THE DOCTRINE OF COMMON PURPOSE AS IT IS APPLIED TO SECONDARY PARTIES IN MURDER CASES

BY

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UNZA 2013

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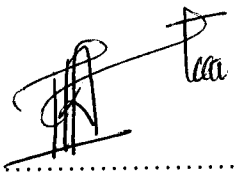

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ABSTRACT

It is common knowledge that any person that is found to be in a group of criminals must be punished even for the wrongs committed by others whilst acting together. But it has also been understood as a matter of principle that every wrongdoer should be fairly punished, to mean, being punished for the wrongs they did independently, or at least jointly with another perpetrator of the wrong in question. The degree of punishment usually depends on the degree of their involvement in the commission of the crime. Overtime, the courts have been at pain to develop mechanisms through which they would bring to book parties who did not directly commit the offence, commonly known as secondary parties. One such mechanism is the common law doctrine of common purpose and the offence of joint unlawful enterprise which statute has codified under section 22 of the Penal Code Chapter 87 of the Laws of Zambia, especially in cases of murder. The purposes of this research it to underscore the doctrine of common purpose as it is applied to secondary parties in murder cases.

This study primarily involves a desk research by review of statutory provisions, case law on murder under the offence of joint enterprise, criminal law literature on the offence murder and the doctrine of common purpose, and various internet materials. The paper first introduces the concept of common purpose and the offence of joint unlawful enterprise. It further gives the current status as it concerns the common law doctrine of common purpose in cases of murder, and this includes the state of statutory law on the subject matter. The research further analyses the judicial interpretation of the doctrine of common purpose as it is applied against secondary parties by providing an analytical approach to the Zambian precedents on the subject matter. In so doing, the research outlines the challenges, deficiencies and weaknesses of the law on common purpose evidenced in the decisions of the courts in selected Zambian cases and cases from other jurisdiction where necessary.

The research indicates grey areas of the doctrine of common purpose and the law on joint unlawful enterprises that requires an overhaul for purposes of doing justice in cases concerning secondary parties, especially where death ensues. In the light of the said adequacies of the law, the research identifies workable recommendations which range from mere advice to the people and institutions involved in prosecuting accused parties to recommendations to the legislature to codify and simplify the law on common purpose and the offence of join unlawful enterprise into statutes. The research has also endeavoured to remind the courts and the office of the DPP that their role is not to persecute, but prosecute offenders hence need to be alive to the challenges of the law on the doctrine of common purpose.

DEDICATION

This Research Paper is lovingly dedicated to my parents, wife and children, who have been my constant source of inspiration. They have given me the drive and discipline to tackle any task with enthusiasm and determination. Even at the time when they needed me the most, they endured without me so that I could do my research. Without their unconditional and unfailing love and support this project would not have been made possible.

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My gratitude goes to God Almighty for presenting me a gift of life and this great opportunity to contribute to the best of my abilities in the development of the law, and also contribute to the legal fraternity as a whole.

I am also heartily thankful to my supervisor, Ms. Felicity K. Kalunga, whose encouragement, guidance and support from the initial to the final level enabled me to develop an understanding of the subject. I sincerely hope that her excellence has been unveiled in its content. I wish to extend my eternally appreciations to my wife and children that have been there all the times, you guys mean so much to me and I owe you all my credits in academic endeavours. I cannot afford to go on without recognising my late father, my mom, aunties, uncle and my loving sisters and brothers. You have been there to offer inspiration and strength at all times. You taught me that there are no shortcuts to any place worth going, and I believed in your words. I am dearly grateful to you all.

My further regards goes to my truly great friend Borniface Ngalasa who has made available his support in a number of ways. Lastly, I offer my regards and blessings to all of those who supported me in any respect during the completion of this project, and my pursuit of my Bachelor of Laws Degree. God bless you bountifully.

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CHAPTER ONE

GENERAL INTRODUCTION

1.0 INTRODUCTION

In Zambia, there has been an increase of criminal activities which have led to people losing their lives. As such, those responsible for causing the death of others are usually charged with the offence of murder or manslaughter depending on the interpretation by the prosecution and the court of facts of each case. Usually the interpretation of the facts of every case is based on the background that criminal law requires that two elements of the crime in issue be identified before one is found criminally liable. Firstly, the conduct that is [legally] prohibited, which conduct is known in the traditional sense as *actus reus*. This comes from a Latin word that means 'a guilty act' or 'forbidden conduct' which differs from crime to crime and may not always be an act or omission, but can also be a state of affairs such as carrying an offensive weapon. The second element required is known as *mens rea*, a term used to refer to the state of mind of faulty that is required in the definition of the crime. The requirement of the two basic elements is based on the criminal law principle that there can never be such a thing as legal guilty where there is no moral guilty. This principle is admirably expressed in a Latin maxim of *actus non facit reum mens sit rea*.[1] Therefore, the prosecution have the duty to prove the presence of the required prohibited act and the evil state of mind for them to secure a conviction for an appropriate crime.

The issues of aggravated robbery and other criminal activities where an individual or a group of people have been killed by a mob or by a syndicate of organised crime poses a legal challenge for the prosecution to apply and prove the elements of murder to each and every

[1] S.E. kulusika, *Text, Cases and Materials on Criminal Law in Zambia* (Lusaka: UNZA Press, 2005),52

co-accused person in order to secure a conviction. To avoid this route, the prosecution seem to prefer to charge all those suspected to have been involved in the death of the deceased all together with the offence of Joint Unlawful Enterprise under section 22 of the Penal Code[2] which states that:

> 'When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.'

In this regard, the basic characteristic of a joint unlawful enterprise is that the venture must be undertaken by two or more persons. Their purpose, which is secured by an agreement prior to or at the time of the commission of the offence, is to carry out a common purpose, common intention, common design, or a joint venture or enterprise. In this sort of joint unlawful enterprise, a secondary party is liable for the offences committed by the principal in carrying out that purpose, even unforeseen ones (known as 'collateral offences'). The secondary party is guilty irrespective of the actual part he or she played in the joint venture. What this means is that where a member of an unlawful enterprise causes death, members of the joint venture can also be found guilty of murder even though the *actus reus* of murder could not be attributed to them.[3]

The Interpretation of Section 22 of the Penal Code is found in the case of *Winfred Sakala v The People*[4], where the Supreme Court of Zambia said;[5]

> 'In our considered view, the section clearly contemplates that liability will attach to an adventure for the criminal acts of his confederates, which will be considered to be his

[2] Cap 87 of the Laws of Zambia
[3] S.E. kulusika, *Text, Cases and Materials on Criminal Law in Zambia* (Lusaka: UNZA Press, 2005), 153
[4] (1987) Z.R 23 S.C
[5] Winfred Sakala v The People (1987) Z.R 23 S.C

> acts also, if what those confederates have done is a probable consequence of the prosecution of the unlawful common design. In this regard, liability will attach for any confederates' criminal act which is within the scope of the common unlawful purpose and this will be whether the act was originally contemplated or not. Where the act was not originally contemplated, an adventurer will only be relieved of the liability if the criminal act of his confederates falls wholly outside the common purpose'

This is in contrast with section 200 of the Penal Code[6] in which the prosecution have to prove both *actus reus* and the *mens rea* in order to discharge the burden of proof for the accused to be found guilty of murder. In the case of *The People v Njovu*[7], the Judge in relation to standard of proof stated that, '....the standard of proof which must be attained before conviction is such a standard as satisfies me of the accused's guilt beyond all reasonable doubt so that I can be sure that he did murder...'

However, where murder is occasioned by joint unlawful enterprise, the doctrine of common purpose requires that the judge need not be sure that all the accused participated in the killing of the victim in order to secure a conviction. All the judge needs to be sure about is that one of them did murder and on that basis attribute the blame of causing death to everyone charged with the offence.

1.1 STATEMENT OF THE PROBLEM

The problem of prosecuting murder cases is that the victim is not there to give an account of what and who caused his or her death. This is left to the state police to gather evidence for submission to the state prosecutors so that the same is used in the prosecution of those who are jointly accused of murder.

[6] Chapter 87 of the Laws of Zambia
[7] (1968) ZR 132 (HC)

In section 200 of the Penal Code, murder is committed when there is *actus reus* of homicide with malice aforethought.[8] However, when applying the law of joint unlawful enterprise under the doctrine of common purpose, a secondary party is liable for the offences committed by the principal who caused the death of a person even when it was unforeseen that the principal will act in such a manner. In *Moloney v R*[9], foresight was described as a virtually or highly probable consequence which was neither intention nor the equivalent of the intention, and as such could be imputed on an accused in any case. Further to this is the fact that the test of foreseeability is a subjective one, that is to say, it is case specific which has to be distinguished from case to case.

Therefore, if the definition of murder is the unlawful premeditated killing of one human being by another, then why should the secondary party whose intention at the beginning was not to cause grievous bodily harm or kill be charged and convicted of murder arising from the *actus reus* of the principal? It can thus be argued that the law of joint enterprise as it stands today perpetuates the miscarriage of justice in that it is not about finding the actual guilty person and suitably punishing them, but about administering the blame on all defendants and punishing them all.

