

The Genesis of the Common Purpose Doctrine in South Africa

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Online ISSN
1727-3781

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Date Submitted

26 June 2023

Date Revised

5 September 2023

Date Accepted

5 September 2023

Date Published

23 November 2023

Guest Editors

Prof M Carnelley
Mr P Bothma

Journal Editor

Prof C Rautenbach

How to cite this contribution

Hoctor S "The Genesis of the
Common Purpose Doctrine in
South Africa" *PER / PELJ* 2023(26)
- DOI
<http://dx.doi.org/10.17159/1727-3781/2023/v26i0a16385>

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DOI

<http://dx.doi.org/10.17159/1727-3781/2023/v26i0a16385>

Abstract

This contribution seeks to assess whether the generally accepted narrative of the emergence of the common purpose doctrine in South African law, as set out in Rabie's analysis of the doctrine, is indeed correct. In particular the following questions are examined: (i) Did the common purpose doctrine derive from English roots? (ii) Were the means of entry into South African law the *Native Territories Penal Code*? (iii) Did the doctrine indeed emerge in South African case law in 1917, in the Appellate Division case of *McKenzie v Van der Merwe*?

Keywords

Common purpose; *socius criminis*; criminal liability for participation.

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1 Introduction

The common purpose doctrine has seen significant development in the past four decades. From a doctrine tainted by its association with the application of the criminal law against those opposing the apartheid regime, it has now been declared constitutionally sound.¹ From a doctrine with some vague and uncertain antecedents, it has now crystallised into a clearly explicated set of rules pertaining to liability.² From a doctrine that was extensively criticised for its short-circuiting the process of establishing criminal liability, it has come to be accepted as fulfilling a crucial role in crime control in the context of unlawful group activity.³

The common purpose doctrine may be defined as follows:⁴

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.

The characteristics of the modern common purpose doctrine are:

(i) While the causing of a particular result is imputed to all members of the common purpose, neither intention nor negligence is imputed from one actor to another.⁵

(ii) Liability for any conduct which differs from that embodied in the common purpose is limited to those members of the common purpose who knew or

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¹ In *S v Thebus* 2003 2 SACR 319 (CC) (hereafter the *Thebus* case).

² See *S v Mgedezi* 1989 1 SA 687 (A) for the requirements of active association common purpose.

³ *S v Tshabalala* 2020 2 SACR 38 (CC) para 57 (hereafter the *Tshabalala* case).

⁴ Burchell *Principles of Criminal Law* 477. This definition was approved in the *Thebus* case para 18. The definitions used by Hoctor *Snyman's Criminal Law* 225 and Kemp *Criminal Law* 283 are similar.

⁵ Hoctor *Snyman's Criminal Law* 225; Kemp *Criminal Law* 283; Visser & Maré *Visser & Vorster's General Principles of Criminal Law* 691.

foresaw (and reconciled themselves to) the possibility of the conduct taking place.⁶

(iii) Common purpose may arise either by prior agreement with other participants in the common purpose or by active association with the conduct of other participants in the common purpose.⁷

(iv) The "late-comer" (or "joiner-in"), that is, the person who actively associates himself with the criminal act of those acting in the common purpose only after the mortal wound has already been inflicted, does not fall within the ambit of the common purpose doctrine.⁸

(v) The common purpose rule is constitutionally sound.⁹

(vi) The common purpose rule applies to all crimes.¹⁰

Much ink has been spilt on the issue of common purpose, and in the course of this brief contribution there will not be scope to expand on any of the intriguing aspects of the doctrine. It is probably fair to say that, from a legal-historical perspective, the unabridged biography of the common purpose doctrine remains to be written.¹¹ The question which will be addressed below will be whether the generally accepted genesis of the common purpose doctrine in South African law, being an English law doctrine, introduced via the *Native Territories Penal Code* (the NTPC),¹² and first authoritatively accepted as a doctrine of South African law in the 1917 Appellate Division delict case of *McKenzie v Van der Merwe*¹³ is indeed correct.

2 Rabie's exposition of the history of the common purpose doctrine

If common purpose entered into South African law from English law, how did this take place? This is not entirely clear. The most influential exposition of this process has been that of Rabie, in his trademark comprehensive analysis of the common purpose doctrine published in 1971.¹⁴ In the

⁶ Hoctor *Snyman's Criminal Law* 225; Kemp *Criminal Law* 287.

⁷ Hoctor *Snyman's Criminal Law* 225; Kemp *Criminal Law* 284; Burchell *Principles of Criminal Law* 477, who raises a novel argument for a third "hybrid" form of common purpose liability, which is criticised by Hoctor 2016 *Obiter* 666.

⁸ Hoctor *Snyman's Criminal Law* 226; Kemp *Criminal Law* 286; Burchell *Principles of Criminal Law* 493-494.

⁹ *Thebus* case; Hoctor *Snyman's Criminal Law* 230; Kemp *Criminal Law* 292-293; Burchell *Principles of Criminal Law* 482.

¹⁰ Hoctor *Snyman's Criminal Law* 226.

¹¹ Despite some strong efforts, notably Parker 1996 *JAL* 78.

¹² *Native Territories Penal Code*, Act 24 of 1886 (C) (NTPC).

¹³ *McKenzie v Van der Merwe* 1917 AD 41 (hereafter the *McKenzie* case).

¹⁴ Rabie 1971 *SALJ* 227. Parker 1996 *JAL* 82 n 20 describes this article as "the fullest account of the early history of the common purpose rule in South Africa."

opening pages of his article Rabie states that the doctrine of common purpose originated in the English law, specifically in the case law, and sets out¹⁵ the "underlying principle" of the doctrine by way of a quote from the English case of *Macklin, Murphy and Others*,¹⁶ which explains that "it is a principle of law, that if several persons act together in pursuance of a common intent, every act done in furtherance of such intent by each of them is, in law, done by all."

Rabie proceeds to then set out some exemplary case law to explain what he terms the "common purpose of English law",¹⁷ and states that at the heart of this doctrine is the fact that "the participants are responsible for one another's conduct because the conduct of the one is imputed to the other or others."¹⁸

If then not simply adopted in terms of an already established doctrine bearing this name, how was it that the common purpose doctrine came to be transferred into South African law? Rabie explains that this took place through the *Native Territories Penal Code* of 1886.¹⁹ This Act was strongly influenced by the *Indian Penal Code* and in particular the *Indictable Offences Bill* drafted by Sir James Stephen as a code of English criminal law.²⁰ The relevant provision is section 78 of the Act, under the sub-heading "Parties to Offences", which is worded as follows:

If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been, known to be a probable consequence of the prosecution of such common purpose.

Rabie points out that somewhat mysteriously the same idea is conveyed in the "Interpretation of Terms" in section 5(e) of the Act, without any overt reference to the section 78 provision.²¹ Section 5(e) provides that:

When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone. Whenever an act which is criminal only by reason of its being done with a criminal knowledge or intention, is done by

¹⁵ Rabie 1971 *SALJ* 227.

¹⁶ *R v Macklin, Murphy and Others* 1838 2 *Lewin* 225, 168 *ER* 1136, per Alderson B.

¹⁷ Rabie 1971 *SALJ* 227.

¹⁸ Rabie 1971 *SALJ* 228, referring to the English case of *R v Harrington* 1851 5 *Cox CC* 231.

