A CRITICAL ANALYSIS OF THE "COMMON DESIGN" DOCTRINE IN ZAMBIA

By

PHIRI JEREMIAH A

28092708

Being a Directed Research essay submitted to the University of Zambia Law Faculty in Partial fulfillment of the requirements for the Award of the Bachelor of Laws (LL.B) Degree.

School of Law
University of Zambia
Lusaka.

May, 2012.
DECLARATION

I, PHIRI JEREMIAH A., acknowledge that copying someone else’s work or essay or part of it is plagiarism. I do hereby declare that this Directed Research Essay is my authentic work and to the best of my knowledge, information and belief, no similar piece of work has previously been produced at the University of Zambia or any other Institution for the award of Bachelor of Laws Degree. All other works in this essay have been duly acknowledged. No part of this work may be reproduced or copied in any manner without the prior authorization in writing of the author.

Phiri Jeremiah A
I Recommend that the Directed Research Essay under my supervision by:

PHIRI JEREMIAH A.
(Of Computer No. 28092708)

Entitled:

A CRITICAL ANALYSIS OF THE "COMMON DESIGN" DOCTRINE IN ZAMBIA

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfills the requirements pertaining to format as laid down in the regulations governing Directed Research Essays.

Ms. M. LWATULA

Date: 11th May, 2012
ACKNOWLEDGEMENTS

On one hand: To my Supervisor for closely accompanying me in my research work. Thank you for your hard work as seen in your untiring pieces of advice, and your perpetual guidance, which has made this work a success. The School of Law members of staff and all those who have helped me come up with this work, I thank you all.

On the other Hand: my sister Martina Phiri and all my relatives for being there for me in this my troubled education life.
DEDICATION

To my nieces and nephews
ABSTRACT

This research was aimed at identifying problems that are associated with the doctrine of common design especially where the criminal liability elements of mens rea and actus reus are concerned. The doctrine of the common design imputes criminal liability on all the parties to a criminal enterprise. Accessories despite them not directly intending and actually committing a crime are held responsible for a crime as though they actually committed the crime in question. The problem that arises herein is how to reconcile the criminal liability principles of mens rea and actus reus into the doctrine of common design where one who does not commit the actus reus is held liable as though he actually committed the act that resulted into the crime.

The research has been conducted through analyzing different pieces of literature, statutes and cases. Through desk research, this research essay has revealed that the Zambian legal system and other legal systems which were studied, apply the doctrine in a similar manner where every party to a crime is held liable for the same offense without defining precisely the mens rea and actus reus of each participant. Different literature has revealed that the doctrine is applied such that criminal liability is imputed on everyone despite the levels of participation in crime. It has also been found out that the applicability of the doctrine is very complex and complicated.

This research has concluded that it is an anomaly that the liability of an accessory should be dependent on the principal’s elements of criminal liability, that is, the actus reus and the mens rea. Therefore, it has been recommended that liability of an accessory and that of the principal should be separated. It has been further suggested that the principle under this doctrine should be simplified, and that other studies that surround group crimes should be undertaken.
LIST OF STATUTES

The Penal Code, Cap 87 of the Laws of Zambia

The Indian Penal Code, 1860 ACT NO. 45 OF 1860 [6th October, 1860.]

LIST OF CASES

Chisholm v Doulton [1989] AC 412

Chisulo v R [1961] R&N 116

Fagan v Smith [1968] 3 All ER 422

Haonga v The People (1976) Z.R. 200 (S.C.)

Mutambo and others v The People (1963-64) ZR 160

Mwape v The People (1976) Z.R. 160 (S.C.)

Petro and Another v The People (1967) Z.R. 140 (C.A.)

