REVISITING THE APPLICATION OF THE DOCTRINE OF COMMON PURPOSE IN THE CONTEXT OF RAPE

S v Tshabalala 2020 2 SACR 38 (CC)

OPSOMMING

'n Herbesoek aan die leerstuk van gemeenskaplike oogmerk binne die konteks van verkragting

Die leerstuk van gemeenskaplike oogmerk is goed gevestig binne die raamwerk van die substantiewe strafreg in Suid-Afrika. Die leerstuk vind algemeen toepassing waar meer as een individu saam 'n misdaad pleeg. Die leerstuk het veral toepaslik geword binne die konteks van materieel omskrewe misdrywe soos moord, waar die element van oorsaaklikheid moeilik is om te bewys. In sodanige gevalle word die handeling van een individu aan die ander toegedig deur middel van die aanwending van die leerstuk van gemeenskaplike oogmerk. Die leerstuk is ook al toegepas met verwysing na misdrywe soos roof en aanranding. Die vraag of hierdie leerstuk aanwending kan vind binne die konteks van die misdaad verkragting bly egter problematies. In hierdie aantkening word die onlangse Konstitusionele Hof uitspraak waar die hof bevind het dat die leerstuk wel aanwending vind binne die konteks van gemeenregtelike verkragting, krities oorweeg. Die leerstuk van gemeenskaplike oogmerk word ge-evalueer binne die konteks van die omskrywingsaard van die misdaad verkragting beide gemeenregtelik en statutêr. Ten slotte word argumente voorgehou ter onsdersteuning van die standpunt dat die leerstuk nie aanwending kan vind binne die konteks van of gemeenregtelike verkragting, of statutêre verkragting soos dit tans daar uitsien nie.

1 Introduction

The doctrine of common purpose is well established in South African substantive criminal law (see Burchell *Principles of criminal law* (2013) 467–493; Snyman *Criminal law* (2014) 255–262; *S v Safatsa* 1988 1 SA 868 (A); *S v Mgedezi* 1989 1 SA 687 (A); *S v Williams* 1980 1 SA 60 (A); *S v Nzo* 1990 3 SA 1 (A); *S v Mzwenpi* 2011 2 SACR 237 (ECM); *S v Mkhize* 1999 2 SACR 632 (W); *S v Molimi* 2006 2 SACR 8 (SCA); *S v Thebus* 2003 2 SACR 319 (CC); *S v Maelangwe* 1999 1 SACR 133 (NC); *S v Khomdule* 2001 1 SACR 501 (SCA)). The doctrine of common purpose typically applies in cases where two or more people agree to commit a crime, or actively associate in a joint criminal enterprise (*Mgedezi* 705–706; Burchell 467; Snyman 255). The doctrine is commonly applied in cases of murder where the element of causation is in issue when a number of people acted together and killed the deceased, and it is consequently difficult to ascertain which act (or acts) contributed causally to the deceased's death (Burchell 467; Snyman 255). The doctrine has, however, been applied also to crimes other than murder, such as housebreaking and robbery (*Maelangwe* 147B–C; *S v Khanbule* 2001 1 SACR 501 (SCA)) and criminal assault (*S v A* 1993 1 SACR 600 (A) 606–607; *S v Mitchell* 1992 1 SACR 17 (A)). One particular crime where the application (more specifically, the applicability) of this doctrine has been contentious is rape. As a result of the definitional nature of the crime of rape, the question that inevitably arises is whether the doctrine of common purpose can be applied to cases of rape. Where

X, Y, and Z, for example, agree to rob a house and during the course of the robbery X rapes B while Z holds B down and Y watches, the question arises as to whether all the perpetrators can, amongst other offences, be charged with rape on the basis of the doctrine of common purpose, even though it was only X who performed the act as contained in the definitional elements of the crime of rape. In the present case, the Constitutional Court was called upon to assess the applicability of the doctrine of common purpose to the crime of common-law rape. The applicant was one of nine accused who were all convicted of the crime of common-law rape. As we shall indicate below, the applicant and one of his co-accused sought leave to appeal against their convictions of rape on the basis that the doctrine of common purpose does not apply to the crime of common-law rape. The applicant's application for leave to appeal was dismissed, which resulted in the further application for leave to appeal to the Constitutional Court. The co-accused's application for leave to appeal to the Supreme Court of appeal was granted and the appeal was successful (*S v Phetoe* 2018 1 SACR 593 (SCA)). The latter judgment will also be discussed in this case comment to illustrate the contrasting outcomes of both decisions, in order to facilitate formulating recommendations in respect of the applicability of the doctrine of common purpose in cases of rape. In this note, the applicability of the doctrine of common purpose in cases of rape will be assessed against the backdrop of the findings of the Constitutional Court in the judgment under review.