¹⁹ Rabie 1971 *SALJ* 229, referring to Act 24 of 1886 (C). For a detailed discussion of this statute and its developmental influence on South African criminal law, see *Koyana Influence of the Transkei Penal Code*.

²⁰ Burchell, Milton and Burchell *South African Criminal Law and Procedure* 2nd ed 38, who point out that the Bill was introduced in the House of Commons in 1878, was referred to a Commission, and then later returned as a Draft Code in 1879. However, it never passed into legislation, despite being reintroduced from time to time.

²¹ Rabie 1971 *SALJ* 229 n 17.

several persons, each of such persons who joins in the act, with such knowledge or intention, is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.'

Rabie then points out that the common purpose doctrine arose in the context of the delict case of *McKenzie v Van der Merwe*²² and was "applied outside the field of application of the Native Territories Penal Code" in 1922,²³ and concludes his historical survey of the doctrine by noting that it has since then "been elaborated especially by the Appellate Division of the Supreme Court and it has been applied in many decisions."²⁴

Rabie's synopsis of the transfer of the common purpose doctrine into South African law and the milestones of its early development has indeed been highly influential.²⁵ It may be noted that this was not the first analysis which identified these sources for the doctrine. In writing about the common purpose doctrine in 1917, in this regard Gardiner and Lansdown cite an adapted version of the section 78 provision,²⁶ and further refer to English sources²⁷ along with the *McKenzie v Van der Merwe* case. Nevertheless, it is Rabie's analysis which has been widely cited and relied upon.

With regard to the textbook writers, Burchell references Rabie's article in stating that the "common-purpose rule originated in the English law and was introduced into South Africa via what was then the Native Territories' Penal Code."²⁸ Kemp also references Rabie's article in attributing the common purpose doctrine to English law and citing the *Macklin; Murphy* case.²⁹ Scholars who have written dissertations on the common purpose doctrine have also followed the chronology of development set down by Rabie,³⁰ as have other writers who have written accounts of the operation of the common purpose doctrine in South Africa.³¹

²² *McKenzie* case.

²³ This appears to be a typographical error, as Rabie 1971 *SALJ* 230 refers to the 1923 case of *R v Garnsworthy* 1923 WLD 17 (Special Criminal Court).

²⁴ Rabie 1971 *SALJ* 230.

²⁵ *De Wet De Wet and Swanepoel Strafreg* 192 n 74; Hoctor *Snyman's Criminal Law* 212 n 23, and Burchell, Milton and Burchell *South African Criminal Law and Procedure* 2nd ed 430 n 173 all cite Rabie's article, although they do not necessarily identify with his suggested pattern of historical development of the doctrine.

²⁶ Instead of "several persons" the authors refer to "two or more persons", and they further include that the imputation of liability occurs "under the general principles of the law of agency". Gardiner and Lansdown *South African Criminal Law and Procedure* 82.

²⁷ Stephen and Stephen *Digest of the Criminal Law*; Halsbury *Halsbury's Laws of England Vol 9*.

²⁸ Burchell *Principles of Criminal Law* 479 n 31.

²⁹ Kemp *Criminal Law* 281 n 11.

³⁰ See, e.g., Walker *Critical Evaluation of the Doctrine of Common Purpose* 26-28; Davidson *Doctrine of Swart Gevaar* 5-6.

³¹ Davis "Capital Punishment" 139-140; Parker 1996 *JAL* 82; Kistner 2015 *Law and Critique* 29.

But does Rabie's analysis accurately convey the correct details regarding the genesis of the common purpose doctrine on South African soil? The matter is susceptible to further inquiry. A full evaluation of this question is unfortunately beyond the scope of this short inquiry, but Rabie's analysis can at least be tested against the following questions: (i) Did the common purpose doctrine derive from English roots? (ii) Were the means of entry into South African law the NTPC? (iii) Did the doctrine indeed emerge in South African case law in 1917, in the Appellate Division case of *McKenzie v Van der Merwe*?

2.1 English roots?

There can be little doubt, following Rabie, that the common purpose doctrine developed from English antecedents. At least, it seems clear that the common purpose doctrine, in the form of a doctrine, does not derive from the Roman or Roman-Dutch common law sources.³² De Wet points out that a systematic set of rules governing participation was unknown to Roman law.³³ It seems that this was not problematic in that crimes in Roman law were typically so broadly defined that liability extended not only to the perpetrator himself but also to anyone who instigated the crime or assisted the offender in committing it.³⁴ Although those who assisted in perpetrating homicide or theft were apparently regarded as perpetrators,³⁵ mere approval of the crime did not bring about liability.³⁶

Similarly, although the body of Roman-Dutch law did not produce a unitary theory of participation, "it is clear from the works of the Roman-Dutch writers that criminal liability was not restricted to persons who actually committed a crime."³⁷ Unfortunately the rather disparate and inconsistent approaches adopted by the Roman-Dutch jurists do not provide a solid foundation for an analysis of the problems associated with participation.³⁸ As pointed out in *R v Mlooi*, the focus of the writers was to determine the measure of punishment rather than the requirements for criminal liability.³⁹

If the common purpose doctrine does not directly derive from the Roman and Roman-Dutch common-law sources, then it follows that the source of

³² Snyman *Criminal Law* 212.

³³ De Wet *De Wet and Swanepoel Strafreg* 178.

³⁴ Maré "Doctrine of Common Purpose" 114; De Wet *De Wet and Swanepoel Strafreg* 178. These actors, though not directly involved in the commission of the crime, could be punished to the same extent as the perpetrator.

³⁵ D 29 5 3 12; C 9 20 12; C 9 39 1.

³⁶ De Wet *De Wet and Swanepoel Strafreg* 178, who cites Inst 4 1 11 *in fine*; D 3 2 20; and D 42 8 10 2 in this regard.

³⁷ Maré "Doctrine of Common Purpose" 114.

³⁸ See Maré "Doctrine of Common Purpose" 114, and in particular De Wet *De Wet and Swanepoel Strafreg* 181-184.

³⁹ *R v Mlooi* 1925 AD 131 135 (hereafter the *Mlooi* case).

the doctrine is English law. This is entirely consistent with the statement of Moseneke J in *S v Thebus* to the effect that rules of criminal liability similar or comparable to common purpose may be found in many common-law jurisdictions such as England, Canada, Australia, Scotland and the USA.⁴⁰

But is the common purpose doctrine in fact a doctrine applied in the English law?

The "common purpose" nomenclature is derived from Stephen,⁴¹ who after describing liability relating to principals in the first degree,⁴² the use of innocent agents,⁴³ and principals in the second degree⁴⁴ in his work states under the head of "common purpose"⁴⁵ that "when several persons take part in the execution of a common criminal purpose, each is a principal in the second degree, in respect of every crime committed by any one of them in the execution of that purpose." While the English law of participation in crime has more recently focussed on the distinction between principals and accessories,⁴⁶ these categories of principal liability, along with accessories before the fact and accessories after the fact, were the currency of participation liability in English law at the beginning of the 20th century.

Stephen describes the category of principals in the first degree as "[w]hoever actually commits, or takes part in the commission of a crime ... whether he is on the spot when the crime is committed or not ..."⁴⁷ Kenny states that this person is the "actual offender – the man in whose guilty mind lay the latest blameable mental cause of the criminal act [and] [a]lmost always ... the man by whom this act was done."⁴⁸ In contradistinction, the principal in the second degree is "one by whom the actual perpetrator of the felony is aided and abetted at the very time when it is committed",⁴⁹

⁴⁰ *Thebus* case para 22.