Consequently, the negative effect of the law of joint enterprise is that it lowers the standard of proof in that once the prosecution have proved their case against the principal then all the co-accused will be held responsible for murder despite not taking an active role in causing the death.

Furthermore, it has the effect of shifting the burden of proof from the prosecution to the accused secondary parties. All that the prosecution must do is to prove the case beyond

[8] Cap 87 of the Laws of Zambia
[9] [1985] AC 905

reasonable doubt against the principal and by so doing they would have proved their case against the co-accused secondary party. Thus for the secondary party, it is up to them to prove their innocence even when the prosecution have not proved a case against them individually. This has the effect of defeating the principle of innocent until proven guilty, the backbone of our legal system as enshrined in the Republican Constitution.[10]

1.2 OBJECTIVES AND PURPOSE OF THE STUDY

The general objective of the study is to critically review the law of joint enterprise on secondary liability and how the courts have applied it and show that it is a misnomer because the doctrine of common purpose concerns liability for an offence that is a departure from the agreed joint venture. Furthermore, to show that the doctrine is so unclear, or so complex, that its use could potentially cause injustice to the accused persons. In this regard, the study aims at showing that;

i. the law of joint enterprise as it stands today perpetuates the miscarriage of justice.
ii. the law of joint enterprise has the effect of lowering the standard of proof which the prosecution is required to adduce against the secondary party's involvement in murder in order to secure a conviction.
iii. the law of joint enterprise has the effect of shifting the burden of proof from the prosecution to the accused, secondary parties.

The study is going to focus on the form of secondary liability whereby a person who agrees to commit a crime with another becomes liable for all criminal acts (even the unforeseen acts) committed by the other person (the principal offender) in the course of their joint criminal venture.

[10] The Constitution of Zambia, Cap.1, Article 18(2)a

1.3 SIGNIFICANCE AND JUSTIFICATION OF THE STUDY

The study is of great significance in the field of criminal law and the administration of justice as a whole. In the field of criminal law the aspect of joint enterprise which has come in for most criticism is the mental state required for a finding of guilt or *mens rea.* This type of joint enterprise essentially relies on the court determining what the offender could have anticipated or foreseen rather than what was explicitly agreed or intended. This implies that joint enterprise in this respect departs, as regards secondary liability, from the standard requirement of *actus reus* and *mens rea* to prove liability of murder on the defendant. When it comes to the administration of justice, the study is important to institutions such as the Director of Public Prosecutions in that it is going to recommend guidance on the use of the doctrine when charging suspected offenders in murder cases.

1.4 RESEARCH DESIGN: OVERVIEW OF THE CHAPTERS

The research is broken down into the following chapters:

Chapter 1: General Introduction

This chapter gives a general introduction to the research and in general terms give the synopsis of the research. It also deals with the basic aspects of the research which include the statement of the problem, objectives the research questions, significance of the study, the methodology and the chapter lay out.

Chapter 2: The Doctrine of Common Purpose

This chapter looks at the doctrine of common purpose in relation to the offence of murder in more detail.

Chapter 3: Foresight and the requisite *Mens Rea* of a Secondary Party

In this chapter, the issue of the standard of proof in criminal cases, particularly the mental state required for finding of guilty of a secondary party, or *mens rea* in joint unlawful enterprises is considered at length in the context of the doctrine of common purpose.

Chapter 4: Review of the Zambian Case Law on Common Purpose

This chapter critically analyses a number of cases in Zambia in order to understand the legal position as regards murder and foresight of consequences under the offence of joint unlawful enterprise and the doctrine of common purpose.

Chapter 5: Conclusion and Recommendations

This chapter gives recommendations and conclusion regarding the findings of the study on the topic of joint unlawful enterprise and the doctrine of common purpose.

1.5 CONCLUSION

This chapter has endeavoured to make known the contents and structure of this research paper. To this effect, this chapter has given a brief introduction of the doctrine of common purpose as it relates to secondary parties. The chapter has further given the direction in manner in which the topic at hand will be discussed in the following chapters. The next chapter endeavours to give a broad understanding of the doctrine of common purpose and the offence of joint unlawful enterprise with regards to secondary parties in murder cases.

CHAPTER TWO

THE DOCTRINE OF COMMON PURPOSE

2.0 INTRODUCTION

The various doctrines of complicity, the state of being involved with others in an illegal activity or wrongdoing, specify methods by which criminal liability may be extended to individuals concerned with or involved in the participation of the commission of crimes. It enables criminal liability to attach to persons whose actions and thoughts would not normally satisfy the physical and mental components of the offence charged.

Depending on the extent and nature of the accused person's involvement in the commission of the crime in contention, their liability may be direct (as a principal offender) or derivative (as a secondary offender). Participants who act in concert or have a common purpose may each be treated as principal offenders (direct liability). As such the accused can be guilty of the principal's offence even if he did not participate in the killing as a joint perpetrator (even if he did not cumulatively perform the *actus reus*).[11] Where the accused acts in concert with another, the actions of the other are attributed to each party to the common enterprise. It does not matter which accused performed the *actus reus*, they will all be guilty of the principal offence if they agree to perform it and one of them does.[12] The principle was ably stated by Smith J when he said that:[13]

> 'if two (2) or more people reach an understanding or arrangement that together they will commit a crime and then, while that understanding or arrangement is still on foot and has not been called off, they are both present at the scene of the crime and one or the other of them does or they do between them in accordance with their understanding or agreement all the things that are necessary to constitute the crime,

[11] MJ Allen and S Cooper, *Elliot and Wood's Cases and Materials on Criminal Law,* Tenth Edn (London: Sweet & Maxwell, 2010), .329
[12] MJ Allen and S Cooper,.330
[13] Lowery and King (1973) 3 All ER 662

they are all equally guilty of the crime regardless of what part each played in its commission.'

It is against this background that this chapter will discuss liability of a secondary offender in relation to murder in the context of participants who undertake a joint criminal enterprise to commit a crime together where death results. The form of secondary liability whereby a person who agrees to commit a crime with another becomes liable for all criminal acts committed by the other person (the principal offender) in the course of their joint criminal venture.

2.1 DOCTRINE OF COMMON PURPOSE

The doctrine of common purpose applies when one party to a joint criminal enterprise commits a crime that goes beyond the original agreement. It thus provides a method for determining whether others can be held liable for the further crimes, enlarging the scope of criminal responsibility to include other parties to the agreement.[14]

It has been argued that the common purpose doctrine could be treated as an extension of the acting in concert doctrine. However, it also expands abettor liability by providing a different way of imposing criminal liability upon an abettor in respect of the substantive crime he abetted. Whereas abettor's liability is focused on what the accused did or caused in respect of the commission of the principal offence, the doctrine of common purpose looks to what the accused agreed to do with others.[15]

[14]CMV Clarkson and HM Keating and SR Cunningham, *Text and Materials on Criminal Law* (Sweet & Maxwell, 2010), 202

[15]CMV Clarkson and HM Keating and SR Cunningham, 205

To this effect, not all situations of participation in crime will be involving individuals acting in concert. Participants are only said to be acting with a common purpose when the following elements are present:[16]

i. **Agreement** – participants reach an agreement (or understanding or arrangement) that criminal acts will be committed by one or more of the parties.

ii. **Offence** – while the agreement is in effect, a crime is committed by one or more of the parties to it.

iii. **Scope** – the crime committed falls within the scope of the agreement (the common purpose of the group).

In this regard, the main feature of the doctrine of common purpose is that all parties to a criminal agreement are deemed equally liable for the criminal acts of the other parties within the scope.[17]

The essential ingredient of joint unlawful enterprise is a shared common purpose or shared common intention, and each one of the party knows that the other members intend the same thing. All of them will be liable for whatever offences the others commit or may commit which fall within the scope of the common purpose.[18]

It is noted that an accessory who foresees a risk that the principal offender might, with the *mens rea* of murder kill the victim, is liable for murder, even if she or he urged the principal

[16]CMV Clarkson and HM Keating and SR Cunningham, *Text and Materials on Criminal Law* (Sweet & Maxwell, 2010), 205

[17] S.E. Kulusika, *Text, Cases and Materials on Criminal Law in Zambia* (Lusaka: UNZA Press, 2005), 153

[18] S.E. kulusika, *Text, Cases and Materials on Criminal Law in Zambia* (Lusaka: UNZA Press, 2005), 155

not to kill. The result was foreseen and the fact that she or he was a party to an unlawful enterprise knew that this could happen.[19]

In most cases, it is easy for the courts to identify the elements of agreement, and that of offence. However, the challenge is in identifying whether or not the crime in issue falls under the scope of the agreement or an additional crime within the scope of carrying out the common purpose. Scope in this case is wide to the extent that, at common law the significance of joint enterprise has been the rule that if several persons act together with common intent, every act in furtherance of such intent by any one of them is an act done by all[20]. This therefore entails that in the actual sense, the term 'scope' is not limited, but any other act that would be reasonably seen to be in continuance of the shared common intent will fall within the scope.