Prosecutor v Delalic, Judgment, Case No. IT-96-21-T (Nov. 16, 1998)

R v Cunningham [1957] 2 Q.B. 396

R v Caldwell [1982] A.C. 341


R v Swindall and Osborne [1846] 2car. & K. 230

R v Anderson and Morris [1966] All ER 644

Shindano v The People (1972) ZR 155

Sweet v Parsley (1970) AC 132

Verreyne v R [1961] R & N 456.)
# TABLE OF CONTENTS

## CHAPTER ONE

AN OVERVIEW OF THE RESEARCH AND UNDERSTANDING THE DOCTRINE OF THE COMMON DESIGN

1.1.0. Introduction..................................................................................................................1
   1.1.1. Origin/Background of the Doctrine.........................................................................2

1.2.0. The Law Applicable to the Common Design Doctrine in Zambian.........................3

1.3.0. Elements for Liability under the Doctrine of the Common Design.........................4

1.4.0. Statement of the Problem............................................................................................4

1.5.0. Objectives of the Study...............................................................................................5

1.6.0. Significance of the Study............................................................................................7

1.7.0. Methodology...............................................................................................................8

1.8.0. Chapter Outline..........................................................................................................8

## CHAPTER TWO

THE APPLICABILITY OF THE DOCTRINE OF THE COMMON DESIGN IN ZAMBIA

2.1.0. Introduction.................................................................................................................11

2.2.0. Participation in Crime................................................................................................11

2.2.1. Types of Parties to a Crime.......................................................................................13
   (a) Principal Offenders......................................................................................................13
   (b) Aider or Abettor..........................................................................................................14
   (c) Counselor or Procurer...............................................................................................15
   (d) Accessory after the Fact............................................................................................16
2.3.0. The Doctrine of the Common Purpose ............................................. 17

2.4.0. Conclusion ....................................................................................... 21

CHAPTER THREE

A COMPARATIVE ANALYSIS OF THE COMMON DESIGN DOCTRINE IN ZAMBIA AND OTHER JURISDICTIONS

3.1.0. Introduction ................................................................................... 23
3.2.0. Liability based on common purpose in different Jurisdictions .............. 23
3.2.1. England ......................................................................................... 23
3.2.2. Canada ......................................................................................... 24
3.2.3. Germany ....................................................................................... 25
3.2.4. International Law ......................................................................... 25
3.2.5. India ............................................................................................. 27
3.3.0 Observations of the doctrine from different jurisdictions ..................... 28
3.4.0. Conclusion ....................................................................................... 29

CHAPTER FOUR

ANALYSIS OF THE DOCTRINE: STRENGTHS AND WEAKNESSES; IS THERE ANY REMEDY TO THE WEAKNESSES?

4.1.0. Introduction ................................................................................... 30
4.2.0. Constitutive Elements of Criminal Liability ....................................... 30
4.2.1. Mens Rea in Murder and Manslaughter ........................................... 36
4.2.2. Mens Rea in Theft ........................................................................ 37
4.2.3. Mens Rea in Aggravated Robbery ....................................................... 37

4.3.0. Mens Rea in Crimes Arising out of the Common Design .......................... 38

4.4.0. Strengths of the Doctrine of Common Design ...................................... 40

4.4.0. The Critique of the Doctrine of Common Design .................................. 40

4.5.0 Conclusion ......................................................................................... 44

CHAPTER FIVE

RECOMMENDATIONS AND FURTHER RESEARCH

5.1.0. Introduction ...................................................................................... 46

5.2.0. Synopsis of the Research ................................................................. 46

5.3.0. Recommendations ............................................................................ 47

5.4.0. Further Research ............................................................................. 48

5.5.0. Conclusion ....................................................................................... 48
CHAPTER ONE

AN OVERVIEW OF THE RESEARCH AND UNDERSTANDING THE
DOCTRINE OF THE COMMON DESIGN

1.1.0. Introduction

The doctrine of common purpose, otherwise called common design or joint enterprise is a legal doctrine which imputes criminal liability on all the participants to a criminal enterprise for all that result from that enterprise. 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 offense 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.\(^1\) Thus, a common incidence of the application of the rule is to impute criminal liability on all persons who in one way or another take part in committing a crime.