⁴¹ Stephen and Stephen *Digest of the Criminal Law*.

⁴² Stephen and Stephen *Digest of the Criminal Law* Art 36 at 30.

⁴³ Stephen and Stephen *Digest of the Criminal Law* Art 37 at 30.

⁴⁴ Stephen and Stephen *Digest of the Criminal Law* Art 38 at 31.

⁴⁵ Stephen and Stephen *Digest of the Criminal Law* Art 39 at 32.

⁴⁶ The dichotomy between these two roles is clear from the following dictum from the House of Lords in *R v Kennedy (No 2)* 2007 UKHL 38 [17]: "Principals cause, accomplices encourage (or otherwise influence) or help ... Accessorial liability is, in the traditional theory, 'derivative' from that of the perpetrator." The notion of joint criminal enterprise, which provided for a broad basis for participant liability, and gave rise to much debate in the English law, was regarded as a legal wrong turn by the United Kingdom Supreme Court in *R v Jogee* 2016 UKSC 8. For discussion of the English law position, see Ormerod and Laird *Smith, Hogan, and Ormerod's Criminal Law* 175ff.

⁴⁷ Stephen and Stephen *Digest of the Criminal Law* Art 36 at 30.

⁴⁸ Kenny *Outlines of Criminal Law* 84; Harris *Principles of the Criminal Law* 28 affirms that the principal in the first degree is "the actor or actual perpetrator of the deed".

⁴⁹ Kenny *Outlines of Criminal Law* 85; Harris *Principles of the Criminal Law* 28 agrees, noting that the principal in the second degree must be present, even if constructively (being sufficiently near as to be able to render assistance).

according to Kenny, who adds that "[a]n aider and abettor is only liable for such crimes committed by the principal in the first degree as were done in execution of their common purpose."⁵⁰ Stephen concurs that a principal in the second degree is "[w]hoever aids or abets the actual commission of a crime, either at the place where it is committed or elsewhere."⁵¹

It may be noted that Stephen's description of common purpose⁵² is mentioned in the *McKenzie* case,⁵³ where Innes CJ states that the rule "has not been deduced from general principles, but rests upon certain old decisions",⁵⁴ and where Solomon JA refers to it as the "general rule on the subject" of the "liability of one criminal for the acts of those associated with him."⁵⁵ However, although raised in argument by counsel in a few instances, Stephen's description of common purpose is (with one later exception⁵⁶) not elsewhere cited as legal authority by a court.

It can therefore be concluded that while Stephen's appellation (apparently not shared by other writers) and description of the English law use of a practical rule of common purpose, based on the case law, was no doubt influential in practice, there is little to no evidence of any actual reception of any English law doctrine to this effect.⁵⁷ The explanation for this is that Stephen's description of common purpose did not accord with what was regarded as the common purpose doctrine in practice in South African law. A significant reason for this disjuncture is the courts' use of the concept of the *socius criminis*, a concept which derives from Roman and Roman-Dutch origins.⁵⁸ In this regard the case of *R v Peer Khan and Laloo*, decided in 1906,⁵⁹ played a central role in the development of the rules of participation

⁵⁰ Kenny *Outlines of Criminal Law* 86.

⁵¹ Stephen and Stephen *Digest of the Criminal Law* Art 38 at 31.

⁵² Stephen and Stephen *Digest of the Criminal Law* Art 39.

⁵³ *McKenzie* case.

⁵⁴ *McKenzie* case 46.

⁵⁵ *McKenzie* case 53.

⁵⁶ *R v Itumeleng* 1932 OPD 10.

⁵⁷ Even in 19th century cases such as *In re Kelly v The State* 1894 1 Off Rep 281, the mixed treatment and application of Roman-Dutch and English rules and sources is evident: the appellant's liability as a principal in the second degree was confirmed, with the court relying on Van der Linden in doing so.

⁵⁸ Kemp "South Africa" 416 refers to the "English law concept of *socius criminis*", but this is not consistent with ascribing the foundation of this concept to Roman-Dutch sources – see *R v Kaplan* 1892-1893 10 SC 259 264-265 (hereafter the *Kaplan* case); *R v Veni Dume* 1908 22 EDC 461 463-464; *R v Brett and Levy* 1915 TPD 53 58-59.

⁵⁹ *R v Peer Khan and Laloo* 1906 TS 798 (hereafter the *Peer Khan* case). The *Peer Khan* case was explicitly followed in *R v Nabi* 1909 TS 103 in the same jurisdiction, before being adopted in the Appellate Division in: *R v Jackelson* 1920 AD 486; the *Mlooi* case; *R v Ngcobo* 1928 AD 372 (hereafter the *Ngcobo* case) and *R v Longone* 1938 AD 372.

in criminal law for a number of decades.⁶⁰ In *Peerkhan* Innes CJ described the applicable legal rules as follows:⁶¹

In the case of common law offences any person who knowingly aids and assists in the perpetration of a crime is punishable as if he had committed it. The English law calls such an one a principal in the second degree; and there is much curious learning as to when a man is a principal in the second, and when in the first degree. Our law knows no distinction between principals in the first and second degrees, or between principals in the second degree and accessories. It calls a person who aids, abets, counsels or assists in a crime a *socius criminis* – an accomplice or partner in the crime. And being so, he is under Roman-Dutch law as guilty, and liable to as much punishment, as if he had been the actual perpetrator of the deed.

It is clear from this statement that the English legal principles – those on which the common purpose doctrine is apparently based – are being distinguished from those operational in the South African law, which are in turn based on Roman-Dutch law. This understanding is further underscored in Innes CJ's further statement to the effect that:⁶²

The true rule seems to me to be that the common law principles which regulate the criminal liability of persons other than actual perpetrators should apply in the case of statutory as well as of common law offences...and I think, therefore, that a person who knowingly assists another to buy unwrought gold in contravention of the law is himself a *socius criminis*, and punishable as such.

In a separate concurring judgment in *Peerkhan*, Wessels J states that "[o]ur law differs considerably from the English law in that ... our law is void of any technicality ... [and] says that a person who assists at a crime is himself guilty of the crime."⁶³ Wessels bases his statement of the law on the writings of Matthaëus.⁶⁴

While the approach of the court in *Peerkhan* has been criticised for not maintaining the distinction between perpetrator liability and accessory liability,⁶⁵ the notion of the *socius criminis* was to play a significant role for decades to come in the language and reasoning of the courts in dealing with

⁶⁰ Until the Appellate Division provided an authoritative analysis of the differences between perpetrator liability and accomplice liability in *S v Williams* 1980 1 SA 60 (A) 63 (hereafter the *Williams* case). See the discussion in Maré "Doctrine of Common Purpose" 116-118.

⁶¹ *Peerkhan* case 802.

⁶² *Peerkhan* case 803.

⁶³ *Peerkhan* case 803-804. Cf the early case of *R v Abrams* 1880-1882 1 SC 393 399, where it was held that merely being a "passive agent" did not suffice for liability.

⁶⁴ *Peerkhan* case 804. Though the report of the case refers to Matthaëus *De Criminibus* ch 1, s 2, the passage referred to, which unequivocally states that people who give aid commit a crime, is in fact at Prolegomena 1 11.