2 The doctrine of common purpose in a nutshell

The doctrine of common purpose, generally, entails that where two or more persons reach agreement to commit a crime and they act together in order to attain that purpose, the act of each of them in the execution of such purpose will be imputed to the others (Burchell 467; Snyman 256; *Thebus* para 18). In cases where two participants are charged with a materially defined crime that entails the causing of a result (otherwise referred to as a "consequence" crime, such as murder), the imputed conduct will include the causing of such result (Burchell 467; Snyman 256). The prosecution will accordingly not have to prove beyond reasonable doubt that each individual accused's conduct contributed causally to the unlawful consequence (Burchell 467). Common purpose, generally, arises either by means of prior agreement or by means of active association (Burchell 467; Snyman 259; see also *Mgedezi* 705–706 where the requirements for active association without prior agreement are set out). It will accordingly suffice to prove that the participants either agreed to commit a specific crime in terms of prior agreement, or that they actively associated themselves with the commission of the crime with the requisite fault (Burchell 467). The doctrine of common purpose is, generally, founded on the individual's active association with such common purpose (Snyman 259). Prior agreement, express or implied, constitutes one manifestation of active association that is more often than not difficult to prove, hence the need for the concept "active association" in order to prove a common purpose (Snyman 259). If there is proof of prior agreement between the individual participants, an inference that each individual associated him- or herself with the crime will be easily justifiable (Snyman 259). In *Mgedezi*, the Appellate Division stipulated requirements to be complied with in cases where there is no proof of a prior agreement. These entail that the individual had to have been present at the scene of the crime where the violence took place; the individual had to have been aware of the assault on the victim by someone else;

the individual had to have intended to make common cause with the person or persons performing the assault; the individual had to have manifested his or her sharing of a common purpose by performing some act of association with the conduct of the others; and the individual had to have intended to kill the victim (*Mgedezi* 705–706; Snyman 259). Common purpose by means of active association becomes relevant particularly in those instances where it is difficult to prove the existence of a previous agreement between the participants (Snyman 259). Prior conspiracy is also not a prerequisite for a finding that a person acted together with one or more persons in the execution of a common purpose (*idem* 257). The doctrine of common purpose is not confined to the crime of murder, although it is most frequently applied in the context of murder (*idem* 257–258). As indicated above, the doctrine of common purpose has been applied to various other offences and has been held to be constitutionally sound (*Thebus* para 18; Burchell 474–475). A controversial question relates to whether the doctrine of common purpose can apply in the context of the crime of rape. Snyman is of the view that the doctrine of common purpose cannot find application in respect of crimes that cannot be committed through the instrumentality of another person but can be performed only by means of a person's own body, such as rape (Snyman 262; see also *S v Saffrer* 2003 2 SACR 141 (SEC) 143–145; *R v D* 1969 2 SA 591 (RA)). It is in the latter context that the judgment under review becomes relevant, as we will show below. In terms of the doctrine of common purpose, it is further important to note that the fault of each individual must still be proved beyond reasonable doubt (Burchell 484–485; Snyman 258). In the latter context, *dolus eventualis*, or even negligence, will suffice (Burchell 485).

