CASES / VONNISSE

AN ANALYSIS OF THE COMMON PURPOSE DOCTRINE AND RAPE IN SOUTH AFRICA WITH SPECIAL FOCUS ON

Tshabalala v The State [2019] ZACC 48

1 Introduction

The common purpose doctrine, a deviation from the principle of individual criminal responsibility, has its roots in English law and was first introduced into South African law through section 78 of the Native Territories Penal Code Act 24 of 1886:

> "If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is 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."

The doctrine later gained recognition in the common law in the 1923 case of *R v Garnsworthy*, in which the court held as follows:

> "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, 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." (*R v Garnsworthy* 1923 WLD 17 19)

This definition of the doctrine lay the foundation for the modern-day definition, which holds, as stated by Kemp *et al*, that

> "where two or more people associate together in order to commit a crime, each of them [co-perpetrators] will be liable for the criminal conduct of the other that falls within the scope of their common purpose." (Kemp, Walker, Palmer, Baqwa, Gevers, Leslie, and Steynberg *Criminal Law in South Africa* 2ed (2012) 234)

Thus, reference to the words "ought to have known" and "probable", as used in *R v Garnsworthy* (*supra* 19), which adopted a more objective approach to culpability, have been removed and the courts have developed the doctrine to require intention to commit the unlawful act, whether direct, indirect, or in the form of *dolus eventualis*. Consequently, the scope of the common purpose extends to those criminal consequences that each accused

subjectively foresaw occurring while pursuing their common purpose (Kemp *et al Criminal Law in South Africa* 235). As held in *S v Malinga*,

> "[n]ow the liability of a *socius criminis* is not vicarious but is based on his *mens rea.* The test is whether he foresaw (not merely ought to have foreseen) the possibility that his *socius* would commit the act in question in the prosecution of their common purpose." (*S v Malinga* 1963 (1) SA 692 (A) 694F–G)

Snyman points out that "the conduct of each of them in the execution of that purpose is imputed to the others" (Snyman *Criminal Law* 4ed (2002) 261). As such, it is not necessary to determine precisely which member of the common purpose committed the act in question (Burchell *Principles of Criminal Law* 5ed (2016) 477). Therefore, the causal *nexus* between the conduct of an accused and the criminal consequence is replaced by the principle of imputation provided that the accused formed a prior agreement to commit the crime or actively associated with the conduct of the fellow perpetrators in the group. Therefore, liability based on common purpose will arise in two instances: first, from a prior agreement to commit the crime in terms of which the accused does not need to be present at the scene of the crime, nor have participated in the commission of the crime (Snyman *Criminal Law* 6ed (2014) 260–261); and secondly, through active association. Active association (a wider concept than prior agreement) is evidenced by an accused's positive conduct (at the time of the commission of the crime) to demonstrate such accused's intention of associating with the crime (Kemp *et al Criminal Law in South Africa* 236). Therefore, *mens rea* can never be imputed in terms of the doctrine and each individual accused must possess the necessary intention.

2 The legal framework of rape and common purpose in South Africa

2 1 The definition of rape

Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (32 of 2007) provides that any person who unlawfully and intentionally commits an act of sexual penetration with a complainant, without the consent of such complainant, is guilty of the offence of rape. The intention of the accused must, thus, be unlawfully to cause sexual penetration.

2 2 Case law

Although the common purpose doctrine has been the subject of much debate and criticism, its constitutionality was confirmed by the Constitutional Court in *Thebus v S* (2003 (6) SA 505 (CC)):

> "The common purpose does not amount to an arbitrary deprivation of freedom. The doctrine is rationally connected to the legitimate objective of limiting and controlling joint criminal enterprise. It serves vital purposes in our criminal justice system. Absent the rule of common purpose, all but actual perpetrators of a crime and their accomplices will be beyond the reach of our criminal justice system, despite their unlawful and intentional participation in

> the commission of the crime. Such an outcome would not accord with the considerable societal distaste for crimes by common design. Group, organised or collaborative misdeeds strike more harshly at the fabric of society and the rights of victims than crimes perpetrated by individuals … In practice, joint criminal conduct often poses peculiar difficulties of proof of the result of the conduct of each accused, a problem which hardly arises in the case of an individual accused person. Thus, there is no objection to this norm of culpability even though it bypasses the requirement of causation." (*Thebus v S supra* par 40)

The Appellate Division, in *S v Mgedezi* ([1989] 2 All SA 13 (A)), clarified the special requirements for common purpose by active association as follows:

> "In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of [the] room … Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea*." (*S v Mgedezi supra* par 67)

With regard to the requirement of an act of association on the part of the accused, there is no closed list of the forms of conduct that will be considered sufficient for a positive act of association (Kemp *et al Criminal Law in South Africa* 236). In *S v Safatsa* (1988 (1) SA 868 (A)), also known as the *Sharpeville Six* case, a mob murdered the deputy mayor of the town council of Lekoa by stoning him, dragging him into the street and setting him alight after pouring petrol over him. The court found accused number 4 guilty through active association based on her repeatedly shouting, "*hy skiet op ons, laat ons hom doodmaak* (he is shooting at us, let's kill him)" (*S v Safatsa supra* 892) and then slapping a woman in the face who was protesting the deceased being set alight. Therefore, merely giving moral support to the actual perpetrator has been deemed sufficient by the courts to constitute a positive act of association (Kemp *et al Criminal Law in South Africa* 236).

In *S v Gaseb* (2001 (1) SACR 438 (NSC)), the Namibian Supreme Court referred with approval to Snyman's assertion that

> "the common purpose doctrine cannot be applied to crimes that can be committed only through the instrumentality of a person's own body or part thereof, and not through the instrumentality of another." (*S v Gaseb supra* 452A–B)

The court went on to hold that an accused who has assisted in a gang rape has to decide whether or not to become a perpetrator who will also penetrate the victim (*S v Gaseb supra* 457H–I). Therefore, if an accused merely assists the actual perpetrator by restraining the woman, but without himself having penetrated her, he can only be an accomplice to the rape and not a co-perpetrator. This view was confirmed by the Supreme Court of Appeal in *S v Kimberley* (2005 2 SACR 663 (SCA)), in which it was held that

> "a woman who assists a man to rape another woman or who makes it possible for him to do so, cannot be held to have committed the act of rape." (*S v Kimberley supra* par 12)

In *Phetoe v S* (2018 (1) SACR 593 (SCA)), the Supreme Court of Appeal held that "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" (*Phetoe v S supra* 15). Therefore, the Supreme Court of Appeal went on to hold that the appellant's conduct of laughing and doing nothing to prevent the rapes was not sufficient conduct to justify a conviction as an accomplice to the rape (*Phetoe v S supra* 16) and that "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" (*Phetoe v S supra* 15).

However, the distinction between co-perpetrators and accomplices can become confused because in most cases it is difficult to find that the accused assisted or furthered the commission of the crime without possessing the requisite intention to commit the crime. Kemp *et al* states that one of the few instances in which an accused will become an accomplice, instead of a co-perpetrator, is where the assistance that is rendered during the commission of a crime (such as rape) can only be committed personally (Kemp *et al Criminal Law in South Africa* 249).

In *S v Moses* ([2010] ZANCHC 48), however, the court disagreed with the views expressed in *Gaseb* (*supra*) by stating that

> "the definition for a perpetrator for robbery and rape is the same, whatever means is employed to commit the crime. The distinction is artificial and more perceived than real. The doctrine of common purpose ought to apply to rape cases, and I make the positive statement that it does apply to them." (*S v Moses supra* 21)

Therefore, it is submitted that the personal nature of rape will not negate the blameworthiness of an accused in his or her foresight of the possibility of rape being committed as part of a group's common design.

In *S v Majosi* ([1991] ZASCA 120), the second appellant, together with the four other appellants, robbed a supermarket. One of the appellants decided to bring a firearm. The second appellant merely kept watch outside the supermarket and the other four entered the supermarket and, in the commission of the crime, one of the appellants shot and killed an employee. The second appellant fled and shared in the proceeds of the robbery. The second appellant, who was neither present at the scene of the crime nor handled the firearm, was convicted of murder owing to the fact that "the five appellants hatched the plan and formed the common purpose to rob" (*S v Majosi supra* 8) and they borrowed a firearm that was to be used "in the furtherance of that common purpose should the need arise to do so" (*S v Majosi supra* 9). The second appellant had subjectively foreseen the possibility that the firearm would be used to shoot and kill someone during the commission of the robbery and he had reconciled himself with that possibility.

It therefore needs to be asked how the doctrine can apply to the crime of murder (in which an accused was not present at the crime scene nor handled the weapon used to commit the crime) but not apply to the crime of rape; in both situations, the accused have not personally committed the crime but have subjective foresight of the possibility that the harm may

ensue and nevertheless reconcile themselves and, consequently, actively associate themselves with such harm.