⁶⁵ *De Wet De Wet and Swanepoel Strafreg* 189-190. According to De Wet the *Peerkhan* case paradoxically also had a positive effect on practice, in that it got rid of the artificialities of the English distinctions in this area.

questions of participation.⁶⁶ The term *socius criminis* has now succumbed to the criticism of its broad inclusivity of all participants excluding the principal offender,⁶⁷ and in the light of the principled approach in *Williams*.⁶⁸ However, the question for the present purposes remains: To what extent did it contribute to the understanding of what the common purpose doctrine entailed in the earliest stages of its development? This has obvious implications for the origin of the common purpose doctrine – could it be founded on Roman-Dutch legal sources after all?

Two conclusions can at least be drawn in this regard. First, the common purpose doctrine that has emerged in South African law is not the same as the eponymous "rule" deriving from English law by way of Stephen. Whereas Stephen's common purpose rule applied only to a principal in the second degree, that is, an aider or abettor of the actual perpetrator, the South African doctrine provides for perpetrator liability to extend to all persons who act together in a common purpose to commit a crime. The breadth of the operation of the *socius criminis* notion has enabled a broader application of the common purpose doctrine in South African law.

Secondly, there is clearly a relationship between the concepts of common purpose and *socius criminis* based on the case law. This is exemplified in the 1928 Appellate Division case of *Ngcobo*,⁶⁹ where the court deals with the point that "even though there was a common purpose ... it does not follow that the accused was guilty of murder", and then proceeds to refer to the definition of the *socius criminis* in the *Peerkhan* case to discuss the law on this point.⁷⁰ A further example is found in the Appellate Division case of *R v Cilliers*, decided in 1937, where the court states that "when accused are charged as *socii criminis* having a common purpose we apply the English rule of evidence."⁷¹ However, this conflation of concepts was not limited to the early case law. In the Appellate Division case of *S v Malinga*, decided in 1963, the court (per Holmes JA) states in its judgment that the test for intention to kill is "whether the *socius [criminis]* foresaw the possibility that the act in question in the prosecution of the common purpose would have fatal consequences, and was reckless whether death resulted or not."⁷² The

⁶⁶ In *R v Littlejohn* 1912 TPD 781 782 the court observed that in the light of the *Peerkhan* case it was unnecessary to charge an accused who advised another to commit a crime as a *socius criminis* or as an accessory; such a person could be charged as a principal offender.

⁶⁷ Hoctor *Snyman's Criminal Law* 221.

⁶⁸ *Williams* case.

⁶⁹ *Ngcobo* case.

⁷⁰ *Ngcobo* case 376.

⁷¹ *R v Cilliers* 1937 AD 278 285.

⁷² *S v Malinga* 1963 1 SA 692 (A) 694G-H. For a further example of the use of both concepts together, see the Privy Council case of *R v Mapolisa* 1965 1 All SA 533 (PC) 541.

passage in the *Malinga* judgment from which this statement was derived was later cited in the leading case of *S v Safatsa*.⁷³

It can therefore be concluded that while the common purpose doctrine has English roots,⁷⁴ its development in South African law has been intertwined with the application of the notion of the *socius criminis*. This has inevitably shaped the nature and ambit of common purpose, both as it was applied in the early decades of the previous century and indeed today.

2.2 Via the Native Territories Penal Code?

While the NTPC has operated as a useful reference point for the courts in several contexts, it is not clear that section 78 has had a broader field of application than merely in its designated geographical area. It seems that the high point of application of the NTPC approach came in the case of *R v Taylor*,⁷⁵ where the court states that the common-law definition of common purpose "has never been more clearly stated than in sec. 78 of Act 24 of 1886 (the Transkeian Penal Code)."⁷⁶ While this dictum from *Taylor* (or indeed any other aspect of the application of the common purpose doctrine) was not explicitly followed in any succeeding case law,⁷⁷ the idea of the NTPC playing a role in the acceptance and development had strong support from another source. From the first issue⁷⁸ to the last⁷⁹ of *South African Criminal Law and Procedure* by Gardiner and Lansdown, section 78 of the NTPC was cited at the outset of the discussion of common purpose.⁸⁰ While Gardiner and Lansdown's support for the proposition that the South African law was influenced by the NTPC in respect of the development of the common purpose doctrine, this is therefore not consistent with the juridical reality. It is notable that none of the sources expressing support for Rabie's explanation of the development of the South African common purpose doctrine provide any additional basis for this conclusion.⁸¹ Rabie's own

⁷³ *S v Safatsa* 1988 1 SA 868 (A) 896A-D; also see *S v Mbatha* 1987 2 SA 272 (A); *S v Nomakhlala* 1990 1 SACR 300 (A).

⁷⁴ See MT Steyn JA in *S v Nzo* 1990 3 SA 1 (A) 14B-C (hereafter the *Nzo* case).

⁷⁵ *R v Taylor* 1920 EDL 318 (hereafter the *Taylor* case). While the question of common purpose arose in the context of both the *Ngcobo* case and *R v Bamana* 1933 EDL 249, where aspects of the NTPC were also discussed, s 78 was not applied. S 78 was however directly applied in *R v Swartbooi* 1916 EDL 170 in respect of a charge of assault.

⁷⁶ That is, the NTPC – *Taylor* case 323.

⁷⁷ In the context of the crime of public violence, the *Taylor* case was mentioned in *R v Salie* 1938 TPD 136.

⁷⁸ Gardiner and Lansdown *South African Criminal Law and Procedure*.

⁷⁹ Lansdown, Hoal and Lansdown *South African Criminal Law and Procedure* 6th ed 145.

⁸⁰ Notably this reliance on s 78 of the NTPC was terminated in Burchell and Hunt *South African Criminal Law and Procedure*.

⁸¹ See Burchell *Principles of Criminal Law* 479 n 31; Kemp *Criminal Law* 281 n 11; Walker *Critical Evaluation of the Doctrine of Common Purpose* 26-28; Davidson

support for this proposition is similarly limited to the judgment of the court in *Taylor*.⁸² Despite *Taylor*'s praising the accuracy of the wording of section 78 in reflecting the common purpose doctrine in South Africa, in fact the common-law definition of common purpose continued to develop without any direct judicial adversion to the NTPC formulation. Walker perceptively notes that the formulation of the doctrine in *Garnsworthy* has distinct similarities to that of section 78, and so the possible indirect influence of the NTPC formulation falls to be examined.⁸³ It is nevertheless revealing that in both the *R v Sipeka*⁸⁴ and *R v Dyomfane*⁸⁵ cases, which dealt with prosecutions for contraventions of provisions of the NTPC, and where common purpose was in issue, the court did not refer directly to the formulation of common purpose under section 78 of the NTPC. In short, despite Koyana's arguing that section 78 exerted a great deal of influence on the South African law pertaining to common purpose,⁸⁶ this is certainly not evident from a conspectus of the case law.⁸⁷

2.3 *McKenzie the leading case?*

Thus far it may be concluded that English law is best characterised as a foundation of the South African common purpose doctrine, and that at best the definition of common purpose in the NTPC may have provided a convenient synopsis of the doctrine in its incipient form (rather than in itself contributing to doctrinal development). There are strong arguments that English law would have influenced the acceptance and further legal development of the common purpose doctrine. But as has been argued based on the sources available, these arguments lack explicit grounds for unequivocal acceptance, and thus the point cannot be made any more authoritatively than this. It is arguably easier to ask the more narrow question arising out of Rabie's synopsis of the acceptance of the common purpose doctrine in South African law: whether the delict case of *McKenzie v Van der Merwe* indeed provides the first example of the application of the common purpose doctrine in the South African case law.⁸⁸

Doctrine of Swart Gevaar 5-6; Davis "Capital Punishment" 139-140; Parker 1996 *JAL* 82; Kistner 2015 *Law and Critique* 29.