3 The definitional nature of the crime of rape

The crime of rape at common law consisted of a male having had unlawful and intentional sexual intercourse with a female without her consent (see Snyman *Criminal law* (1995) 424 (hereinafter "Snyman (1995)")). The act of rape consisted of the penetration of the female's genital organ by that of the male (Snyman (1995) 425). Rape could, further, be committed only by a male. The crime of rape was accordingly gender and conduct specific. In cases where another assisted the perpetrator in terms of committing the act of sexual intercourse, he or she could be guilty only as an accomplice and not as a co-perpetrator (Snyman (1995) 425; see also *S v Jonathan* 1987 1 SA 663 (A) 643H–I; *S v Kock* 1988 1 SA 37 (A) 40–41). The position in respect of sexual offences was, however, radically revisited. This resulted in the enactment of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereinafter "SORMA"). SORMA came into operation on 16 December 2007 and gave effect to a whole new framework of sexual offences. More specifically, the Act redefined the crime of rape: the crime of common-law rape was abolished and replaced with the offence of rape in terms of section 3 of SORMA. Section 3 provides a newly defined statutory offence of rape that replaces the common-law definition (see Smythe & Pithey *Sexual offences commentary – Act 32 of 2007* (2011) 2-1). Rape is defined thus: "Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape." Section 1(1) of SORMA, in turn, defines the act of "sexual penetration" to include –

"… any act which causes penetration to any extent whatsoever by –

(*a*) the genital organs of one person into or beyond the genital organs, anus or mouth of another person;

(*b*) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person, or

(*c*) the genital organs of an animal, into or beyond the mouth of another person."

The definition of rape has accordingly been vastly expanded so that it now also includes rape by means of objects. Any form of penetration, however slight, will be sufficient to fall within the ambit of the definition (Smythe & Pithey 2-2). In addition, the definition of rape is completely gender neutral, thus also providing for male rape.

It is clear from the definitional nature of rape at common law, and in terms of the new statutorily defined offence of rape, that the crime of rape is autographic in nature, and very specific and distinct in terms of its definitional structure. We submit that rape by virtue of its definitional nature is a crime that does not lend itself to the application of the doctrine of common purpose. We shall address the reasons in support of this argument below.

4 *Tshabalala*: The factual background

The salient facts of the decision appear from the judgment delivered by Mathopo AJ, writing for a unanimous court. On 20 September 1998, a group of men violently attacked several homes on nine separate plots in the Umthambeka section of Tembisa in Gauteng. The group forcefully entered several homes in a neighbourhood inhabited by vulnerable members of society. The group threw rocks and stones on the roofs of selected houses and further pretended to be police officers. The group further broke down doors of some of the houses and assaulted the occupants; some of the male occupants were ordered to lie on the ground with blankets covering their faces. Amidst the violence, eight female occupants were raped, some of them repeatedly. The youngest of the victims was only 14 years old. Also, one of the victims was pregnant. During the course of the rapes, some of the members of the attacking group waited outside in order to act as lookouts.

The members of the group were consequently charged and brought before the High Court on 13 August 1999. On 23 November 1999, the accused (Tshabalala) and his co-accused were found guilty on 8 charges of rape, 7 of which were imposed on the basis of the application of the doctrine of common purpose.

It was contended that the common-law crime of rape was not a crime for which an individual could be convicted by the application of the doctrine of common purpose (para 9).

The High Court rejected this contention. Upon an assessment of the evidence as a whole, the court held that the group had acted as a cohesive unit and that the violence had been committed in a systemic pattern (para 10). It further held that a common purpose had to have been formed before the attacks had commenced, and consequently the rapes had been executed in the execution of a prior agreement in the execution of a common purpose (para 9). The High Court rendered its findings based on inferential reasoning that the accused persons had been at the scene of the crimes with the group; they had been identified by witnesses at the scene and later at an identification parade; they had to have

known of the group's *modus operandi* to execute the crimes; and they had not disassociated themselves from the group's endeavours (para 11).

The accused persons were convicted and sentenced to effective life sentences. Two of the accused, Tshabalala and Ntuli, sought leave to appeal from the High Court, which leave was refused.

On 26 August 2009, Tshabalala petitioned the Supreme Court of Appeal for leave to appeal against his convictions and sentences. On 11 September 2009, his application for leave to appeal was dismissed.

During December 2018, Tshabalala applied to the Constitutional Court for leave to appeal against his convictions and sentences. Ntuli, the other applicant in the decision under review, applied directly to the Constitutional Court for leave to appeal. The Commission for Gender Equality and the Centre for Applied Legal Studies were admitted as *amici curiae* in the matter.

5 *Tshabalala*: The judgment

In delivering judgment, the Constitutional Court was called upon to assess two main questions: whether an accused can be convicted of common-law rape based on the application of the doctrine of common purpose, and whether the decision by the Supreme Court of Appeal in *Phetoe* (see the discussion below of this judgment) was correct.