It is evident that the most important element is the mental state or *mens rea* of the secondary party. The mental standard required of an accused alleged to have acted with common purpose of another is foresight of the possibility that the further offence would be committed as a consequence of the common purpose. A possibility in this case is substantial risk – an act contemplated as a possible incident of the originally planned venture. It should be noted that foresight of the additional crime's possibility is an individual assessment and that such contemplation does not need to be shared by all participants, it is sufficient that the accused had the foresight. In the same vein, the actual foresight of the possibility that the crime charged will be committed as part of the criminal venture is sufficient to establish the *mens rea* required by the doctrine of common purpose[21].

[19] R v Powell and Another (1997) 4 All ER 545
[20] Macklin (1838) 2 Lew CC 225
[21] Johns v R (1980) 143 CLR 108

Their Lordships, unanimously held that under the doctrine of common purpose, a secondary party will not be held accountable for the crimes committed by the principal offender where the court finds that the principal offender in the commission of the further crimes did so deliberately and if his/her acts where that they were contrary to the purpose of the joint enterprise. This is so because the principal committed an offence that is outside the scope of the joint enterprise[22].

Where the accused foresees that in the occurrence of the enterprise the other party may carry out, with the required *mens rea*, an act which brings about another offence, such an accused is liable for that offence (the other offence) if committed by the other party in the course of the unlawful enterprise. However, where the risk was remote, the secondary party may argue that the act that resulted in the commission of the second crime was outside the scope and in doing so will be escaping criminal liability.

In this regard, common purpose is seen to provide a lower mental standard for the prosecution to prove, and may thus be a more appropriate starting point in certain circumstances. As it has been alluded to, the mental requirement in respect of the offence remains that of the principal offender. However, conviction of other parties to the agreement only requires foresight of the possibility that the *actus reus* of the further crime would be committed. Further, liability of participants is direct (and not derivative), so accomplices can be convicted notwithstanding acquittal of the principal.

Under the doctrine of joint unlawful enterprise, a secondary party may escape liability where s/he proves to the court that in the commission of the second crime by the principal, the acts of the principal where such that they were unforeseen fundamental different acts to which the secondary party can be held reasonably accountable for. For instance, where the joint

[22] Davies v DPP (1954) 1All ER 507 (HL)

enterprise was to assault the victim with sticks and hit his legs, the acts of the principal offender who deliberately hits the victim on the head causing the victim to die of skull fracture will amount to fundamental departure from the common purpose and would absolve the secondary party, who did not foresee nor contemplate such a deliberate departure from the common agreement, of liability.

Departure from the initial unlawful agreement can also happen by way of accidental departure, in approving the above position, E.S Kulusika[23], says, "...where a common design is to beat up X, and in the course of beating up Z pushes X who falls from which he died. Both Z and his accessory S will be liable for the intended death." In his illustration, he further says that, "...the offence would be murder if Z was intending to do grievous bodily harm and S would be guilty of murder, if the common design was to inflict grievous bodily harm in the beating." Clearly, if the common design was to beat up X without causing grievous bodily harm, the acts of Z would be adjudged as 'fundamental different' from the common purpose.

Further, a secondary party may be exempted from criminal liability for an offence committed in the course of a joint unlawful enterprise if the intention to abandon the enterprise was communicated to the principal offender before the commission of the crime. This principle however does not apply to a principal offender. This means that a secondary party can withdraw his/her participation in the crime and use that as a defence but the same does not apply to a principal offender. However, even for a secondary party to escape criminal liability based on withdrawal there are certain requirements that the secondary party must satisfy.

The first requirement of abandonment or withdrawal in a joint unlawful enterprise is the communication of the secondary party's intention to withdraw in an 'unequivocal and timely

[23] S.E. Kulusika, *Text, Cases and Materials on Criminal Law in Zambia* (Lusaka: UNZA Press, 2005), 153

way'.[24] This means that mere disclaimer may not be sufficient to absolve criminal liability of a secondary party. Kulusika argues that according to some authors, running away from the scene of the principal offence may not suffice; even calculated staying away from the place at which the principal offence was to be committed would not affect the criminal liability of the secondary party[25]. The law demands that the said communication be done on time, and be done effectively, for instance, before the principal crime is committed.

Another interpretation of an equivocal withdrawal demands that the secondary party intending to withdraw should take all necessary steps to prevent the commission of the crime[26]. These steps may include but are not limited to alerting the victim so that the victim may take precautions, or may even take the responsibility of informing the necessary law enforcing agents like the police of the plan to commit the offence. Therefore, the court will be hesitant to accept and be compelled by any evidence less than the aforementioned. This means that 'unequivocal withdrawal' is at law given a very strict interpretation so as to eliminate mere rhetoric having not participated, or moved away.

Unequivocal withdrawal applies in cases where the principal offence has not been committed. The question that remains to be answered is whether a secondary party can have a defence in a case where s/he discontinues the commission of the crime, and if they can, what then do they have to do in order to escape criminal liability? The law provides that the secondary party must do something credible to counteract his/her previous contribution to the principal offender. Where participation is by giving assistance and encouragement, the assistance must be discontinued instantly. Similarly, the encouragement must be undone by means of a string statement that the principal offender must stop, or discontinue what s/he is doing or about to

[24] *Simester, A.P and Sullivan, G.R., Criminal Law: Theory and Doctrine (2nd ed.), Oxford: Hart Publishing, (2003) p. 235*
[25] S.E. Kulusika, *Text, Cases and Materials on Criminal Law in Zambia* (Lusaka: UNZA Press, 2005), 157
[26] Rv Perman [1996] Cr.App. R.24

do. In the same vein, physical intervention must be employed for purposes of making the withdrawal effective. Where the participation of the secondary party was by way of counselling, the secondary party must discourage the principal offender from proceeding with the counsel.

2.2 THE LAW IN ZAMBIA

The law in Zambia on joint enterprise is founded on section 22 of the Penal Code. The section reads:[27]

> 'when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such a purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence'

The particular context in which the most difficult problems arise regarding the application of section 22 of the Penal Code is this: two or more persons agree to commit a certain crime (the primary crime such as aggravated robbery), in the course of which another crime (the secondary crime such as murder) is committed by any member of the group (the actual doer). The question is under what conditions would the rest of the group (the common intenders) be liable for the secondary crime? Section 22 has the potential to make each and every member of the group liable for murder as well.

The Zambian courts have tried to define the scope of common purpose where death arose from an offence of joint unlawful enterprise. In *Mutambo and 5 Others v The People*[28], Charles J, in relation to common intention by joint offenders said at pages 25 and 26 that to bring an appellant within section 22 of the Penal Code as being guilty of an offence, the following facts must have been proved against him beyond reasonable doubt:

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[27] Cap 87 of the Laws of Zambia
[28] (1965) ZR 15

i. That two or more persons, of whom the appellant was one, each formed an intention to prosecute a common purpose in conjunction with the other or others.

ii. That the common purpose was unlawful.

iii. That the parties, or some of them, including the appellant, commenced or joined in the prosecution of the common purpose.

iv. That, in the course of prosecution of the common purpose one or more of the participants murdered a person.

v. That the commission of the murder was a probable consequence of the prosecution of the common purpose. It would seem that a probable consequence is that which a person of average competence and knowledge might be expected to foresee as likely to follow upon the prosecution of the particular purpose although the consequence was not intended or foreseen by the appellant[29].

The learned judge further pointed out two points affecting the application of section 22 of the Penal Code which must be noted:

i. The formation of the common purpose does not have to be by express agreement or otherwise premeditated; it is sufficient that two or more persons join together in the prosecution of a purpose which is common to him and the other or others, and each does so with the intention of participating in that prosecution with the other or others.

ii. It is the offence which was actually committed in the course of prosecuting the common purpose which must be a probable consequence of the prosecution of the common purpose. If a different offence to that committed was a probable consequence an accused cannot be convicted under the section.

The legal principles in the *Mutambo*[30] case were used to determine the case of *Mwape v The People*[31] in which the court tried to look at the issue of scope. In that case, the appellant, together with other persons, broke into the ZCBC shop in Mporokoso, blew up the safe, and obtained a large amount of money contained therein together with the other goods. It was alleged that they attacked the security guard, stabbing him in the leg and generally using violence on him in order to execute their objective. The appellant was convicted of

[29] Mutambo and 5 Others v The People (1965) ZR 15
[30] Mutambo and 5 Others v The People (1965) ZR 15
[31] (1976) ZR 160

aggravated robbery from the confession he gave which was accepted by the court. The question before the court was whether or not the appellant was guilty of the crime or other offence since he claimed to have acted as a driver and did not assault the night watchman but remained in the car. Stated another way, whether the case which the appellant had to answer was that of the violence which was used against the watchman named in the information. The court held that the appellant had no intent to harm the night watchman and consequently cannot be guilty of aggravated robbery instead he was convicted of store-breaking and theft contrary to section 303(a) and 272 of the Penal Code.