⁸² Rabie 1971 *SALJ* 229 n 16.

⁸³ Walker *Critical Evaluation of the Doctrine of Common Purpose* 28. The case of *R v Garnsworthy* 1923 *WLD* 17 (hereafter the *Garnsworthy* case) will be further discussed below.

⁸⁴ *R v Sipeka* 1915 *EDL* 19 (hereafter the *Sipeka* case).

⁸⁵ *R v Dyomfane* 1927 *EDL* 169.

⁸⁶ Koyana *Influence of the Transkei Penal Code* 123, and see preceding discussion at 109-123.

⁸⁷ But see MT Steyn JA in the *Nzo* case 14E-G, who relied on Rabie's summary of the early doctrinal history.

⁸⁸ MT Steyn JA in the *Nzo* case 13BC agreed with Rabie that the first mention of common purpose was in the *McKenzie* case.

While the Appellate Division has imported doctrines into South African law which were not previously explicated in the case law,⁸⁹ this is a necessarily rare occurrence. It would therefore be unusual if the common purpose doctrine was raised and discussed for the first time at Appellate Division level. A further initial query relates to the fact that common purpose is first and foremost a criminal law doctrine, and thus for it to first be applied in the private law context would also be unusual. In fact, there are indeed criminal cases where the common purpose doctrine was applied prior to the 1917 Appellate Division case of *McKenzie*, which fall to be discussed below. Before doing so, it bears noting that the term "common purpose" was employed in the Cape delict case of *Steenkamp v Kyd*,⁹⁰ where the defendants appealed against the verdict of the trial court, which held them responsible for damages for bodily injuries and loss of business sustained by the plaintiff in consequence of an assault upon him by the defendants. Their appeal was unsuccessful, De Villiers CJ holding that any person who conspires with others to wage war against the Queen and joins them in appointing a leader to conduct such a war is responsible for damage done to individuals by the orders of such a leader, provided that such orders "might reasonably have been contemplated as a consequence of the conspiracy."⁹¹ In his concurring judgment Buchanan J stated that the evidence further revealed that there was a "common purpose to attack [the plaintiff] which should render them all, severally and individually, liable for the consequences."⁹² It is noteworthy that De Villiers CJ acknowledges that "the law-books provide no definite rule to meet the particular case with which the Court has now to deal",⁹³ despite the trial court's making reference to the NTPC, and that instead the "principles underlying the decision of previous cases may be made use of for the purpose of discovering the rule which should be applied ..."⁹⁴

It seems that the first reported criminal case in which the term "common purpose" was employed was that of *R v Cohen*,⁹⁵ a Cape case relating to dealing in rough diamonds. While the court convicted the accused on the basis that there was a common purpose between him and two others, it is

⁸⁹ Such as the mistake as to the causal sequence defence excluding fault: *S v Goosen* 1989 4 SA 1013 (A).

⁹⁰ *Steenkamp v Kyd* 1898 15 SC 221 (hereafter the *Steenkamp* case), cited in *R v Louw* 1904 21 SC 36. Other pre-1917 cases not dealing specifically with criminal liability are the insurance cases of *Lindsay and Pirie v the General Accident Fire and Life Assurance Corporation Ltd* 1914 AD 574 and *Orenstein Arthur Koppel Ltd v Salamander Fire Insurance Co. Ltd* 1915 TPD 497.

⁹¹ *Steenkamp* case 224.

⁹² *Steenkamp* case 225.

⁹³ *Steenkamp* case 223. De Villiers CJ, however, states that "such a rule may be fairly deduced from the cases relating to the law of agency" (at 224).

⁹⁴ *Steenkamp* case 223-224.

⁹⁵ *R v Cohen* 1884-1885 3 SC 337.

notable that the court expressly identified another as the principal, and the other two persons in the group (including the accused) as accessories. It follows that this classification into categories does not reflect the common purpose doctrine. The next case where there was held to be a "common purpose" between the participants in the offence was in the context of procuring in *R v Rose*,⁹⁶ where it was held, per Searle J, that the accused, who was a brothel-keeper, and the mother of a teenage girl "were acting in concert with a common purpose" to bring it about that the teenage girl leave her mother's residence and go to reside at the brothel.⁹⁷ While it was assumed that the teenage girl was well aware of the implications of this decision and readily acquiesced, Searle J nevertheless stated that "the accused, by joining in the arrangement, assisting at its consummation, and, receiving the girl under it, committed the offence of procuring the girl."⁹⁸ This statement is consistent with the operation of the common purpose doctrine. An unusual feature of this conviction is that despite the established common purpose, and although the mother of the girl was described as the "prime instigator" of the girl's move to the brothel, apparently only the accused was convicted of the offence.

There then followed a series of cases in the Appellate Division where the question of common purpose was considered. All these cases were appeals against judgments of the Natal Native High Court.⁹⁹ In the 1912 case of *Mjoji* the conviction in question was for indecent assault, and the court heard an application for leave to appeal.¹⁰⁰ The three applicants had stopped a young girl on her way home, one of the three had thrown her to the ground, and when an independent witness arrived, one of the three was lying on the girl while the other two were looking on. It was contended on behalf of the applicants that there was no evidence of concerted action, but the court rejected this application. While there is no mention of the term "common purpose" in the very brief judgment, which simply refers to "concerted action", both the flynote and headnote of the case report use the term, with the headnote summarising that there was "sufficient evidence of a common

⁹⁶ *R v Rose* 1911 CPD 956 (hereafter the *Rose* case).

⁹⁷ *Rose* case 964.

⁹⁸ *Rose* case 964. Maasdorp JP agreed that the accused was rightly convicted of procuring, with Hopley J dissenting.

⁹⁹ Lansdown and Lansdown *South African Criminal Law and Procedure* 5th ed 130 explain that in terms of the *Extended Jurisdiction of Native High Court Act* 30 of 1910 (N) (passed in order "To amend the Courts Act 49 of 1898"), the Natal Native High Court had jurisdiction to try without a jury all crimes (apart from certain specified exceptions) committed by "natives" (defined as "all members of the aboriginal races or tribes of Africa south of the Equator ..." in terms of s 5 of the *Courts Act* 49 of 1898 (N)). Where jurisdiction to try a crime was given to the Native High Court, the jurisdiction of the Provincial Division of the Supreme Court was ousted. The Natal Native High Court was abolished as from 1 January 1955 (see ss 2 and 4 of the *Black High Court Abolition Act* 13 of 1954).