It was contended on behalf of the applicants that the doctrine of common purpose does not apply to the common-law crime of rape, as the crime itself involved the unlawful insertion of the male genitalia into the female genitalia (para 33). The applicants relied exclusively on the instrumentality approach in respect of common-law crime of rape (Snyman *Criminal Law* (2008) 269). The respondent contended that the instrumentality approach as supported by Snyman was incorrect and argued that the conduct of each of the accused in the execution of the common purpose is imputed to the others (para 39). The respondent also relied on international authority to support its argument that applying the doctrine to the crime of rape is in line with international standards (para 40). It was further argued that the instrumentality approach is fundamentally flawed, artificial, and unprincipled (para 43). It was contended that there should be no reason as to why an individual's body should be the determining factor in the case of rape but not in cases of assault or murder (*ibid*). In addition, it was argued that the instrumentality approach is not in line with the new expanded definition of rape as provided for in SORMA (*ibid*). The Constitutional Court (per Mathopo AJ) analysed the instrumentality approach and stated the following (para 53):

> "It perpetuates gender inequality and promotes discrimination. There is no reason why the use of one's body should be determinative in the case of rape, but not in the case of other crimes such as murder and assault. I agree with the *amici* that the instrumentality argument has shortcomings because it seeks to absolve other categories of accused persons from liability, who may not have committed the deed itself (penetration), but contributed towards the commission of the crime by encouraging persons who fail to exclude themselves from the actions of the perpetrators. Permitting accused persons, in similar positions as the applicants, and the other co-perpetrators to escape liability on the basis of common purpose is *unsound, unprincipled and irrational*" (emphasis added).

The court held that the instrumentality approach had no place within our current system founded upon the Bill of Rights. Mathopo AJ stated (para 54):

> "It is obsolete and must be discarded because its foundation is embedded in a system of patriarchy where women are treated as mere chattels. It ignores the fact that rape can be committed by more than one person for as long as the others have the intention of exerting power and dominance over the woman, just by their presence in the room."

It was further held that there was no reason why the doctrine of common purpose and its concomitant application should be reserved for crimes such as murder – it could apply with equal force to the common-law crime of rape (para 56). In terms of the application of the doctrine of common purpose to the common-law crime of rape, Mathopo AJ held (para 59):

> "There is no rationale for treating the one who penetrated differently from the others who did not. What is clear is that the other preparators, given their positive conduct and presence, did not disassociate from the conduct of the one who penetrated the complainant.... To endorse or support Snyman's approach would defeat common sense and logic. I say this because it is not only the mala anatomy that is critical, the presence of the co-perpetrators who encouraged and facilitated the commission of the crime is equally important. The perpetrators were all complicit and acted in cahoots.... If the doctrine of common purpose extends to crimes of murder, common assault or assault with intent to do grievous bodily harm, it is irrational and arbitrary to make a distinction when a genital organ is used to perpetrate the rape. The constitutional principles of equality, dignity, protection of bodily and psychological integrity, and not to be treated in a cruel inhumane and degrading way, should be afforded to the victims of sexual assault. It would be a sad day if courts were to countenance such an arbitrary distinction" (paras 59–60).

The applicants' appeal was accordingly dismissed. The court held that the doctrine of common purpose applied to the common-law crime of rape, and that the applicants had rightly been convicted by the High Court (paras 64–66).

6 *PHETOE*: The flipside of the coin?

The reason for incorporating the *Phetoe* decision into this review is to provide a glimpse of the alternative approach in terms of which an individual who does not perform an act of rape by means of his or her own body, but who acted in common concert with the perpetrator who raped the complainant, should be convicted as an accomplice, and not as a co-perpetrator, by virtue of the application of the doctrine of common purpose. Whether an individual will be guilty as such will depend on the evidence presented and the particular circumstances of each case.

In *Phetoe*, the appellant stood trial with six co-accused (including Tshabalala) on eight charges of housebreaking with intent to rob and robbery with aggravating circumstances, eight charges of common-law rape perpetrated on numerous complainants, one charge of attempted robbery, three charges of assault with intent to do grievous bodily harm, two charges of malicious damage to property, and two charges of ordinary assault.