Much as this is the position, it is common knowledge that there is the principle which asserts that there should be no penal liability without fault. It follows from this principle that there should be no responsibility for the offence beyond the capacities of the accused to commit it. Secondly, there is the principle of proportionality between culpability and penal liability.\(^2\) The question which is to be answered is how the common design doctrine fit into the aforementioned principles.

---

\(^1\) Simon E. Kulusika, *Text, cases and Materials on Criminal Law in Zambia*, (Lusaka: UNZA Press, 2006), 147

1.1.1. Origin/Background of the Doctrine

The doctrine derives from the case of *R v Swindall and Osborne* where two cart drivers engaged in a race. One of them ran down and killed a pedestrian. It was not known which one had driven the fatal cart, but since both were equally encouraging each other in the race, it was irrelevant which of them had actually struck the man so both were held jointly liable. Thus, the parties must share a common purpose and make it clear to each other by their actions that they are acting on their common intention so that each member of the group assumes responsibility for the actions of other members in that group. Their purpose, which is secured by an agreement prior to or at time of the commission of the offense, is to carry out a common purpose, common intention, common design, or a joint venture or enterprise. When this happens, all that flows from the execution of the plan will make them all liable.

The doctrine was further defined by Lord Parker LCJ in *R v Anderson and Morris* thus;

where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise, and that includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise; but (and this is the crux of the matter)... if one of the adventurers goes beyond what has been tacitly agreed as part of the common enterprise, his co-adventurer is not liable for the consequences of that unauthorised act... it is for the jury in every case to decide whether what was done was part of the joint enterprise, or went

---

3 [1846] 2 Car. & K. 230  
4 Kulusika, *Text, cases and Materials on Criminal Law in Zambia*, 147  
5 [1966] All ER 644
beyond it and was in fact an act unauthorised by that joint enterprise.

One may distinguish the above cases, and vital to note is that the core of the doctrine find its explanation in the said common design, which entails that there should be the same intention by the parties to a crime to prosecute the crime and that the same end result should reasonably be envisaged by all. Mere participation might not always entail the same criminal liability for all.

1.2.0. The Law Applicable to the Common Design Doctrine in Zambian

The law applicable to the common design doctrine in the Zambian Legal system is the Penal Code, Cap 87 of the Laws of Zambia. Zambian Law acknowledges the fact that there would be instances when an act would be done by one member of the participants to a crime that is beyond the common design. The Zambian Penal Code differentiates the culpability of each participant depending on the circumstances of the case and levels of participation in accordance with a particular aim of the participants to a joint criminal enterprise. Part V, Sections 21, 22 and 23 of the Zambian Penal Code, provides for the participation in crime, describing the parties to a crime. Section 22 particularly provides that parties to a crime will be deemed to have committed the offense.

Other than the Penal Code, Zambia has largely borrowed from the English Legal System. English common law principles and cases are used in Zambia when cases dealing with the doctrine of the common design arise. Local case law also forms bulk of the law that applies to common design doctrine in the Zambian Legal system.
1.3.0. Elements for Liability under the Doctrine of the Common Design

Different parties may get involved in the planning or commission of the crime.\(^6\) They may have supplied tools, information, advice, kept a look-out or even instigated the crime.\(^7\) All such participants would be liable to the offense out of that common purpose albeit the mitigating circumstances might be considered.

Like in any other criminal offence, parties to a crime must have a necessary criminal culpability, that is, the mens rea. The actus reus must as well exist. The actus reus may subsist in the commission or omission of a particular act. This may merely be through counsel rendered, or indeed any active or passive role played that contributes to the final result of the enterprise. As a general rule mens rea is the same for all the parties as they all contribute to the final result. For this to be effected and enforced fully there is need that common intention of all the parties is established, without which the parties will not be equally liable for the offence. Such situations occur when one or more parties to the exclusion of others act or omit to act in such a manner that their act or omission results into a crime that was not reasonably expected by the rest of the participants. In other words, common intention is another element that is applicable for group liability.