However, in *Winfred Sakala v The People,*[32] a case with similar facts to that of *Mwape,*[33] in the night in question, Isaac Banda, a night watchman, was on duty guarding the shop premises and other property of the Eastern Cooperative Union when someone stole up to him, took his axe, and struck him viciously on the head, causing severe injuries and rendering him insentient. The assailant was one of the three individuals (who included the appellant) who had arranged to steal some money which was in the shop. In interpreting section 22 of the Penal Code, the court said, "In our considered view, the section clearly contemplates that liability will attach to an adventurer for the criminal acts of his confederates, which will be considered his also, if what those confederates have done is a probable consequence of the prosecution of the unlawful common design."

In comparing the decision in the case of *Sakala* with *Mwape,*[34] it was argued in the *Sakala*[35] case that the common purpose was to break in and to steal the money without causing injury to the watchman and that the brutal attack on the watchman fell outside the scope of the common purpose. The court however held that the fact that he was actually assaulted and

[32] (1987) ZR 23
[33] Mwape v The People (1976) ZR 160
[34] Mwape v The People (1976) ZR 160
[35] Winfred Sakala v The People (1987) ZR 23

rendered incapable of preventing the theft, or raising an alarm, did not take that act out of the scope of the common purpose but was clearly a probable consequence of deliberate setting out to steal property known to be under the immediate and personal care and protection of the watchman whose specific duty it was to prevent and to deter marauders of the appellant's ilk from taking the employer's property.

2.3 CONCLUSION

This chapter has endeavoured to give a common law and statutory definition and elements of the doctrine of common purpose. The chapter has further given the scope of common purpose in the light of court decisions. From the foregoing, it is evident that there is still a lot to be desired as far as the definition and determination of scope is concerned. This arises from the fact that issues of scope are subjective and varies from cases to case and from time to time. This has resulted in inconsistencies in the manner in which the courts have adjudicated on matter of scope. The Chapter has also reviewed that the central or principle issue for consideration is the appropriate standard that should be adopted for foresight of consequences at common law where death has arisen out of an unlawful joint enterprise and the complicity or otherwise of the secondary party is in issue.

CHAPTER THREE

FORESIGHT AND THE REQUISITE *MENS REA* OF A SECONDARY PARTY

3.0 INTRODUCTION

It is trite law that for a person to be criminally liable, they should have both an unlawful act, and an evil mind. Central to this Chapter is the standard of proof in criminal cases, particularly the mental state required for a finding of guilty, or *mens rea* in joint unlawful enterprises. This is because as has been stated above, this type of joint enterprise relies on the court determining what the offender could have anticipated or foreseen rather than what was explicitly agreed or intended. In order to put the arguments in their true perspective, it is necessary first to consider the common law position relating to murder and foresight in cases where the killer acts alone compared with cases involving joint unlawful enterprises.

3.1 FORESIGHT OF DEATH, MURDER AND PROBABLE CONSEQUENCE

According to the renowned authors of Criminal Law in Zambia: Texts, Cases and Material[36], in Zambia, the *mens rea* for murder is more complex than under English criminal law. The English criminal law defines *mens rea* in general terms that the accused person must either:

i. Intend to cause death, or

ii. Intend to cause grievous bodily harm.

The complexity of *mens rea* in Zambia is seen in the wording of section 204 of the Penal Code Cap 187 of the Laws of Zambia. Accordingly, the reading of section 204 would review that there are three kinds of malice aforethought, instead of the two as is the case in the English criminal law.

[36]S.E. Kulusika, *Text, Cases and Materials on Criminal Law in Zambia* (Lusaka: UNZA Press, 2005), 451

In its verbatim, the section states that:

> Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstance:
>
> a) An intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;
> b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such a person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
> c) An intent to commit a felony;
> d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

Of concern in the cited section are subsections (a), (b) and (c) which bring out the issue of knowledge and intention. In describing 'malice aforethought', the High court in the case of *The people v Njovu*[37] stated that, "...so far as this case is concerned, to establish malice aforethought, the prosecution must proof that the accused either had an actual intention to kill or to cause grievous harm to the deceased, his wife, or that he knew that what he was doing would be likely to cause death or grievous harm to someone".

It can be observed from the above section that malice aforethought means the mental state of the accused person at the time of the commission of the alleged crime recognised by criminal law statutes; for the present purposes, as sufficiently blameworthy to make a homicide murder.

In relation to foresight of consequences in a joint unlawful enterprise, in *Dickson Sembauke Changwe and Ifellow Hamuchanje v The People*[38], the Supreme Court held that;

> "It is a question of fact whether a reasonable person must know or foresee that serious harm is a natural and probable consequence of throwing someone out of a moving train. If, armed with this realisation and foresight, and knowing that serious

[37] (1968) ZR 132 (HC)
[38] (1988 - 1989) Z.R. 144 (S.C.)

harm could result, an intent founded on knowledge of the probable consequences will be evident and will be sufficient to satisfy section 204 of the Penal Code."

This was a case where the appellants, railway police officers, when carrying out their duties found a passenger travelling without a ticket. After questioning the passenger the police officers manhandled him and led him away to another compartment where they accused him of stealing a ride. The passenger called the appellants a derogatory name and tried to humiliate them whereupon the appellants picked him up bodily and threw him out of the carriage whilst the train was moving fast. Soon afterwards the train was stopped and reversed and a search made for the passenger. The time was dark and the passenger was not then found but was found the next day but later he died in hospital. The appellants were charged with and convicted of murder.

The issue of foresight of death or grievous bodily harm, as opposed to intention to kill or effect bodily harm, was further considered by the House of Lords in *Moloney v R*[39]. In that case, the appellants had been drinking heavily with his stepfather to whom he was deeply attached. The stepfather said he could not overdraw his stepson and had requested him to take two shotguns which were in the house so that his claim could be put to rest. The appellant claimed that he did not intend to kill the victim, in his words, he said, "I just pulled the trigger and he was dead".

The trial judge said that when the law requires that something must be proved to have been done with particular intent meant that a person intends the consequence of his voluntary acts when he desires it to happen, whether or not s/he foresees that it will probably happen, and also where he foresees that it will happen, whether s/he desires it or not.

[39] [1985] AC 905

Further, it was the opinion of their Lordships that only in exceptional cases should judges direct reference to foresight of consequences. On the issue of what constituted a natural and probable cause, Lord Bridge said of word natural so as to convey the idea that in the ordinary course of events a certain act will lead to a certain consequence unless something unexpected supervenes to prevent it. From his words, one might be tempted to almost say that, if the consequence is natural, it is really useless to speak of it as being probable.

In the *Moloney* case, foresight was described as a virtually or highly probable consequence which was neither intention nor the equivalent of the intention. Intention covers the state of mind where the accused person aims or decides to kill (direct intent).

However, in *R v Hancock*[40], a subsequent decision of the House of Lords, it was held necessary to direct the jury where foresight is concerned that the greater the awareness of the probability of a consequence, the more likely it was that the consequence was foreseen; and that, if it were foreseen, the more likely it was intended. *Hancock* was a classic case involving foresight and murder. There, the respondents who were miners on strike pushed a block of concrete and a concrete post over a highway from the bridge. The block hit the driver and he died. The respondents claimed that they did not intend to harm anybody, since they thought that the block and post where positioned over the middle lane when the taxi was being driven nearside lane. Their intention, they claimed were only to block the road.

Australian courts have arrived at the similar conclusion. In *R v Jakac*[41], the full court of the Supreme Court of Victoria ruled that a person would be guilty of murder if he foresaw death or grievous bodily harm as a natural and probable consequence of his acts. In this case, the court opted for the standard of probability or likelihood, rather than possibility.

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[40] [1986] 1 AC 455
[41] [1961] VR 367

A recent case on the issue of foresight and murder is the case of *R v Crabble*[42]. In that case, a disgruntled truck driver, who was heavily intoxicated, had been physically ejected from a hotel when he drove through the walls of the hotel and bar killing five persons and injuring others. In a redirection, the judge suggested that a person could be guilty of manslaughter if he foresaw the possibility that people might be in the bar. In this case, emphasis was put on the principle that that the test of foresight when recklessness and murder was in issue was foresight of probable consequence. His Honour when delivering the judgment of the court, said:

> "If an accused knows when s/he does an act that death or grievous bodily harm is a 'probable' cause consequence, s/he does that act expecting that death or grievous bodily harm will be the likely result, for the word probable means likely to happen. That state of mind is comparable with an intention to kill or do grievous bodily harm. There is a difference between the case in which a person acts knowing that death or serious injury is only a possible consequence and where s/he knows that it is a likely result."

In another case, Brennan J defined intent as connoting a decision to bring about a decision so far as it is possible to do so, to bring about an act of a particular kind or a particular result[43]. According to Brennan, foresight of a virtue certainty is sometimes called 'oblique intent'. Oblique intent also is used to refer to the state of mind which occurs when there is no possibility of realising one's aim.

From the cases above, it can be said that the *mens rea* of murder is satisfied if intention to kill or cause grievous (bodily) harm is proved. As such, an accused person intends death or grievous harm if (i) it is her aim, objective or purpose to bring that result or consequence about, or (ii) she foresees them (aims) as virtually certain to result from her acts.