The salient facts appear from the judgment delivered by Mocunie JA (Leach JA and Plasket AJA concurring). The factual background has already been canvassed above in the *Tshabalala* discussion and will not be repeated here, save for additional facts relevant to the *Phetoe* judgment.

The appellant had been part of a group of men who had rampaged through the Umthambeka section of Tembisa. They forced entry into several shacks. Once inside, they assaulted, robbed, and raped the occupants. Subsequently, seven men, including the appellant, were arrested. In the trial court, one of the complainants, Ms DM, testified that on the night in question one of the men had demanded to have sexual intercourse with her, and that a second man had assisted the first man to assault her and overcome any resistance by her. She testified that at some stage she had noticed the appellant lying next to her in bed. When she later inquired what he had been doing there, the appellant started laughing. When asked whether the appellant had raped her, she answered in the negative. Under cross-examination, she indicated that she was unable to identify who had raped her.

In the trial court, the applicant was convicted of the rape of two complainants based on the application of the doctrine of common purpose, and on the basis of a finding of prior agreement (para 6). The latter finding was based on inferential reasoning by the trial court derived from circumstantial evidence that the appellant had been the second intruder who had assisted the first intruder to assault and overpower Ms DM and, also on the basis of a finding of prior agreement (*ibid*).

The appellant subsequently lodged an appeal to the full bench of the court.

The majority of the court (per Mokgoatheny J and Khumalo J) upheld the finding of the trial court that Ms DM was a reliable witness. On this basis, the court concluded that the appellant had been the second intruder who had assisted the first intruder in assaulting and overpowering Ms DM when she was raped for the first time (para 8). The full court also held that the appellant had associated himself with the second rape of Ms DM (*ibid*). The majority of the full court, however, held the appellant liable as an accomplice in respect of the eight charges of common-law rape committed in respect of the eight complainants (*ibid*). The appeal in respect of the remainder of his convictions and sentences was subsequently dismissed.

The minority of the court (*per* Dana AJ), however, held that there had been no evidence linking the appellant to the rape and that he should have been acquitted (para 9).

The appellant subsequently lodged an appeal to the Supreme Court of Appeal against the conviction of being an accomplice to rape. It was argued on behalf of the appellant that portions of Ms DM's evidence had been confusing. It was accordingly argued that the full bench had misdirected itself in convicting the appellant as an accomplice to the rape of Ms DM and her younger sister.

On appeal, then, Mocumie JA accordingly analysed the substantive criminal law pertaining to liability as an accomplice. In respect of the appellant's conviction as an accomplice to rape, Mocumie JA held (para 15):

> "To convict the appellant on the basis of his mere presence is to subvert the principles of participation and liability as an accomplice in our criminal law. For criminal liability as an accomplice to be established, there must have been some form of conduct on the part of the appellant that facilitated or assisted or encouraged the commission of the rape of Ms DM during the two separate incidents in her shack. Ms DM's evidence does not disclose any assistance rendered by the appellant in the commission of the rapes; and the conduct does not amount to facilitation, assistance or encouragement. That, in my view, should have been the end of the matter. The fact that

> the appellant laughed after being asked why they were 'doing such a thing' may be conduct that showed his approval of what was happening, but that is not enough to establish his liability as an accomplice."

And further (para 16):

> "In the appeal before us, the least that can be said about the appellant's conduct of laughing and doing nothing to prevent the rapes, is that it was morally reprehensible. That, and his mere presence at the scene, is not enough to justify a conviction as an accomplice to rape."

The court went further and assessed the doctrine of common purpose in respect of all the offences for which the appellant had been convicted and reiterated the principles as enunciated in *Mgedezi* (para 19). It held that there had been no evidence which proved that the appellant had been present at the scenes where the violence had taken place, or that he had shared a common purpose with the other perpetrators in respect of the rapes, assaults, housebreakings, robberies, and other offences (para 20). The court accordingly set aside all the appellant's convictions and sentences save for the conviction and sentence in respect of robbery with aggravating circumstances (para 22).

Reflecting on the judgment by the Supreme Court of Appeal, it could be argued that the appellant's conviction in terms of being an accomplice to rape was set aside on appeal for lack of evidence. The application of the principles of the substantive criminal law by the full bench of the High Court as well as the Supreme Court of Appeal cannot, however, be faulted.