2 3 S v Tshabalala

The constitutional court decision of *S v Tshabalala* ((2019) ZACC 48) is the latest landmark decision regarding the common purpose doctrine that involves the crime of rape. The case is discussed below.

2 3 1 In the High Court

(i) Facts

On 23 November 1999, seven accused stood arraigned for eight charges of common-law rape; various counts of housebreaking with intent to rob and robbery with aggravating circumstances; unlawful possession of a firearm and ammunition in contravention of the Firearms Control Act of 1969; malicious damage to property; assault with intent to do grievous bodily harm and rape (*Tshabalala v The State supra* 5).

On 26 January 2000, judgment was handed down on all seven accused. The convictions of all the accused persons arose from the events that took place during the night of 20 September and in the early morning of 21 September 1999 at Umthambeka section in Thembisa. During the said night, a group of youths went on a rampage, broke into various houses and upon entering each house, they demanded identity documents, cash and covered the victims using blankets. Thereafter, they raped the female victims (*Tshabalala v The State supra* 6).

The victims were robbed of money and other belongings, and the male victims were assaulted, stabbed and sustained injuries in the process. Mr Shabalala (accused number four) and Mr Ntuli (accused number six) were identified at the scene of the violence by witnesses whom the High Court found to be credible. Mr Shabalala was identified in household number eight where an attempted rape took place and was further identified at an outside toilet. Similarly, Mr Ntuli was identified at two locations – household number two and household number six.

(ii) Judgment in the High Court

Mr Shabalala and Mr Ntuli pleaded not guilty to all the charges. However, they were convicted on eight counts of rape based on the doctrine of common purpose. They were sentenced to life imprisonment on the common-law rape offences and additional years of imprisonment on the other counts. The court concluded that the effective term of imprisonment was one of life imprisonment. In determining that the doctrine applied to common-law rape, the High Court evaluated the evidence and found that the group acted as a whole, moving from one home to another at different times, and that the violence was committed in a systematic pattern. In support of its finding, the court held that the fact that blankets were placed over the other members of the homes when the women and children were raped, and that

some members of the group were posted outside as guards, inexorably pointed to one conclusion, that the attacks were not spontaneous but were planned. The High Court reasoned that a common purpose must have been formed before the attacks began and the rapes were executed pursuant to a prior agreement in furtherance of a common purpose (*Tshabalala v The State supra* 10).

Both accused applied for leave to appeal against their convictions and sentences. Both applications for leave to appeal against convictions and sentences to the full bench were dismissed on 15 May 2000. The two accused also petitioned the Supreme Court of Appeal during August 2009 but their application was dismissed. Their Supreme Court of Appeal application was spurred on by a co-accused who appealed his conviction and sentence and was successful (see case of *Phetoe v S* discussed above*)*.

2 3 2 Constitutional Court

The applicants brought an application for leave to appeal on the merits of the case. One of the main issues that the Constitutional Court had to determine was whether an accused can be convicted of common-law rape on the basis of common purpose. This case note focuses on this issue only, given its context.

(i) Applicants' argument

The applicants contended that the doctrine does not apply to the common-law crime of rape because this crime, as defined, required the unlawful insertion of the male genitalia into the female genitalia (*Masiya v Director of Public Prosecution Centre for Applied Legal Studies and Another as Amici Curiae* [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827)*.* On the applicants' submissions, it is simply impossible for the doctrine to apply, as by definition, the causal element cannot be imputed to a co-perpetrator. This is referred to as the "instrumentality argument". To support their argument, the applicants relied on Snyman's definition, which suggested that if X rapes a woman while his friend Z assists him by restraining the woman but without himself having intercourse with her, Z is an accomplice to the rape, as opposed to a co-perpetrator. Possible further examples of crimes that cannot be committed through the instrumentality of another are perjury, bigamy and driving a vehicle under the influence of liquor (Snyman *Criminal Law* (2014) 261). This was the main argument delivered on behalf of the applicants.

(ii) Respondent's argument

The respondent contended that there was prior agreement on the part of the group, and that a common purpose must have been formed before the attacks commenced. The respondent submitted that Snyman's views are fallacious when a prior agreement has been proved because the conduct of each accused in the execution of that purpose is imputed to the other. To support this argument, the respondent relied on a case dealing with murder by common purpose and the remarks of Theron J that

> "[t]he operation of the doctrine does not require each participant to know or foresee in detail the exact way in which the unlawful results are brought about. The State is not required to prove the causal connection between the acts of each participant and the consequence, for example, murder." (*Jacobs v S* [2019] ZACC 4 par 70)

In support of this proposition, it relied on the International Criminal Court where, in article 25(3)(a) and (d) of its Statute (Rome Statute of International Criminal Court (1998)) dealing with individual criminal responsibility and common purpose, it provides as follows:

> "In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person–
>
> (a) commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
>
> ...
>
> (d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either–
>
> (i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> (ii) be made in the knowledge of the intention of the group to commit the crime."