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[42] (1985) 59 ALJR 417
[43] He-Kaw The v R (1985) 157 CLR 523

From this analysis, it has become, apparent that courts in Zambia and other jurisdictions have striven to insist upon a high level of foresight and contemplation of death or grievous bodily harm as a probable consequence, before a person who kills another can be found guilty of murder. Courts have repeatedly held that the position that foresight of death or grievous bodily harm following upon a course of unlawful conduct is insufficient to constitute murder. Rather, in those circumstances the appropriate verdict is manslaughter[44].

3.2 COMPLICITY FOR MURDER AND SECONDARY PARTIES TO JOINT ENTERPRISES AT COMMON LAW

If the above approach of the courts at common law in regard to murder, is correct, as it is submitted it is, then it would seem logical that a similar approach should be adopted at common law in regard to joint unlawful enterprises and the complicity of secondary parties. The reason for this is that the secondary party, who embarks upon a joint enterprise involving a prospect of violence, has less control over the ultimate death than the person whose actions directly cause death. If the law insists on a high standard in relation to the latter, in cases involving foresight as opposed to actual intention, then so it should require a high standard in the case of secondary parties.

When confronted with a situation which involved a joint unlawful enterprise, in the case of *Mutambo and Five Others v The People*[45], the Court of Appeal said that the formation of the common purpose does not have to be by express agreement or otherwise premeditated; it is sufficient if two or more persons join together in the prosecution of a purpose which is common to him and the other or others, and each does so with the intention of participating in that prosecution with the other or others. Further, the court said that it is the offence

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44

45 (1965) Z.R. 15 (C.A.)

which was actually committed in the course of prosecuting the common purpose which must be a probable consequence of the prosecution of the common purpose. If a different offence to that committed was a probable consequence an accused cannot be convicted under the section. Thus, if the offence actually committed was murder but the offence which was a probable consequence was manslaughter, the section does not apply.

That is not to say, however, that the secondary party who contemplates that a person may be killed, or seriously injured during the course of a hazardous and unlawful enterprise should escape the consequences of embarking upon the enterprise entirely. For having embarked upon an enterprise that envisaged violence, that person should be found guilty of manslaughter if death arose as a consequence of the common venture, albeit that it might be an unlikely consequence.

Further, even if the secondary party did not appreciate that death or grievous bodily harm was a possible consequence, or did not turn their mind to the question, s/he should be found guilty of manslaughter if death be fairly within the scope of the joint enterprise because they voluntarily embarked on a venture which had the potential for violence. Only if death was a total departure from the common purpose should the person be acquitted of both murder and manslaughter, at common law.

In adopting the dictum of Starke, J., in *Brennan v The King*[46], the court in the *Mutambo* case, as it relates to foresight, averred that it would seem that a probable consequence is that which a person of average competence and knowledge might be expected to foresee as likely to follow upon the prosecution of the particular purpose; though it may be that the particular consequence was not intended or foreseen by the appellant.

[46] Brennan v The King, 1936, 55 C.L.R. 253 H.C

Thus in the case of *Winfred Sakala v The People*[47], the Supreme Court held that the fact that the watchman was axed contrary to the alleged agreement does not absolve the appellant of guilty intention that some form of aggravated robbery should take place if necessitated by the watchman's possible vigilance. In this case it was essential for the carrying out of the plan that access to the premises be attained regardless of any possible resistance by the watchman. Therefore, the fact that he was actually assaulted and rendered incapable of preventing the theft, or raising an alarm, did not take that act out of the scope of the common purpose but was clearly a probable consequence of deliberately setting out to steal property known to be under the immediate and personal care and protection of the watchman whose specific duty it was to prevent and to deter marauders of the appellant's ilk from taking the employers' property[48].

Looking further to other jurisdictions, decisions at common law in both Australia and elsewhere have not adopted the approach espoused above. In two decisions of the High Court of Australia, *Johns v R*[49] and *Miller v R*[50], and in the Judicial Committee of the Privy Council in *Chan Wing-Siu v R*[51], an appeal from Hong Kong, the approach has been taken that a secondary party will be guilty of murder even though he only foresaw death or grievous bodily harm as a possible consequence of the common enterprise.

In *Johns v R*[52] two men, Johns and Watson, set about robbing a jeweller Morris who, they believed, carried large amounts of money and jewellery with him. Watson had informed Johns that he was going 'to hold him up, tie him up and take the money and stuff. To Johns knowledge, Watson always carried a pistol. The plan involved Watson returning to Johns

[47] (1987) ZR 23
[48] Ibid.
[49] [1980] 28 ALR 155
[50] [1983] 2 AC 161
[51] [1980] AC 168
[52] [1980] 28 ALR 155

car, depositing the stolen property and making his 'get-away'. Johns knew that Watson was quick-tempered and capable of becoming violent. Watson had told him that he would not stand for any nonsense and that Morris was always armed and would not stand mucking around if it came to a showdown. Johns left Watson and one other to carry out the robbery. They accosted Morris whom they discovered was not carrying any money or jewellery. During a struggle, Watson drew his gun and shot Morris dead.

The trial judge directed the jury that they might find Johns guilty of murder as an accessory before the fact, if the parties must have had in mind the contingency that for the purpose of carrying their joint enterprise out or attempting to carry it out, the firearm might be discharged and kill somebody. The jury were also informed that they would be entitled to hold that all parties must be taken to have had in mind the possibility of the lethal use of the firearm when they assented to and encouraged the joint enterprise of robbery with violence.

The High Court rightly saw no merit in drawing any distinction between a principal in the second degree and an accessory before the fact. On the issue, however, of the appropriate test to be applied, Stephen J agreed with the other members of the court that liability of a secondary party was contingent upon foresight of the possible consequences of the joint venture.

In arriving at his decision, Stephen J described the test of probable consequence as being 'singularly inappropriate'. In saying this, he was motivated by what he conceived to be a difficult task for the jury should they have to assess the contingencies that could follow upon a joint enterprise in terms of 'more probable than not'. He further considered that a secondary party should bear responsibility for murder if the killing was within the contemplation of the parties as a 'substantial risk'.

As has been mentioned above, a person is guilty of murder in a sole venture, if he foresaw death or grievous bodily harm as a possible contingency. It therefore, seems that the criterion of possibility, if applied, would mean that an accessory before the fact, to say, armed robbery, who well knows that the robber is armed with a deadly weapon and is ready to use it on his victim if the need arises, will bear no criminal responsibility for the killing which in fact ensues so long as his/her state of mind was that, on balance, s/he thought it rather less likely than not that the occasion for the killing would arise. Yet his complicity seems clear enough, the killing was within the contemplation of the parties, who contemplated "a substantial risk" that the killing would occur.

In a subsequent decision of the High Court of England in *Miller v R*[53], the Court was in support of the view that a secondary party to a common unlawful enterprise was guilty of murder if death or grievous bodily harm was contemplated as a possible consequence of the common venture. In that case, Miller and a man named Worrall entered into arrangements to pick up girls for Worrall's sexual gratification. They did so on a number of occasions. On some but not all, Worrall proceeded to murder the young women involved. It was argued on behalf of the appellant that only if he foresaw the killing of the girl as a probable consequence, should he be liable to conviction for murder. In a joint judgment, relying on Johns and in particular the reasoning of Stephen J, the Court concluded that Miller was guilty of murder if death or grievous bodily harm was foreseen as a possible consequence of the venture.

In *Chan Wing-Siu v R*[54] the Judicial Committee of the Privy Council, also relying heavily on Johns and Miller, rejected an argument that probability was the appropriate criterion in cases of this kind. There, the appellant had, it would seem, also attempted to advance an argument

[53] [1983] 2 AC 161
[54] [1980] AC 168

that foresight of probable consequence meant foresight that it was more probable than not that death or grievous bodily harm would occur.

From the above, it can be observed that the position of the common law on common purpose is that as secondary party should not be found guilty of murder where death arises during the course of carrying out the plan unless death or grievous bodily harm was intended, or was foreseen as a probable consequence. If the court found that s/he did not intend or foresee death or grievous bodily harm as a probable consequence, then unless the death in issue could fairly be described as a total departure from the common purpose, s/he should be found guilty of manslaughter. This is so even if death was an unusual occurrence, to which the accused did not really turn his mind.

3.3 CONCLUSION

This Chapter has endeavoured to give a statutory and common law position as far as the state of mind of a secondary party in an unlawful joint enterprise is concerned. According to this Chapter, the prosecution have a high standard of proof in all criminal cases, especially those involving murder. But on the face of it, the concept of joint unlawful enterprises seems to lessen the burden of standard which the prosecution ordinarily holds in all criminal cases.