7 Assessment

At the start of this note, it was noted that the application of the doctrine of common purpose to the common-law crime of rape is contentious and has been debated for many years and in many judgments. The decision under discussion is pivotal as it not only addressed this point of contention, but also opened the door for a critical debate as to whether our substantive criminal law allows this doctrine to apply to the common-law crime of rape. Also, although it was not addressed in this judgment, the question which now calls for assessment is whether this judgment could pave the way for the application of the doctrine of common purpose to the newly statutorily defined offence of rape in section 3 of the SORMA. We submit that the latter calls for a much deeper analysis than merely blindly applying the doctrine to the new statutory offence of rape.

The first aspect that deserves assessment pertains to the essential distinction between a perpetrator and an accomplice in our substantive criminal law.

Snyman defines a perpetrator as follows:

> "1. A person is a perpetrator if –
>
> (a) his conduct, the circumstances in which it takes place (including, where relevant, a particular description with which he as a person must, according to the definition of the crime, comply) and the culpability with which it is carried out are such that it satisfies all the requirements for liability contained in the definition of the crime, or
>
> (b) although his own conduct does not comply with that required in the definition of the crime, he acted together with one or more persons and the conduct required for a conviction is imputed to him by virtue of the principles relating to common purpose.
>
> "2. If two or more persons act together and they all comply with the above definition of a perpetrator, they all are co-perpetrators…

"3. For a person to be a perpetrator, it matters not whether he commits the crime himself or makes use of an agent (human or non-human) to effect the commission. This rule, however, does not apply to crimes which can be committed only with a person's own body, such as the old common-law crime of rape." (Snyman 252–253).

(See also Burchell 465; Snyman *Criminal Law* (2020) 222, where the instrumentality approach was removed (hereinafter "Snyman (2020").)

It is clear from Snyman's definition of rape that it is distinguished from other crimes as a result of the instrumentality approach that was highly scrutinised and heavily criticized in the decision under review.

In turn, Snyman defines an accomplice as follows:

"1. A person is guilty of a crime as an accomplice if, although he does not satisfy all the requirements for liability contained in the definition of the crime and although the conduct required for a conviction is not imputed to him by virtue of the principles relating to common purpose, he unlawfully and intentionally engages in conduct whereby he furthers the commission of a crime by someone else.

"2. The word 'furthers' in rule 1 above includes any conduct whereby a person facilitates, assists or encourages the commission of a crime, gives advice concerning its commission, orders its commission or makes it possible for another to commit it."

The fundamental reason why the essential distinction between perpetrators as opposed to accomplices becomes relevant relates, in the first instance, to the definitional nature of the crime of rape, and, secondly, to the different approaches followed in *Tshabalala* and *Phetoe*. In *Phetoe*, the full court on appeal found the appellant guilty as an accomplice to rape by virtue of his presence at the scene of the rape. As a result of the fact that he had not committed the crime with his own body, the conviction of rape was altered to one of being an accomplice to rape. The latter finding is well in line with other decisions where the accused had not committed the crime with his or her own body, but still assisted in its commission; the accused was subsequently convicted as an accomplice to rape (*S v Saffier* 2003 2 SACR 141 (SE); *S v M* 1950 4 SA 101 (T); also *S v Gaseb* 2001 1 SACR 438 (NMH).

In *Phetoe*, the finding of the full bench was reversed on appeal to the Supreme Court of Appeal as a result of a lack of evidence indicating that the appellant had actively assisted or furthered the commission of the crime. However, we support the approach followed by the full bench of not convicting the appellant as a co-perpetrator to rape, for the reasons set out below.

As was seen above, the definitional nature of the crime of rape is very specific and unique – it requires one person to commit either an act of sexual intercourse with the complainant in terms of common-law rape, or an act of sexual penetration in terms of the new statutory regime. As such, we submit that rape does indeed constitute an autographic offence that can be committed only by one person with his or her own body with the complainant. Should another person assist or further the commission of the crime, he or she can be guilty as an accomplice to rape. We submit that the definition of an accomplice is wide enough to cater adequately for situations where another person had not committed the crime with his or her own body, but had assisted in its commission, or had made its commission possible in some manner (Burchell 495–499; Snyman 266; Snyman (2020) 233).