The respondent submitted that the above principles apply with equal force to the doctrine where participation in the common purpose has been proved through prior agreement or conspiracy (*Tshabalala v The State supra* 41).

(iii) The majority Judgment in the Constitutional Court

The court held that the actions of the perpetrators were cavalier and callous towards the victims and perpetuated gender-based violence (*Tshabalala v The State supra* 52). The court further directed that the Snyman approach on which the applicants based their argument was flawed, as it promoted discrimination. In addition, the instrumentality argument was rejected as it sought to exonerate from liability other categories of accused person who may not have committed the deed itself but who contributed towards the commission of the crime by encouraging persons who failed to exclude themselves from the actions of the perpetrators. The instrumentality argument was found to be obsolete as its foundation is embedded in a system of patriarchy where women are treated as mere chattels (*Tshabalala v The State supra* 54). To allow accused persons in similar positions to the applicants and other co-perpetrators to escape liability on the basis of common purpose is unsound, unprincipled and irrational (*Tshabalala v The State supra* 53). With respect to the doctrine of common purpose, it extends to crimes of murder, common assault or assault with intent to do grievous bodily harm and, therefore, it is irrational and arbitrary to make a distinction when a genital organ is used to perpetuate the rape. The constitutional values 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 (*Tshabalala v The State supra* 60). In conclusion, the doctrine of common purpose applies to the common-law crime of rape and the applicants were rightly convicted by the High Court (*Tshabalala v The State supra* 66).

(iv) Was it a correct judgment?

Studies show that approximately one out of five South African men have admitted to participating in a gang rape either by penetrating the victim or assisting in the commission of the crime (Jewkes "Gender Inequitable Masculinity and Sexual Entitlement in Rape Perpetration South Africa: Findings of a Cross-Sectional Study" 2011 6(12) *PLoS ONE*). As Vogelman and Lewis point out, "gangs seem to be the exclusive domain of the young males, with women as peripheral yet crucial 'components' of this youth culture" (Vogelman *"*Illusion der Stärke: Jugenbanden, vergewaltigung und kultuur der gewalt in Südafrika*"* 1993 2 *Der Überblick* 39–42). Rape is among the most serious crimes that a person can commit. It is a profound invasion of a victim's privacy and bodily integrity and a drastic infringement of their dignity. It is deeply damaging for the victim, both emotionally and psychologically. Rape is not only a radically anti-social act, but it carries with it the risk of transmission of disease that can be life threatening. More than 25 years into our constitutional democracy, which is underpinned by the Bill of Rights, we are still plagued by the scourge of rape and the abuse of women and children on a daily basis. In order to curb this pandemic, concerted efforts by courts and law enforcement agencies are required. The Constitutional Court has previously recognised that the crime of rape involves the breach of the right to bodily integrity and security of the person, and has recognised the right to be protected from degradation and abuse (*Masiya v Director of Public Prosecutions Pretoria* (*The State*) [2007] ZACC 9 25). Furthermore, judges should adapt the common law to reflect the changing social, moral and economic fabric of the country (*Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) 36). To continue on the path that the definition of rape is a crime purely about sex is misguided, and the court confirming this will assist in ending the perpetuation of patriarchy and rape culture in our society.

At this juncture, it would be interesting to consider the position regarding the common purpose rule and rape in Germany.

3 Comparative analysis of the German doctrine of common purpose

The concept of common purpose as a separate category of individual criminal responsibility does not exist under German criminal law (Reed and Bohlander *Participation in Crime: Domestic and Comparative Perspectives* (2013) 335). Instead, the German Criminal Code (*Strafgesetzbuch – StGB*) divides the parties to a crime into two distinct groups, namely, principals and accessories. In terms of section 25(2) of the *StGB*, if more than one person commits the offence jointly, each shall be liable as a principal (co-perpetrators). This principle of co-perpetration is referred to as

Mittäterschaft. Co-perpetrators commit an offence jointly based on a common plan (*gemeinsamer Tatplan*), which can extend to a tacit common understanding or can be spontaneous (Hamdorf "The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime" 2007 5(1) *Journal of International Criminal Justice* 212). In addition to the common plan, German courts and scholars require the common plan's cooperatively shared execution (*arbeitsteilige Tatausfuhrung*) (Du Bois-Pedain "Participation in Crime" Legal Studies Research Paper Series 2019 6 *University of Cambridge* 17) in terms of which each co-perpetrator must make a significant, but not necessarily causal, contribution towards the common unlawful goal and its attainment (Krebs *Joint Criminal Enterprise in English and German Law* (doctoral thesis, The University of Oxford) 2015 181).