1.4.0. Statement of the Problem

Where crime is a group activity, a distinct set of problems arises, such as where several group members encourage the offense, but only one individual actually carried out the Actus Reus.


\(^7\) Ibid.
In many cases, the crime may have been unplanned and spontaneous, brought by the spur of the movement when a suggestion from one member of a group is taken up by others and acted upon.\(^8\)

The need therefore, arises to find some ways of measuring the blameworthiness of the group members and the degree to which the end result could be attributed to them. It is difficult however, to say that the secondary party’s conduct caused the crime, particularly where he or she was not even present at the scene. It is possible that the secondary party may lack *mens rea*\(^9\) whereby he or she never intended that such a result should ensue from the criminal activity. Thus, whatever links the defendant with the crime; it cannot be the same *actus reus* and *mens rea* as that required for the principal offender. The problem one would face under this principle is where the voluntary actor with appropriate fault and engaging in harmful conduct or causing harm would be rendered involuntary actor.

The research will therefore, endeavour to explicate the rules governing the common design doctrine and relate them to the elements of criminal culpability and with regards the criminal culpability of those who do not actually perpetrate the offence, or indeed the innocent agents of the crime committed. Today, common design doctrine continues to be a powerful weapon of prosecutors because of its ambiguities, statute advantages, and potential for abuse.

**1.5.0. Objectives of the Study**

This research aims at understanding the rationale of criminal law doctrine of the “common design” which results to the actual commission of the crime. The research will endeavour to

---


\(^9\) *Ibid.* p. 545
study the law of participation in crime and the doctrine of common design in Zambia and understand the basis of the doctrine in Zambia. The research will discuss various issues under the Zambian Penal Code and other related provisions and examine their efficacy in relation to the general principles of criminal law, particularly, *mens rea* and *actus reus*.

Other jurisdictions and international law common design principles will be discussed. The research will also consider highlighting certain areas of doubt where there seems to be no definite pronouncement on issues pertaining the common design doctrine. The research will therefore come with the suggested law reforms to address some weakness and challenges that the doctrine may present to the Zambia Legal system.

The research will unveil the legal weaknesses of the doctrine of common design. It will examine how proportional apportionment of culpability (*mens rea*) to individuals of a group crime can be achieved, while considering what amounts to participation in a crime. Establishing what amounts to common design and how it could be determined would give efficacious results to the application of the doctrine.

This research therefore, will investigate the possible weaknesses of the doctrine whereby the accused could be left with any chance to use non-common intention as a scapegoat. The research will also investigate how the prosecution would prove the common intention and the *mens rea* of the parties to the crime, and also the possible abuse by the prosecution of the doctrine.
1.6.0. Significance of the study

It is trite to note that in most of the Zambian societies, both rural and urban, there are cases of group crime. Such crimes result from either deliberate criminal agreement to execute the crime or merely by getting involved under different circumstances other than pure free will to commit the offence. The study therefore, will give an analysis of different circumstances under which people can get involved in group crimes.

The research will acknowledge that criminal culpability in common design doctrine is a matter of fact, to be determined from case to case. This is where culpability is determined depending on the facts of every other case. It is in such cases that the research will highlight different circumstances in which the doctrine may be applied. The study in the final analysis will blot out the subjective determination of criminal culpability and the extent to which parties to the crime would be liable, and the extent to which they may recuse themselves from criminal liability arising from their participation in a joint crime. The study will give an insight that in the administration of justice in light of the aforementioned doctrine, there are dangers that undue culpability may be apportioned to people who do not deserve it. That is to say, the “innocent” or “less guilty” will be convicted “unfairly”, and “the guilty” will be released or convicted for a lesser offence unduly. This would necessitate the law reform so that a more objective way of coming up with mechanisms of apportioning blame to parties to a joint criminal enterprise is achieved, whereby dangers of convicting the innocent people is reduced.