It should further be borne in mind that liability as an accomplice can also arise by virtue of an omission. Burchell encapsulates the latter thus: "However, where the accused's inaction amounts to participation in the crime itself, or assistance, authorisation or encouragement of the perpetrator, he or she may be an accomplice" (Burchell 499; see also Snyman 267–268; Snyman (2020) 235).

Accordingly, if one individual stands by while another commits an act of rape, he or she could also be guilty as an accomplice by virtue of his or her inaction and failure to stop or prevent the act of rape taking place. We submit that accomplice liability is a more just and logical approach to follow in cases where two or more persons act together, but only one of them actively commits the crime of rape with his or her body. Note that an accomplice can potentially receive the same punishment as the perpetrator, and can also receive a harsher punishment depending on the facts and circumstances of the case, and to what extent the accomplice furthered the commission of the crime or rendered assistance (Burchell 501–502; Snyman 270; Snyman (2020) 237).

The crime of rape remains essentially a formally defined crime. As such, it is not the consequence or result that is punished, but the act itself. The latter should be distinguished from materially defined crimes where the result or consequence is punished, such as murder or culpable homicide. The Constitutional Court in the decision under review draws a comparison between murder and rape in respect of the application of the doctrine of common purpose. It should be borne in mind that in cases of rape we are not dealing with issues pertaining to causation, as rape is not a materially defined crime. With rape, the perpetrator is more often than not clearly identifiable and it is the act of rape, and not the consequence or result, that is punished. The doctrine of common purpose has typically been applied in cases of materially defined crimes such as murder, where the element of causation was difficult to prove (for example, *Safatsa*). As we indicated above, the doctrine has been applied to other offences, too. However, we submit that the definitional nature of those offences lends itself to the application of the doctrine. By contrast, the definitional nature of rape does not lend itself to the application of the doctrine by virtue of the unique nature of the crime of rape.

Note further that where an individual attempts with another to commit rape, or incites another, or conspires with another, to commit rape, he or she can potentially be guilty of inchoate or incomplete offences, such as attempted rape, incitement to commit rape, or conspiracy to commit rape. The inchoate offences are catered for by the Riotous Assemblies Act 17 of 1956. The SORMA provides its own unique cluster of inchoate sexual offences in terms of section 55 (see Smythe & Pithey 19-1–19-4).

A related issue that arises as a result of the findings of the Constitutional Court in the judgment under review concerns the potential impact that these findings could have with reference to the current statutorily defined offence of rape in section 3 of the SORMA. Although the new position in terms of the SORMA was not in issue before the court, it still invites debate as to whether the doctrine of common purpose could find application in terms of section 3 of the SORMA.

We submitted that the same arguments as advanced above as to why the doctrine should not apply to the crime of common-law rape can be advanced in respect of section 3 of the SORMA. The crime of rape remains a formally defined crime in terms of which the act itself is punished. Even though the definition of rape is now wider, catering for other situations above and beyond

sexual penetration of the genital organ of one person by that of another, we submit that the crime can still be committed only by one person with another. If another person assists, encourages, or furthers such commission, his or her liability should be founded on liability as an accomplice and not as a co-perpetrator. The definition of rape in terms of section 3, and more specifically the definition of "sexual penetration" as contained in the SORMA, caters for rape by means of objects and is, more importantly, gender neutral by providing for male rape as well. Accordingly, the arguments advanced above could also apply to male rape in whichever form the act of sexual penetration occurs.

The SORMA also provides for a unique cluster of inchoate offences specifically applicable to sexual offences. Accordingly, when an individual does not commit the act of sexual penetration him- or herself, but still attempts to commit it, incites another to commit the rape, or conspires with another to commit rape, he or she may potentially be liable for the same punishment as the perpetrator, in terms of section 55 (Smythe & Pithey 19-1–19-4).