¹⁰⁰ *R v Mjoji* 1912 AD 4.

purpose to justify the conviction". In the *Mpeta* case decided in the same year the Appellate Division heard an appeal against a conviction of assault with intent to commit murder.¹⁰¹ The court held that whoever shot the first victim dead was also responsible for the wounding of the second victim (which matter was the subject of the appeal), and that these persons were "acting in concert to achieve a common purpose".¹⁰² However on the facts of the case the court upheld the appeal and set aside the conviction. In the 1913 case of *Muka; Sitimela*¹⁰³ the court heard applications for leave to appeal against murder convictions. The deaths occurred during an attack on a kraal by a group of men including the applicants. The court set out the facts of the matter, dealing in particular with the testimony of one of the attackers, before stating the following:¹⁰⁴

Now if this story is substantially correct, then all the petitioners are clearly guilty of murder, no matter which of them inflicted the actual wounds. Because they set out by common arrangement, to achieve a common purpose. They went to attack the kraal, and, as it was expressed, 'to execute magic'. What they had in mind was only too clear; it was to complete the destruction of the kraal and overpower any resistance. Their intention to kill is shown by the fact that they armed themselves with lethal weapons and used them at once before they were themselves assaulted.

The applications for leave to appeal were consequently denied by the court. While the *Mjoji* and *Mpeta* cases simply clearly illustrate that the common purpose doctrine was already in use in the courts at this stage, the dictum from *Muka; Sitimela* is noteworthy not merely for the application of the doctrine but for the evidence that the doctrine had already assumed a form entirely consistent with the modern doctrine.

The acceptance of the doctrine prior to the *McKenzie* case is further demonstrated in the story of the demise of an ostrich in *Laubscher*.¹⁰⁵ The three accused, all teenage boys, had intruded on the ostrich camp of a farm, whereupon they were chased by the male ostrich. Once they got out of the ostrich camp, they responded by further annoying the ostrich, and then ultimately throwing stones at the ostrich, breaking one of his legs, as a result of which the ostrich had to be killed. The accused were convicted of malicious injury to property in the trial court, and the conviction was appealed to the Cape Provincial Division. The centrality of the common purpose doctrine for the resolution of this case is evident from the argument of counsel, who disputed whether the accused had acted with a common purpose.¹⁰⁶ Both judges dismissed the appeal and upheld the conviction.

¹⁰¹ *R v Mpeta* 1912 AD 568 (hereafter the *Mpeta* case).

¹⁰² *Mpeta* case 569.

¹⁰³ *R v Muka; R v Sitimela* 1913 AD 290 (hereafter the *Muka/Sitimela* case).

¹⁰⁴ *Muka/Sitimela* case 293-294.

¹⁰⁵ *R v Laubscher* 1913 CPD 123 (hereafter the *Laubscher* case).

¹⁰⁶ Notably, counsel for the appellants contended that "[a]s it has not been proved which boy caused the injury to the bird the conviction should be quashed." This contention,

Buchanan J set out the evidence before dealing with the question of liability in the following terms:¹⁰⁷

I think the evidence, therefore, justifies the Magistrate in coming to the conclusion that the ostrich's leg was broken by the stones thrown by the boys. But it is said that the injury must have been caused by one particular stone and the responsibility of the throwing of that stone must be fixed on one of the boys. I am not, however, prepared to accept that reading of the law. Here we find three boys taking part in the same act, all of them deliberately throwing stones at the bird, and I think that the evidence fully justified the Magistrate in finding that all three were responsible for the results, even though it is possible only one of them threw the stone which actually fractured the leg.

It was further added by Buchanan J that the attack on the ostrich was "most wanton, wilful and mischievous, and, of course, unlawful ..."¹⁰⁸ While Buchanan J did not actually use the term "common purpose" in his judgment, the dictum cited above clearly reflects the reasoning employed in this form of perpetrator liability, and the way the doctrine functions. In agreeing with this conclusion Searle J more overtly indicated that the common purpose doctrine underpinned the verdict: "There is ... sufficient evidence to show that the accused were acting with a common purpose, that is, they were indulging in a common retaliation after they had escaped from the bird."¹⁰⁹

The adoption of the common purpose doctrine beyond (the then Union of) South Africa into (the erstwhile) Southern Rhodesia prior to the *McKenzie* case is evidenced by the case of *Tababona*.¹¹⁰ Here the court was required to consider whether the witnesses to the accused's killing of the new-born twins of another woman, in accordance with the custom of the tribe, could be regarded as principals or accessories to the crime of murder. The nature of the inquiry, as set out by the court, is instructive: "This question involves an examination of the evidence to see whether the witnesses aided and abetted the prisoner, or whether they were animated by a common purpose."¹¹¹ In other words, could the witnesses be regarded as accessories (by merely aiding and abetting the crime) or as principals (by the operation of the common purpose doctrine)? After setting out the facts

as to the need to prove individual causation in order to establish liability for each perpetrator in a crime, would resound through the development of the common purpose doctrine, and has remained the subject of contention, despite its being conclusively settled as valid and constitutional by the Constitutional Court in the *Thebus* case in 2003.

¹⁰⁷ *Laubscher* case 125.

¹⁰⁸ *Laubscher* case 126.

¹⁰⁹ *Laubscher* case 126.

¹¹⁰ *R v Tababona* 1915 SR 72 (hereafter the *Tababona* case).

¹¹¹ *Tababona* case 74.

establishing that the accused killed the twins, the court states the following about the witnesses:¹¹²

The witnesses were all present together, they joined in burning the twins, whose bodies were put into a pot by Mpalaiwa and the prisoner, and in my view there is sufficient evidence of a common purpose animating these women, not one of whom raised a finger to save the children, to render everyone of them liable to be indicted for the crime of murder.

The possible prosecution of the accused and witnesses could not proceed, however, on the grounds of a lack of outside evidence. Nevertheless, the application of the common purpose doctrine by the court is entirely consistent with the modern conception of the doctrine.

Lastly, in the case of *Sipeka* the court on appeal assessed convictions for housebreaking and theft, and arson, formulated in terms of the NTPC.¹¹³ The appellant was one of a group of five men who were charged with breaking into a trading store and certain huts, stealing goods, and then setting fire to these buildings. The source of the evidence against the appellant, implicating him in this criminal conduct, was the testimony of a fellow member of the group. Despite there being gaps in respect of the physical evidence of the theft, the court dismissed the appellant's appeal against his convictions, reasoning as follows:¹¹⁴

[A]ll of the accused...went down to the store with the unlawful purpose of breaking into it, and...after they did so, they all combined in destroying it by fire...the magistrate was justified in concluding that if they all took part in the storebreaking, they all took part in the theft of the articles which were stolen.

Although the term "common purpose" does not appear in the judgment as such, only in the flynote, it is clear that the court is applying the common purpose doctrine in upholding the convictions. As noted earlier, despite the court's applying the NTPC there is no reference to the common purpose provision set out in section 78 of the Act.

It may thus be concluded that the common purpose doctrine was being applied in South African law prior to 1917, and prior to being raised in the *McKenzie* case.

Before dealing with *McKenzie*, it is noteworthy that the same bench of the Appellate Division that handed down the decision in *McKenzie* delivered another judgment in the context of delict on the very same day as *McKenzie*. In *Naude and Du Plessis v Mercier*¹¹⁵ the court heard an appeal against a judgment given for the respondent in an action to recover damages for wrongful arrest and detention. The factual context for the case involved the

¹¹² *Tababona* case 74.

¹¹³ *Sipeka* case, in terms of ss 215 and 199, and s 236, respectively, of the NTPC.

¹¹⁴ *Sipeka* case 21.

¹¹⁵ *Naude and Du Plessis v Mercier* 1917 AD 32 (hereafter the *Naude* case).

respondent, a headmaster of the local school in Winburg in the erstwhile Orange Free State, being taken captive by members of a band of rebels who had entered the town. The period of captivity lasted about 24 hours, before the respondent was released.