Further, it has been submitted in this Chapter that at common law in joint unlawful enterprise cases, a secondary party should not be found guilty of murder where a death arises during the course of carrying out the plan unless death or grievous bodily harm was intended, or was foreseen as a probable consequence. If the court found that he did not so intend or foresee death or grievous bodily harm as a probable consequence, then unless the death could fairly be described as a total departure from the common purpose, he should be found guilty of manslaughter. That is so even if death was an unusual occurrence, to which

s/he did not really turn his/her mind. This is because in voluntarily associating him/herself in an unlawful activity which envisaged violence, s/he exposed another to the risk of injury, and so should not be permitted to entirely escape the consequence of his/her actions.

CHAPTER FOUR

SELECTED ZAMBIAN CASES ON COMMON PURPOSE

4.0 INTRODUCTION

This chapter reviews selected Zambian case law on the general interpretation of section 22 of the Penal Code by the courts, and the manner in which the courts have implemented the subject section using the doctrine of common purpose.

4.1 SELECTED ZAMBIAN CASE LAW ON JOINT UNLAWFUL ENTERPRISE

In *Dickson Sembauke Changwe and Ifellow Hamuchanje v The People*[55], the Supreme Court held that it is a question of fact whether a reasonable person must know or foresee that serious harm is a natural and probable consequence of throwing someone out of a moving train. If, armed with this realisation and foresight, and knowing that serious harm could result, an intent founded on knowledge of the probable consequences will be evident and will be sufficient to satisfy section 204 of the Penal Code.

The brief facts of the case of *Sembauke* cited above are that the appellants being railway police officers, when carrying out their duties found a passenger travelling without a ticket. After questioning the passenger the police officers manhandled him and led him away to another compartment where they accused him of stealing a ride. The passenger called the appellants a derogatory name and tried to humiliate them whereupon the appellants picked him up bodily and threw him out of the carriage whilst the train was moving fast. Soon afterwards the train was stopped and reversed and a search made for the passenger. The time was dark and the passenger was not then found but was found the next day but later he died in hospital. The appellants were charged with and convicted of murder. They appealed. The

[55] (1988 - 1989) Z.R. 144 (S.C.)

appellants argued they had no malice aforethought. Murder requires a specific intent and they had no intention to kill.

The learned trial judge considered the story that the deceased had jumped out of the moving train and found it, in the circumstances to have been improbable. He accepted the evidence of PW8 and found that the act of throwing the deceased out of the fast moving train showed that the appellants had the necessary malice aforethought and were guilty of murder.

On appeal, the Supreme Court stated that it was unquestionably unlawful to throw the deceased out of a moving train and the issue raised by the alternative argument is whether this was murder or manslaughter. As Sections 200 and 204 of the Penal Code show, murder is a crime which requires a specific intent or a specific frame of mind and it is for the prosecution to adduce evidence which will satisfy this requirement.

In its decision, the Supreme Court cited the English case of *R v Hancock*[56], a decision of the House of Lords, wherein it was held necessary to direct the jury where foresight was involved that the greater the awareness of the probability of a consequence, the more likely it was that the consequence was foreseen; and that it was intended. On the strength and guidelines of this authority, the Supreme Court in the subject case decided that indeed the possibility and probability of harm of a serious nature was very high in this case and the fact that the appellants knew or reasonably ought to have known and foreseen that consequence, makes it clear that the consequence was intended or that, at any rate, they had the necessary specific mental attitude to satisfy paragraph (b) of Section 204 of the Penal Code.

The relevance of this case lies in cases dealing with foreseeability and intent of the principal offender, as it covers the intent and foreseeability of both parties as principal offenders and not one of them being a secondary party. However, even though the court endeavoured to

[56] [1985] UKHL 9

define foreseeability on the part of the accused which to a greater extent can be of help when dealing with matter of joint unlawful enterprise, and secondary parties respectively, the Supreme Court did not fully advance the difference between what 'possibility of death' and 'probability of death'. This arises from the fact that there is a great difference between the state of mind of an accused who is prepared to risk the consequences of death or grievous bodily harm that he foresees as probable and that of an accused who does no more than take the chance that death or serious injury may ensue although it seems an unlikely consequence. Clearly, the act of the former is much more blameworthy than that of the later. Therefore, treating knowledge of a possibility as having the same consequences as the knowledge of a probability as the Supreme Court did in this case, would amount to adopting a stringent test. Such treatment would in addition tend to almost obliterate the distinction between murder and manslaughter.

Whereas the above position indicates that the principal offender needs to have both the knowledge and the foresight that a serious harm could result, the doctrine of common purpose demands that knowledge is immaterial but foresight of a probable harm would suffice to secure a conviction[57] when it comes to a secondary party.

The case of *Benson Phiri and Sanny Mwanza v The People*[58] was another classic case nvolving foresight and murder. There, the appellants were sentenced to death following a charge of murder contrary to section 200 of the Penal Code. The particulars of the offence lleged that the two appellants and co-accused, on 7th September, 2000, at Ndola District of he Copperbelt Province of the Republic of Zambia did murder Michael Chulu. The co-ccused was acquitted.

was argued by the appellants that the production of a knife by the first appellant went

Johns v R (1980) 143 CLR 108
SCZ Judgment 25 of 2002; [2002] ZMSC 55 (3 September 2002)

beyond a common purpose of assaulting the deceased. Counsel contended that whoever produced the knife and stabbed the deceased, there was no common purpose to stab. It was submitted that the second appellant never knew that the first appellant had and would use a knife.

Sakala, J.S., in his judgment, stated that although the second appellant took part in assaulting the deceased, it could not be said that he knew that the first appellant would use a knife. In the circumstances, the Court found it unsafe to uphold the conviction of murder as against the second appellant.

The court did not direct itself to the scope of common purpose because even after realizing that it was case of joint unlawful enterprise, the court put the two accused on a different footing from each other. It is therefore the contention that had the court addressed its mind to the principle of common purpose, the second appellant would not have been found guilty of murder, or at least a similar punishment to that of the principal offender. This is because there was reckless indifference to a consequence of death which was supposed to have been appreciated may occur. In this case, the Supreme Court concentrated more on the presence of the weapon, and on whether death was foreseen as a probable of possible natural consequence of the assault in question than on the accused had foreseen that death might arise, or whether death was outside their common purpose.

Suffice to say that as regards the mental element of the secondary party the Supreme Court seriously misdirected itself when it relied and emphasized on the knowledge of the presence of the weapon or foresight of the weapon as opposed to foresight of the consequences of the unlawful venture. Resulting from the above court decision, a secondary party who may contemplate that a person may be killed, or seriously injured during the course of a hazardous and unlawful enterprise would escape the consequences of embarking upon the enterprise

entirely by simply satisfying the court that he was not aware of the element that was used to injure or kill the victim even though he had reasonable foresight of death or grievous bodily harm arising from the unlawful venture.

If the approach of the Supreme Court in *Dickson Sembauke Changwe and Ifellow Hamuchanje v The People* is the position at common law in regard to murder, is correct, as it is submitted it is, then it would seem logical that a similar approach be adopted at common law in regard to joint unlawful enterprises and the complicity of secondary parties. The reason for this is that the secondary party who embarks upon a joint enterprise involving a prospect of violence, has less control over the ultimate death than the person whose actions directly cause death. Thus, if the law insists on a high standard in relation to the later, in cases involving foresight as opposed to actual intention, then it should require a high standard in cases of secondary parties.

This, as mentioned above is not to *say* a secondary party who contemplates that a person may be killed, or seriously injured during the course of a hazardous and unlawful enterprise should escape liability entirely. For having embarked upon an enterprise that envisages violence, s/he should be found guilty of manslaughter if death arose as a consequence of the common venture, albeit that it might be an unlikely consequence. This is so even if the court finds that the accused did not appreciate that death or grievous bodily harm was a possible consequence, or that s/he did not turn his mind to the question, s/he should be found guilty of manslaughter if death be fairly within the scope of the joint enterprise.

In the case of *The People v Ackim Manda and Malie Simbeye*[59] where the accused were charged with aggravated robbery and attempted murder, the High Court of Zambia held that it is unsafe to uphold a conviction on a charge of armed aggravated robbery where there is no direct evidence of

[59] (1992) S.J. (H.C.)

the use of firearms. Further, the Court held that for the offence of attempted murder to be proved, it must be shown that the accused had positive intention to cause death. The case for the prosecution was that the accused were in a car with its owner who was driving, at some point the two ordered the owner of the car to stop driving and one of the accused shot the owner of the car and the other accused drove away in the car. The injured man later identified the second accused to the police as the one who had shot him. In its judgment, the question was as to whether the prosecution satisfied the court to the built that actual intention to kill has been established, or whether the killing was in furtherance of robbery. The court also stated that to secure a conviction for the two accused, the prosecution should show common purpose or design that there was common intention between the two accused to kill the complainant.

The court had an opportunity to deal with the matter that arises as a consequence of a robbery. Even with such an opportunity, the court decided to shun from resolving whether or not the shooting would be a natural consequence of a robbery. This shows the inadequacies in the manner in which the Zambian courts have dealt with matters of common purpose. In so doing, the court misdirected itself at law when it said that the common purpose should be with regards to the 'killing', when the killing should have been seen as a furtherance or natural consequence of the common (unlawful) purpose in issue, being to steal the vehicle.

