapably to violate the right to the presumption of innocence, to not be convicted for conduct which is not an offence, and the right to dignity.

It also allows for convictions by distorting reality, as a matter of law, when, if the requirement of knowledge of the law is observed, convictions would be almost impossible.

It does all this in the face of perfectly appropriate and applicable alternatives – that do not require that our courts pretend that someone has done something that they did not do. In the context of a criminal law that is wonderfully advanced and progressive, it remains a source of deep embarrassment as a truly unnecessary evil.

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95 Where a mistake of law is raised.