The appeal being unsuccessful, it was confirmed that the appellants were required to pay damages to the respondent. The Appellate Division's reasoning in employing the common purpose notion is instructive:¹¹⁶

Up to the time when [Du Plessis] handed the respondent over there can, of course, be no doubt that he and Naude were equally liable. The position when he handed him over was this: the appellants were both engaged in the common purpose of imprisoning Mercier and others in the interests of the general movement. Du Plessis delivered him into the custody of Koster (acting under Naude), knowing that his detention would be continued, with the object of enabling it to be continued... By doing what he did, he enabled the imprisonment to be continued; he assisted in so continuing it, and he must have been taken to have contemplated and intended that it should be prolonged, at any rate for some short time.

The *Naude* case has not been mentioned in any discussion of the development of the common purpose doctrine, no doubt because all later citations of this judgment dealt with other issues rather than the application of common purpose thinking.

What was the basis of the decision in *McKenzie*? The case arose out of the acts of bands of rebels in the Orange Free State, who had taken stock from the appellant's farm and cut the fences on his farm, causing considerable damage. The respondent was at the time the assistant commandant of such a band of rebels. Evidence of who had caused the harm and how this was done was understandably hard to come by, and so the appellant had argued that "every rebel was liable for acts ... done by every other rebel in furtherance of the common purpose",¹¹⁷ or as the court phrased the question:¹¹⁸

Where a rebellion has taken place, is every rebel liable for the delict of every other rebel if done in furtherance of the common purpose, and not foreign to it, in the absence of any other connection by way of command, instigation, advice, assistance or participation of any kind in the particular delict itself? For the appellant the matter was put in this way: Every person who joins in rebellion is party to a common unlawful purpose; the taking of stock and the cutting of wires are incidents which may be taken as likely to happen during the execution of that purpose; and therefore every rebel is liable for all acts of that kind committed by other rebels in the prosecution of the rebellion.

As mentioned earlier, in the course of his judgment Innes CJ noted that while the appellant had cast his reliance on the English criminal law rule of

¹¹⁶ *Naude* case 40.

¹¹⁷ *McKenzie* case 44.

¹¹⁸ *McKenzie* case 44-45.

common purpose,¹¹⁹ this rule had not been deduced from general principles, but rather rested on old decisions.¹²⁰ Nevertheless, Innes CJ pointed out that the English cases provided a narrower basis for liability than that which was contended for by the appellant.¹²¹ Solomon JA (in whose judgment De Villiers AJA and Juta AJA concurred) agreed that the common purpose rule found in *Stephen* and based on decided cases was narrower in ambit than what the appellant was claiming.¹²² Solomon JA proceeded to identify the rule found in *Stephen* with the writings of Van der Linden,¹²³ where it is stated:

If, therefore, the parties to a conspiracy have met together in conjunction for the commission of a certain act, and have been prepared with mutual aid and co-operation, or have been used as spies or as sentinels against danger, they are all equally punishable, though the act itself, e.g. a murder has only been committed by one of them.¹²⁴

Considering the similarity between the common purpose rule in *Stephen* and the passage in Van der Linden, Solomon JA concludes that the appellant's argument is by no means assisted by this passage:¹²⁵

If crimes of different natures which have no direct connection with each other are committed at the same time by different sections of the same conspiracy, each act must be considered by itself, although the perpetrators are all parties to the same conspiracy.

It is noteworthy that Solomon JA further states that the case at hand needed to be determined "upon the principles of our own law, not upon any special rules of the English criminal law."¹²⁶ In dismissing the appeal from the court *a quo* against the denial of the appellant's claim against the respondent,¹²⁷ the Appellate Division in the *McKenzie* case therefore: (i) recognised the common purpose rule laid down by *Stephen*; (ii) noted that the rule was based on case law rather than principle; (iii) equated *Stephen*'s common purpose rule with Van der Linden's statement regarding participation; and (iv) expressed the need to first resort to South African sources rather than English sources in resolving problems of participation.

¹¹⁹ Citing *Stephen* and *Stephen Digest of the Criminal Law* 46 para 39.

¹²⁰ *McKenzie* case 46.

¹²¹ *McKenzie* case 46-47.

¹²² *McKenzie* case 52-53. The *Steenkamp* case was held not to assist the appellant's argument (at 52).

¹²³ Van der Linden is regarded as the "most direct authority in our criminal law" by Solomon JA in the *McKenzie* case 56.

¹²⁴ Van der Linden *Regsgeleerd, Practicaal en Koopmans Handboek* 2.1.7 cited at *McKenzie* case 53. This passage was also cited with approval in the early case of *Kaplan* 265.

¹²⁵ *McKenzie* case 53.

¹²⁶ *McKenzie* case 56.

¹²⁷ Maasdorp JA wrote a dissenting judgment.

The approach in the *McKenzie* case therefore in itself somewhat disrupts the neat flow set out in Rabie's explanation of the genesis of the common purpose doctrine in South Africa. While the English law "rule" as set out by Stephen is acknowledged, the court is careful to indicate that the South African sources, including Van der Linden, are of primary importance in assessing questions relating to participation. Further, the readily available formulation in the NTPC is not mentioned at all by the court.

In this regard, it is noteworthy that the next important case dealing with common purpose after the *McKenzie* case, that of *Garnsworthy*,¹²⁸ does not cite any authorities whatsoever in setting out the legal position where the accused are charged with participation in criminal conduct with a common purpose:

Now the law upon this matter is quite clear. Where two or more persons combine in an undertaking for an illegal purpose, each one of them is liable for anything done by the other or others of the combination, in the furtherance of their object, if what was done was what they knew or ought to have known, would be a probable result of their endeavouring to achieve their object.

The statement that the law on common purpose was at that stage "quite clear" is interesting in that, as indicated, this conclusion does not entirely follow directly from the *McKenzie* case. Nevertheless, the court specifically refers to the "common purpose" of the commando,¹²⁹ and that it is for the court to decide "whether each or any of them is so identified with the common purpose as to make them responsible for its obvious result."¹³⁰ Could this be because the court was aware of the use of the common purpose doctrine in cases preceding its application in *McKenzie*? In any event, the *Garnsworthy* precedent is not useful in respect of the common purpose doctrine beyond the subjectivisation of the concept of intention in the middle of the 20th century, given its objective aspects ("ought to have known"). Moreover, it is evident that in its application of common purpose the court has muddled the basic rationale of the doctrine. The final statement in the judgment is:

It is impossible, therefore, for any man who was there at the latest at the time of the first exchange of shots, to escape the imputation of knowledge of the full and fatal extent of the operations in which he took part.¹³¹

¹²⁸ *Garnsworthy* case. Interestingly, Rabie 1971 SALJ 230 includes the *Garnsworthy* case in his historical synopsis of the development of the common purpose doctrine. The *Garnsworthy* judgment was followed in *R v Barry* 1932 TPD 312 315, and then subsequently approved in the Appellate Division in *R v Duma* 1945 AD 410 415 (hereafter the *Duma* case). The *Duma* decision was then subsequently followed in respect of common purpose in the Appellate Division in *R v Ndhlangisa* 1946 AD 1101, *R v Morela* 1947 3 SA 147 (A) and *R v Kahn* 1955 3 SA 177 (A).