Previously, two distinct doctrines were applied to distinguish between principals and accessories, namely, the formal-objective theory (which states that one can only be classified as a principal where the person fully or partially perpetrated the crime) and the strictly subjective theory (which holds that the distinction between principals and accessories is determined by the accused's will and motives) (Hamdorf 2007 *Journal of International Criminal Justice* 210) – in other words, whether or not the accused wanted the offence as his or her own (*animus auctoris*) (Bohlander *Principles of German Criminal Law* (*Studies in International and Comparative Criminal Law*) (2009) 162).

Currently, the German doctrine is influenced by Claus Roxin's "control over" theory (*Tatherrschaftslehre*), which includes an amalgamation of the objective and subjective theories. According to Roxin:

> "a person is a perpetrator if he controls the course of events; one who, in contrast, merely stimulates in someone else the decision to act or helps him to do so, but leaves the execution of the attributable act to the other person' is an accomplice. A co-perpetrator under German law is not required to have participated in the *actus reus* of the offence if they have exercised some degree of functional control over the commission of the offence." (Roxin "Crimes as Part of Organised Power Structures" 2011 9 *Journal of International Criminal Justice* 196)

Therefore, German law dispenses with the requirement of personal fulfilment of all the elements of the specific offence and acknowledges that they can be carried out with the help of a coerced human instrument or in cooperation with another perpetrator (Jain *Theorising the Doctrine of Joint Criminal Enterprise in International Criminal Law* (doctoral thesis, The University of Oxford) 2010 139). The distinguishing feature between co-perpetrators and accessories is therefore the *control of the act* (Bohlander *Principles of German Criminal Law* 161–162). As long as the accused offers a contribution that has an impact on how the common plan is shaped or enforced, and he also influences the actual mode of commission, then he will be classified as a joint principal (Bohlander *Principles of German Criminal Law* 162). Thus, the Federal Court of Justice (*Bundesgerichtshof – BGH*), Germany's highest court of civil and criminal jurisdiction, now decides whether the accused possesses *animus auctoris* based on the scope of their objective influence and control over the offence as demonstrated by the evidence, and makes its determination of who is a principal by inferring the

necessary *mens rea* from the objective evidence (Bohlander *Principles of German Criminal Law* 163). Each of the participants must view their actions as furthering those of the others and not merely to assist or help another in the execution of that other's plan (Bohlander *Principles of German Criminal Law* 163). Even a small cooperation in the preparation stage may lead to liability as a co-perpetrator if it is carried out with the will of a perpetrator (Jain *Theorising the Doctrine of Joint Criminal Enterprise in International Criminal Law* 151).

In terms of section 25(2) of the *StGB*, the co-perpetrators' individual contributions are added up, and the resulting crime is, in full, attributed to each participant insofar as their criminal intent overlaps (Krebs *Joint Criminal Enterprise in English and German Law* 184). Therefore, when determining the liability of joint principals, "the factual contributions by each of them to the commission of the offence are attributed to all others without the need to establish the commission of a full offence as such by one of them" (Bohlander *Principles of German Criminal Law* (*Studies in International and Comparative Criminal Law*) (2009) 163). The main principle of the *Mittäterschaft,* as discussed above, is the attribution of blameworthiness to all the participants of the common plan as long as their actions have contributed to the furtherance of the commission of offence (Bohlander *Principles of German Criminal Law* (*Studies in International and Comparative Criminal Law*) 163). In this regard, German law, like South African law, does not insist on a contribution by each of the co-perpetrators to the *actus reus* of the offence but it is sufficient that he or she played a role in the planning, preparation, or completion of the resultant crime. Therefore, "what is essential is mutual consent over the joint realisation of the act at the time or even before the beginning of the act" (Jain *Theorising the Doctrine of Joint Criminal Enterprise in International Criminal Law* 153). This agreement does not need to be explicit but can also take place by implication. Deviations from the common plan that are within the range of the acts with which one must normally reckon do not count as falling outside the common plan and this will be established through foresight of the deviant course of action (Jain *Theorising the Doctrine of Joint Criminal Enterprise in International Criminal Law* 154). Furthermore, a deviation from the original common plan during the joint executing action can also be introduced into the agreement by a mutual understanding (Jain *Theorising the Doctrine of Joint Criminal Enterprise in International Criminal Law* 154).