Emphasis on knowledge instead of foresight of the further crime when the court said that "... In this charge the prosecution must prove that the two accused were aware that *Fumpa* was armed with firearm and that he was going to kill PW1 with it..." is equally a deviation from the general required *mens rea* on the part of the secondary party in cases of joint unlawful enterprises. This was in itself misdirection on the part of the court. On the plethora of authorities, the court should have directed their attention to whether or not the secondary party had necessary *mens rea*, which as has been shown above, is the foresight that a further crime, being murder would have resulted.

One would agree, from the doctrine of common purpose, that even though the court moved on the assumption that the appellant did not know of the availability of the weapon, being the fire arm, or of its intended use, it could be reasonably be held that the use of such an instrument was not in the circumstances within the scope of the common design to beat up or kill the victim. It would have been different if the court took the time to determine issues of foresight of death and whether it was within the scope of the consequences likely to arise from the robbery in which the accused was participating.

Another case of importance in the Supreme Court of Zambia is *Winfred Sakala v The People*[60]. In that case, the appellant and is confederates were convicted of aggravated robbery. In the process of the robbery a night watchman was hacked with an axe. On appeal the appellant told the court that the conspirators had specifically agreed that the night watchman would not be harmed and that the appellant had been assured that there would be no resistance from the watchman. It was therefore the appellants' position that he had agreed to participate in a simple store breaking and theft in which there would be no resistance from, and no violence to the watchman. The issue at the trial was whether the appellant was guilty of store breaking and theft only or of aggravated robbery

The Supreme Court held that Section 22 of the Penal Code clearly contemplates that liability will attach to an adventurer for the criminal acts of his confederates, which will be considered to be his acts also, if what those confederates have done is a probable consequence of the prosecution of the unlawful common design.

Further the court said that the fact that the accused was actually assaulted and rendered incapable of preventing the theft, or raising an alarm, did not take that act out of the scope of the common purpose but was clearly a probable consequence of deliberately setting out to steal property known to be under the immediate and personal care and protection of the

[60] (1987) Z.R. 23 (S.C.)

watchman whose specific duty it was to prevent and to deter marauders of the appellant's ilk from taking the employers' property.

The learned trial judge when comparing the case at hand with the earlier decision of *Mwape v The People*[61], and in so doing, the Court ran short of admitting that the case of *Mwape* was wrongly decided when the court stated that the case can only be supported on its own peculiar facts. In this case, the use of violence against the watchman in the concerted design to rob the Eastern Co-operative Union shop was said not to be a probable consequence of the prosecution of the common purpose. Thereby, even with similar facts decided otherwise. In this case, clearly the *Mwape* case was wrongly adjudicated as regards foreseeability or natural consequence of committing a theft motivated by a an unlawful common purpose. The court paid attention to the degree of the crime agreed to be executed by the accused parties, being 'robbery' and store 'breaking', yet in the actual sense, the concept of common purpose simply demands that the initial venture should be unlawful.

Section 22 of the Penal code clearly contemplates that liability will attach to an adventurer for the criminal acts of his/her confederates, which will be considered to be his/her acts also, if what those confederates have done is a probable consequence of the prosecution of the unlawful common design. In this regard, liability will attach for any confederates' criminal act which is within the scope of the common unlawful purpose and this will be so whether the act was originally contemplated or not. Where the act was not originally contemplated, an adventurer will only be relieved of liability if the criminal act of his/her confederates falls wholly outside the common purpose.

It should however be admitted that the *Sakala* case is good law as it is within the doctrine of common purpose in the sense that liability of the secondary was said to be based on the

[61] (1976) ZR 160

foreseeability of the murder of the victim by the secondary parties. Being a recent case after the *Mwape* case, the *Sakala* case takes precedence over the *Mwape* case. However, the court should have been bold enough to change their position where foresight and scope is concerned so as to alter the position of the law. Therefore, to avoiding admitting the earlier wrong decision and precedence in the *Mwape* case creates two positions which are conflicting, but still law to the extent that some legal practitioners can take advantage of the bad/wrong law to inflict injustice on an innocent party.

In relation to the responsibility or complicity of secondary parties for collateral crimes arising out of a joint enterprise situation, the Court of Appeal in deciding a *Zambian case of Petro and Another v The People*[62] provided yet another chance for the court to exercise their minds as far as common purpose and unlawful joint enterprise is concerned. In this case, a party of five men visited Cleveland Park Farm. The two appellants were members of that party. One of the Congolese cut the telephone wires running to the farm, and all the Congolese then entered the premises whilst the two appellants remained outside. There was no direct evidence of what happened inside the house, but from statements made by the two appellants it would appear that Mr Dunkley was roused and that after a short altercation he was fatally shot in the chest with a 9 mm pistol. The intruders then stole a considerable amount of property from the premises of which each of the appellants received a share. The main issue before the trial judge was to determine whether the degree of complicity of the two appellants in this raid on Cleveland Park Farm was sufficient to justify their being convicted of the murder of Mr Dunkley as charged.

In delivering the judgment of the Court of Appeal, the Learned judge found that once it is accepted that the common purpose which the second appellant joined was limited to burglary

[62] (1967) Z.R. 140 (C.A.)

without arms he cannot be saddled with any responsibility for what happened when a firearm was used; and it cannot be said that murder was a probable consequence of the limited common purpose which he had joined. His conviction for murder therefore cannot be sustained. In furtherance of its judgment, the court stated that the case of the first appellant, however, is different in that he joined and pursued the common purpose in the full knowledge that this was armed burglary. Where loaded firearms are carried on a burglarious expedition, even if the intention be only to frighten off any opposition, it is in our view, an inescapably probable consequence that someone will be shot and killed in circumstances which, almost inevitably, must amount to murder.

As regards the first holding, the court was in error when after admitting that the secondary party was part of the unlawful joint enterprises could not be so convicted because he was not aware that the burglary would involve the use of arms. The issue in Section 22 does not indicate that the expedition should be armed or non-armed. All that is required is that the common purpose is to do that which is unlawful. The only defense that a secondary party is availed with at law is that the act that was performed by the principal offender was outside the scope of the common purpose. The issue of whether there was a fire arm or not only holds if the court wishes to convict the secondary party for aggravated robbery, and the same has no bearing in finding a secondary party guilty of murder that ensues from an unlawful common venture.

Further, the court in the case at hand did not address the extent of foresight as it relates to the second appellant and whether or not a reasonable person in the position of the second appellant would have foreseen that death could reasonably result out of a robbery. If the court had directed itself in finding, not the knowledge of the presence a weapon, but rather the

foresight of another crime arising from the robbery, as is demanded by the doctrine of common purpose, they could have found the second appellant also guilty of murder.

In a nutshell, *Petrol and Another v The People* like many other court decision above have not fully addressed the arguments on the appropriate standards to be adopted in regard to foresight in order to find a person party to a joint enterprise guilty of murder, when there was no intent to cause death or grievous bodily harm. It seems this has been left to the courts to decide that point. Strangely, even after making reference to many English authorities that seem to have laid standards to be adopted in their jurisdiction, no effort seem to have been made by the Zambian Courts to standardise the basic requirement for foresight and scope so as to make the law on common purpose and unlawful joint enterprise predictable and easy to follow.

Thus, the argument advanced here, is that cases such as *Benson Phiri, Ackim Manda* and *Mwape* are fundamentally flawed both in principle and in policy. They are inconsistent with the approach in some cases involving foresight and murder like *Sakala* and *Sembauke*. Much as the *Sakala* case tried to discuss the doctrine of common purpose, the court limited itself to discussing scope and made no much emphasis on foresight, whereas the *Sembauke* case made elaborate arguments as for foresight and scope is concerned although as has been alluded to above, is one case where all parties where charged as principal offender and thus even the elements of foresight and scope where argued with parties at an equal footing. The case would have been so helpful if it included liability of a secondary party to an unlawful joint enterprise under the doctrine of common purpose.

4.2 CONCLUSION

From the cases above, to be convicted of murder an offender must be shown both to have caused the victim's death and to have intended either to kill or cause 'really serious harm.'

Secondary liability allows the prosecution to proceed not only against the principal offender who committed the crime but also against others who were involved in the commission of the offence. Crucially, secondary liability is a common law doctrine.

At the core of the doctrine of secondary liability is the notion that secondary party can and should be convicted of the offence that principal commits. While the courts have often treated joint enterprise as an umbrella term, the type considered in this Chapter is a form of secondary liability whereby a person who agrees to commit a crime with another becomes liable for all criminal acts committed by the other person (the principal offender) in the course of their joint criminal venture.

Joint enterprise, in the form described above, must be seen in the context of other common law and statutory forms of complicity, including aiding, abetting, counselling or procuring; and the law on inchoate liability, where an act intended to assist the carrying out of a criminal enterprise is completed but the enterprise itself fails because the principal offender does not carry out the act intended. Together they allow prosecutors to bring proceedings against all participants in offences, a particularly important weapon in tackling large scale criminal operations such as murder. However, as can happen with common law doctrines, the law on complicity has been complicated over the years by court decisions. The chapter has identified the limited reach of inchoate liability as leading to an over-extension of secondary liability, which carries more serious consequences for the secondary participant. This in its turn created problems with the "parity of culpability"—the principle that those facing the same punishment should be equally guilty of the offence.