¹²⁹ *Garnsworthy* case 19.

¹³⁰ *Garnsworthy* case 20.

¹³¹ *Garnsworthy* case 22.

Contrary to what the statement indicates, it is the unlawful conduct of the participants in a common purpose that is imputed to each other, not the "knowledge" or intention in respect of the unlawful conduct.

The *McKenzie* case was explicitly followed in the Appellate Division in the *Mouton* case in the context of delict,¹³² was mentioned but distinguished on the facts in the Appellate Division criminal case of *Ngcobo*,¹³³ and was mentioned in the mid-20th century criminal cases of *Duma*,¹³⁴ *Mkize*¹³⁵ and *Mtembu*¹³⁶ in the context of implied mandate providing a basis for the common purpose doctrine. Just as this rationale for the common purpose doctrine has disappeared from the case law and the most recent writing,¹³⁷ so too the *McKenzie* decision has become a footnote in the history of the doctrine. However, somewhat unusually,¹³⁸ in the *Nzo* case the *McKenzie* case arose for consideration. Writing for the majority of the court Hefer JA distinguished the *Nzo* case from the *McKenzie* case on the facts, and therefore stated that the comments of the *McKenzie* court which limited the application of the common purpose doctrine did not assist the appellants.¹³⁹ However, in his dissenting judgment MT Steyn JA made extensive reference to the reasoning of the *McKenzie* court and, relying on the narrow application of the doctrine by the *McKenzie* court, concluded that the appellants in *Nzo* ought to be treated as were the commando members in *McKenzie*, where no liability was apportioned to them for their conduct.

¹³² In *Mouton v Beket* 1918 AD 181 190, 193, and in the decision in the court *a quo*, in *Beket v Mouton* 1917 OPD 90 95, 99.

¹³³ *Ngcobo* case 376.

¹³⁴ *Duma* case 414-415.

¹³⁵ *R v Mkize* 1946 AD 197 206.

¹³⁶ *R v Mtembu* 1950 1 SA 670 (A) 684.

¹³⁷ In the face of withering criticism from De Wet *De Wet and Swanepoel Strafreg* 194-197. Hoctor *Snyman's Criminal Law* 227 refers to this rationale as previously accepted. In *S v Mzwempi* 2011 2 SACR 237 (ECM) para 39 (hereafter *Mzwempi* case) it was indicated that *mandatum sceleris* plays an important role in common purpose today, although the court specifies that this is in the case of the prior agreement form of common purpose. However, the growing significance of the active association form of common purpose, widespread acceptance of the prior agreement form, and the query whether the contractual concept is appropriate have all contributed to the demise of implied mandate as a specified rationale for common purpose – if, in the light of the influence of the notion of the *socius criminis*, it ever was. See Unterhalter 1988 SALJ 674; Matzukis 1988 SACJ 232.

¹³⁸ The case does not seem to have been cited by counsel but was referred to in both the majority and minority judgments, though the *McKenzie* case is not typically mentioned in criminal cases dealing with common purpose, and when this does occur there is generally a qualification that it applies primarily to delict cases (see *S v Thomo* 1969 1 SA 385 (A) 394B), it still occasionally finds application in non-criminal cases – see *Godfrey v Campbell* 1997 1 SA 570 (C); *Cipla Medpro (Pty) Ltd v Aventis Pharma SA* 2013 4 SA 579 (SCA).

¹³⁹ *Nzo* case 8A-E.

It is noteworthy that the approach of Hefer JA, where common purpose is established based on the appellants' foresight of the possibility of and reconciliation with the death of the deceased, is consistent with the broad approach adopted in relation to common purpose today. In contrast, MT Steyn JA's approach, which seeks to limit liability on the basis of common purpose, and which adopts the principle of "proximity" in order to establish common purpose liability, does not reflect the developments in the doctrine since the *McKenzie* case. Innes CJ in *McKenzie* tests liability on the basis of agency:¹⁴⁰

[D]o [the circumstances of each case] ... justify the inference that the perpetrator was the agent of the accused to do the particular act? And where there is no evidence of express authority the presence of accused at the time and his co-operation then in a common purpose would, of course, become an element of great importance.

The common purpose doctrine has moved on from seeking to assess questions of whether "express authority" was given in order for there to be liability. The present law is that "[i]t is trite that a prior agreement may not necessarily be express, but may be inferred from the surrounding circumstances."¹⁴¹

3 Concluding remarks

This brief analysis assessing whether the generally accepted narrative of the genesis of the common purpose doctrine, as set out by Rabie, is trustworthy cannot expand into a full discussion of the development of the doctrine into its present form. This is a much larger endeavour which far exceeds the ambit of the current article. It is hoped, however, that this discussion could contribute to such an assessment.

What then can be concluded? It can be agreed that the doctrine was initially introduced from English law into South African common law after the occupation by the English of the Cape and the other South African territories during the 19th century.¹⁴² The so-called common purpose rule derived from the writings of Stephen reflected aspects readily recognisable in the modern common purpose doctrine. There was no distinction in blameworthiness between principals in the first degree and principals in the second degree, as reflected by the fact that the punishment allocated to these joint actors was generally the same.¹⁴³ Moreover, where there was a deviation from the agreed common purpose by A, there would be no liability for B in respect of conduct by A to which B had not agreed.¹⁴⁴ The degree of influence of these

¹⁴⁰ *McKenzie* case 47 cited at *Nzo* case 13E-F.

¹⁴¹ *Tshabalala* case para 49; see also *Thebus* case para 19.

¹⁴² *Mzwempi* case para 38.

¹⁴³ Harris *Principles of the Criminal Law* 29.

¹⁴⁴ Harris *Principles of the Criminal Law* 29-30.

English rules on the nascent South African criminal law cannot fully be traced, but it can be concluded that in the frequent resort to English law in dealing with problems in South African courts, it would be inevitable that this approach would be absorbed into the approach adopted in criminal practice. Such an influence would certainly have been strengthened by the fact of the inclusion of the rule of common purpose in the NTPC, which exercised an effect on South African criminal law well beyond its intended geographical limitations.

However, as has been argued above, the simple reception of the doctrine suggested by Rabie's synopsis is misleading. In fact, the above brief survey of the law reveals no monolithic narrative of the historical origins of common purpose, but instead suggests that the origins of the doctrine need to be extracted from succeeding case law. In particular, it seems clear that the origins and early development of the common purpose doctrine owe much to the rather broad concept of the *socius criminis*, which operated alongside and was interwoven with the ideas on participant liability received from English law.

A further key aspect of Rabie's synopsis of the genesis of the common purpose doctrine in South African law which requires examination is the primacy of the 1917 Appellate Division case of *McKenzie v Van der Merwe*. As the cases reveal, the common purpose doctrine was reflected in the case law prior to the *McKenzie* judgment, which did not play a significant role in the future development of the doctrine.

The modern doctrine of common purpose has survived the taint of its employment in a number of trials arising out of political violence to be declared constitutional. Concerns about the breadth of the doctrine have been addressed. The rationale for the use of the doctrine has shifted, and the South African doctrine of common purpose is exactly that, a doctrine which once introduced through the early English law influences on South African criminal law has found its own path of development through the criminal cases.

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List of Abbreviations

JAL	Journal of African Law
NTPC	Native Territories Penal Code
SACJ	South African Journal of Criminal Justice
SALJ	South African Law Journal