In *BGH 1 StR 93/02 (2002),* the Federal Court of Justice pointed out that the decisive factor in determining the responsibility of the participants to a crime is determined by their indifference to the conduct carried out by other participants – in other words, a conscious disregard of the consequences of unlawful conduct:

> "edoch werden Handlungen eines anderen Tatbeteiligten, mit denen nach den Umständen des Falles gerechnet werden muss, vom Willen des Mittäters umfasst, auch wenn er sie sich nicht besonders vorgestellt hat; ebenso ist er für jede Ausführungsart einer von ihm gebilligten Straftat verantwortlich, wenn ihm die Handlungsweise seines Tatgenossen gleichgültig ist (however, actions of another party involved, which must be expected in the circumstances of the case, are covered by the will of the accomplice, even if he has not specifically imagined them; Likewise, he is responsible for every

> type of execution of a crime he has approved if he is indifferent to the conduct of his comrade)."

Section 77(2) of the *StGB*, which deals with rape, conveys the seriousness of rape committed in a group as it states that "an especially serious case typically occurs if the offence is committed jointly by more than one person".

Considering this, German law advocates for the prosecution of co-perpetrators despite them not being 'directly' involved in the crime if they contributed to the furtherance of the commission of the crime and where they have accepted the crime through their indifference and, thus, associated themselves with the conduct of their co-perpetrators. In this way, "joint perpetration is a doctrine of mutual agency/act-attribution" (Ambos, Duff, Roberts, Weigend and Heinze *Core Concepts in Criminal Law and Criminal Justice, Volume 1: Anglo-German Dialogues* (2020) 115). Given the evolution of the common purpose doctrine as depicted above in German law, South Africa can now follow suit with its landmark judgment of *Tshabalala*, as the case is progressive and in line with foreign law. It has correctly been stated that "looking through the eyes of foreign law enables us better to understand our own, so looking through the eyes of foreign disciplines should similarly help us better to understand our own discipline" (Michaels "The Functional Method of Comparative Law" in Reimann and Zimmermann (eds) *The Oxford Handbook of Comparative Law* (2008) 339 342). Therefore, co-perpetrators should correctly be responsible for the execution of the crime of rape that they have approved where they are indifferent to the conduct of their co-perpetrator.

4 Conclusion

This note seeks to provide the reader with a background to the common purpose doctrine and, thereafter, to analyse the groundbreaking Constitutional Court decision in *Tshabalala*. The judgment is discussed in conjunction with a comparison to German law. The judgment can be hailed as a triumph for South Africans and, more especially, the unfortunate victims of crimes of rape and sexual assault, in that, as discussed earlier, the inconsistent instrumentality approach has been rejected. The approach inhibited the State's ability to prevent and combat gender-based violence in accordance with constitutional and international obligations (*Tshabalala v The State supra* 43). It has correctly been stated that "a theory of participation in crime must engage with the social reality of participatory conduct, in that it must capture the social significance and reflect the social meaning of the various contributory acts" (Ambos *et al Core Concepts in Criminal Law and Criminal Justice* 122). Therefore, the extension of the common purpose doctrine to the crime of rape serves a legitimate societal function in that rape constitutes a "humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim" (*S v Chapman* 1997 (2) SACR 3 (SCA) 5). Rape is considered a serious crime and it has been acknowledged by the Constitutional Court that is a significant societal scourge (*Thebus v S* 2003 (6) SA 505 (CC) 34). Therefore, the inclusion of rape in the common-purpose doctrine is in line with section 39(2) of the Constitution, which holds that the common law must be adapted so that it develops in line with the objective normative value system found in the

Constitution. The Constitutional Court correctly emphasised that the object and purpose of the doctrine is to remove an unfair result that offends the legal convictions of the community by eliminating the element of causation from criminal liability and instead imputing the *actus reus* that constituted the rape to all co-perpetrators. The constitutional values pertaining to dignity, privacy, and integrity must be afforded to all victims of such crimes. The judgment has proved that the South African judiciary is committed to developing and implementing progressive and vigorous legal principles that champion the fight against gender-based violence.

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