The SORMA also provides for the offence of compelled rape, where a person compels or orders another to rape another person (Smythe and Pithey 3-1–3-5; Snyman (2020) 319). Section 4 will typically apply to situations where one person orders another to perform an act of rape with another. It could be argued that should the doctrine of common purpose apply to the statutorily defined offence of rape in terms of section 3, section 4 would inherently be redundant. The reason for the latter would be as a result of the fact that the person ordering another to commit rape would be charged with rape in terms of section 3 together with the individual who performed the act of rape by virtue of the application of common purpose, regardless of the fact that he or she who compelled the other individual did not perform the act of sexual penetration him- or herself. The existence of section 4 constitutes a strong argument against the application of the doctrine of common purpose to the offence of rape in terms of section 3 of SORMA.

Having regard to the definition of a perpetrator, read in conjunction with the definitional nature of rape, we submit that the crime of rape is unique and distinct in nature, and that it accordingly falls outside the scope of the doctrine of common purpose. We submit that the application of the doctrine of common purpose should be reserved, in the first instance, for crimes where causation is problematic such as murder or even culpable homicide, and, secondly, for those crimes where the definitional nature of the crime lends itself to the application of the doctrine of common purpose.

In the decision under review, the Constitutional Court proclaimed the need to address gender-based violence in conjunction with the scourge of rape, which is a serious phenomenon at present. However, we submit that within our current substantive criminal law framework, there is a solid basis for holding persons liable for their participation in the crime, even though they did not commit the act of rape themselves. These individuals could be held liable based on the principles of accomplice liability as enunciated above, and even on basis of an omission. Rape in the context of group criminal enterprise is more often not accompanied by other offences such as robbery or assault. These crimes are more often than not the offspring of prior conspiracy or even incitement. In such cases the offenders who do not physically commit the act of rape, can be held liable in terms of our well-established framework of inchoate offences, as shown above. Inchoate offences potentially carry the same punishment as that which

would have been imposed if the crime had been completed. We submitted that rape remains an essentially formally defined crime with its own unique and distinct definitional nature. In the framework of accomplice liability, and in conjunction with the established framework of inchoate offences, group criminal activity in the context of rape can be adequately addressed. We submit that the latter will give rise to a more just and logical application of the substantive criminal law pertaining to participation in group criminal enterprise in cases of rape.

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THE STRICT NATURE OF PAUPERIEN LIABILITY CONFIRMED: A POSTSCRIPT

Van Meyeren v Cloete 2021 1 SA 59 (SCA)

OPSOMMING

Die skuldlose aard van aanspreeklikheid ingevolge die *actio de pauperie* bevestig: 'n naskrif

In hierdie saak het die eienaar van drie honde wat uit hul erf ontsnap het en 'n persoon in die straat byna doodgebyt het toe die hek tydens hulle eienaar se afwesigheid deur 'n oortreder oopgelaat is, appèl aangeteken teen die verhoorhof se uitspraak teen hom waarin skadevergoeding ingevolge die *actio de pauperie* aan die beseerde eiser toegestaan is. Namens die verweerder (appellant) is betoog dat die verweer wat in 1993 in deur die Hoogste Hof van Appèl in *Lever v Purdy* erken is – dat die eienaar van die dier wat nadeel veroorsaak het skotvry daarvan afkom indien die slagoffer se beserings die gevolg was van die nalatige optrede van iemand wat deur die eienaar in beheer van sy dier gestel is – uitgebrei moet word na gevalle waar die *causa causans* van die eiser se beserings die nalatige optrede van enige derde was. Nadat die hof veral aan die hand van die meerderheids- en minderheidsuitsprake in *Lever v Purdy* 'n oorsig van die gemeenregtelike skrywers, regspraak en die menings van kontemporêre skrywers verskaf het, is daar beslis dat die *status quo* behoue moet bly en dat daar geen rede bestaan om die gemenereg te ontwikkel ten einde die gevraagde uitbreiding toe te staan nie. Die hof het die eiendomsregbasis van skuldlose aanspreeklikheid ingevolge die *actio de pauperie* deurgaans beklemtoon. Daar word aangetoon dat aanwending van die risikoleerstuk soos deur veral Van der Merwe bepleit nie 'n noemenswaardige verskil aan die uitkoms van hierdie tipe saak behoort te maak nie.

1 Introduction

In this case the Supreme Court of Appeal had the opportunity to consider the judgment of the Eastern Cape High Court in *Cloete v Van Meyeren* 731/2017 (2018) ECP (27 November 2018) in which that court had to decide on a point of law in respect of the *actio de pauperie* that had been *res nova*. In an extensive