The aspect of joint enterprise which has come in for most criticism in this Chapter is the mental state required for a finding of guilt, or *mens rea*. This type of joint enterprise essentially relies on the court determining what the offender could have anticipated or

foreseen rather than what was explicitly agreed or intended. It is argued that the principle should be abandoned because in some cases it can lower the bar for conviction: The prosecution will usually find it easier to adduce evidence that the defendant foresaw what the principal might do than to adduce evidence that he actually intended the principal to cause serious injury or to kill—indeed, such evidence may not go far beyond evidence of association added to alleged presence at the scene. The courts' approach to determining the mental state required for a finding of joint enterprise is inconsistent. In some cases the secondary participant in the criminal venture is only required to foresee the commission of the offence. In others, the secondary participant is apparently required to foresee the state of mind of the principal offender, as well as foreseeing the criminal act itself.

CHAPTER FIVE

CONCLUSION AND GENERAL RECOMMENDATIONS

5.0 GENERAL CONCLUSION

The doctrine of common purpose under the principle of joint unlawful enterprise is one area that attracted attention in the Zambian judicial system as it imposes liability on a secondary party who in the actual sense did not commit the *actus reus.* Under Chapter One indicates that murder is committed when there is *actus reus* of homicide with malice aforethought.[63] Further, Chapter One makes it clear that when applying the law of joint unlawful enterprise under the doctrine of common purpose, a secondary party is liable for the offences committed by the principal who caused the death of a person even when it was unforeseen that the principal will act in such a manner. The first Chapter also reviewed that the negative effect of the law of joint enterprise is that it lowers the standard of proof in that once the prosecution have proved their case against the principal then all the co-accused will be held responsible for murder despite not taking an active role in causing the death. It also reviewed that the doctrine of common purpose has the potential effect of shifting the burden of proof from the prosecution to the accused secondary parties.

Chapter Two of the study endeavoured to give a common law and statutory definition and elements of the doctrine of common purpose. It further gave the scope of common purpose in the light of court decisions. The Chapter reviewed that the test of scope is a subjective test and varies from cases to case and from time to time. As such, this has resulted in inconsistencies in the manner in which the courts have adjudicated on matter of scope. The Chapter also reviewed that the principle issue for consideration as regards liability of the secondary party under the offence of joint unlawful enterprise foresight of consequences at

[63]Cap 87 of the Laws of Zambia

common law where death has arisen out of an unlawful joint enterprise and the complicity or otherwise of the secondary party is in issue.

This Chapter has endeavoured to give a statutory and common law position as far as the state of mind of a secondary party in an unlawful joint enterprise is concerned. According to this Chapter, the prosecution have a high standard of proof in all criminal cases, especially those involving murder. But on the face of it, the concept of joint unlawful enterprises seems to lessen the burden of proof which the prosecution ordinarily holds in all criminal cases.

Further, it has been submitted in this Chapter that at common law in joint unlawful enterprise cases, a secondary party should not be found guilty of murder where a death arises during the course of carrying out the plan unless death or grievous bodily harm was intended, or was foreseen as a probable consequence. If the court found that he did not so intend or foresee death or grievous bodily harm as a probable consequence, then unless the death could fairly be described as a total departure from the common purpose, he should be found guilty of manslaughter. That is so even if death was an unusual occurrence, to which he did not really turn his mind. This is because in voluntarily associating himself in an unlawful activity which envisaged violence, he exposed another to the risk of injury, and so should not be permitted to entirely escape the consequence of his actions.

In Chapter Four, the study reviewed the aspect of joint enterprise which has come in for most criticism, which according to the Chapter is the 'mental state' required for a finding of guilt, or *mens rea*. This type of joint enterprise essentially relies on the court determining what the offender could have anticipated or foreseen rather than what was explicitly agreed or intended. According to Chapter Four, the courts' approach to determining the mental state required for a finding of joint enterprise was "inconsistent". In some cases the secondary participant in the criminal venture was only required to foresee the commission of the

offence. In others, the secondary participant was apparently required to foresee the state of mind of the principal offender, as well as foreseeing the criminal act itself.

Conclusively, it is noted that due to the complexity of the doctrine of common and the subjectivity when it comes to determining whether the further crime committed falls within the scope or is a direct consequence of the agreed unlawful venture and subjectivity of the determination of the necessary *mens rea* has the potential of perpetuating miscarriage of justice. As a result, the courts have given different decisions on cases of similar facts as has been evidenced in the two cases of *Mwape v The People and Winfred Sakala v The People* above. In addition, the doctrine of common purpose has been a subject of debate in many jurisdictions and Zambia should not be left behind as shown in Chapter Three.

5.1 RECOMMENDATIONS

Having demonstrated the need for reforms owing to the various issues raised throughout the paper as regards the offence of unlawful joint enterprise and the doctrine of common purpose, this part of the study affords several recommendations to remedy the issues identified and make the offence of unlawful joint enterprise and the doctrine of common purpose as regards liability of secondary parties more relevant in the current judicial system. Arising from this observation, recommendations and possible reforms have been outlined hereunder which reforms will encamps both short term and long terms reforms.

5.1.1 ABOLISHMENT vis-à-vis RETENTION OF THE DOCTRINE OF COMMON PURPOSE

It is hereby proposed that the courts should either abolish the doctrine of common purpose and joint unlawful enterprise as it relates to murder be abolished. In this line of thought, it is argued that whether an additional crime is within the scope of the common purpose if the accused foresees its commission as possible is a legal fiction. The problem of scope only

arises because there is no common purpose to commit the additional crime. To this extent, it is thus recommended that the doctrine should be abandoned and where possible the test of recklessness be adopted instead.

In the same vein, the courts may wish to maintain the common law doctrine of common purpose and the offence of join unlawful enterprise but this has be done with safeguards, or in other terms limitations.

5.1.2 CLEAR DEFINITION OF THE ELEMENTS OF LIABILTY

Under this recommendation, it is submitted that there is need to define clearly the elements of liability as it concerns a secondary party, especially the element of *mens rea*. The cases reviewed show that the issue of *mens rea* is a very complex one that has not been applied uniformly in the judicial system capable of being seen to be a pointless complication of *mens rea*. This will help the court to have an equal approach towards foresight in particular and *mens rea* in general as it relates secondary parties in offences joint unlawful enterprises.

5.1.3 ENACTMENT OF STATUTE TO CODIFY THE DOCTRINE OF COMMON PURPOSE

Considering the complexity of the common law doctrine of common purpose which has been developed by the courts, it is hereby recommended that the doctrine be adopted and enshrined in a statute further than section 22 of the Penal Code and codified into a specific legislation that will cover the law relating to complicity and liability of secondary offenders. This statute should be expected to provide clarity over the common law doctrine on joint enterprise is unacceptable for such an important aspect of the law.

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5.1.4 PURPOSE OF THE LAW ON COMMON PURPOSE

It is often the desire of the Director of Public Prosecution to bring all individuals found to be participants in an organised crime into liability. The law of joint enterprise, and secondary liability more generally, was developed by the courts to ensure that all participants in a criminal enterprise could be held accountable. The deterrent effect intended by discouraging people who may be on the periphery of organised crimes from becoming involved in criminality is yet to be proven. At the same time, the Director of Public Prosecution and the investigative wings should have in mind that it is not the purpose of the law of joint enterprise to foster criminal mentality or draw people into the criminal justice inappropriately.

5.1.5 WRONG CHARGES UNDER JOINT ENTERPRISE

Wrong charging under joint enterprise will not assist the task of those trying to deter people from becoming involved in organised crimes especially where death ensues. It may also deter potential witnesses to an offence who fear that they might be charged under joint enterprise if they came forward, impeding the justice process. In this vein, it is recommended that the Director of Public Prosecution issues guidance on the proper threshold at which association potentially becomes evidence of involvement in crime. Such guidance should deal specifically with murder although it is acknowledged that such guidance will not mitigate some of the concerns on the subject of common purpose.

Where possible, the courts should be charging secondary parties of other complicities like aiding, abetting, counselling and procuring and so on.

5.2 CONCLUSION

This Chapter has highlighted the areas of reform as identified in Chapters Two, Three and Four and proposed recommendations where need be. From the foregoing, it can be seen that the law on joint enterprise and the common law doctrine of common purpose is essential in the justice system. However, the problems lie in the uncertainty of the offence and the wide discretion left with the court to determine numerous issues, including the state of mind of the secondary party. The law has come to be replete with uncertainties and conflict. This betrays the worst features of common law, and what some regard as flexibility appears from the cases discussed as a succession of opportunistic decisions by the courts, often extending the law and has resulted in a body of jurisprudence that has little or no coherence at all. These defects call for reforms in the administration of justice as has been recommended above, which recommendations are aimed at ensuring that in all circumstances of joint unlawful enterprise, justice is not just done, but is seen to be done.

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