Clear definition of what amounts to the elements of the common design must be expressly outlined in the penal code, as well as elements that negates common purpose hence, negation
of criminal liability. A clear guide and manual for Magistrates and Judges must be put in place to ensure that the dangers of probably convicting people who lack the necessary mens rea are curbed. This would be a vital instrument to help both the prosecution, Judges and magistrates.

1.7.0. Methodology

This research will be done mainly by analysing relevant literature on the doctrine. This is because the research is a qualitative one. Published and unpublished works will be consulted. Authoritative materials from the internet will also be consulted. In this respect, the desk research will be through the collection of secondary data in the form of Law Reports within the Zambian legal system and international jurisdictions, text books, journals, dissertations under obligatory essays and those anchored on the award LL.M, classroom lectures.

1.8.0. Chapter Outline

CHAPTER ONE

AN OVERVIEW OF THE RESEARCH AND A BRIEF UNDERSTANDING OF THE DOCTRINE OF THE COMMON DESIGN

This chapter has introduced the research and in general terms given a condensed outline of the research. It has also dealt with the basic aspects of the research which has included the statement of the problem, objectives and significance of the study, the methodology and the chapter lay out. What will be considered under the rest of the chapters has been outlined under this chapter.
CHAPTER TWO

THE APPLICABILITY OF THE DOCTRINE OF THE COMMON DESIGN IN ZAMBIA

This chapter will discuss the law of the common design in Zambia. The provisions of the penal code will be analysed and identify controversial elements of the doctrine. The Zambian Penal Code will be explained and establish how the sections relevant to the doctrine are applied in relation to the common design.

The law applicable to the common design doctrine in the Zambian Legal system is the Penal Code, Cap 87 of the Laws of Zambia. Part V, Sections 21, 22 and 23 of the Zambian Penal Code, provides for the participation in crime, describing the parties to a crime. Section 22 particularly provides that parties to a crime will be deemed to have committed the offense.

CHAPTER THREE

A COMPARATIVE ANALYSIS OF THE COMMON DESIGN DOCTRINE IN ZAMBIA AND OTHER JURISDICTIONS

Chapter three will discuss how the law applies in Zambia. This will be discussed in light of case law. Other jurisdictions which include England, South Africa, Canada, Germany, India and international law jurisdiction will be compared under this chapter. International law and other instruments dealing with the doctrine will be discussed, and how they apply. The comparison will make us appreciate the doctrine to a deeper level.
CHAPTER FOUR

ANALYSIS OF THE DOCTRINE: STRENGTHS AND WEAKNESSES IS THERE ANY REMEDY TO THE SITUATION?

This chapter will outline and identify specific elements of criminal liability. The chapter will explain the advantages of the applicability of the rule and identify possible problems that may arise out of the doctrine of common design in relation to the principles of criminal liability both in the Zambian context and other international jurisdictions such as England, South Africa, Canada, Germany, India and international law jurisdiction.

The chapter intends to address the questions of criminal liability and the principle of proof beyond reasonable doubt in criminal law. A critique of the doctrine will be done and thereafter outline the possible measures that would make the complex doctrine understood in entirety by common man.

CHAPTER FIVE

RECOMMENDATIONS AND FURTHER RESEARCH

Chapter five will give a synopsis of the essay and conclude the research by suggesting the possible solutions to the possible weaknesses in the doctrine, in suggested law reforms. Further research on the issues concerning the doctrine will be suggested.
CHAPTER TWO

THE APPLICABILITY OF THE DOCTRINE OF THE COMMON DESIGN IN ZAMBIA

2.1.0. Introduction

This chapter will discuss the law of the common design in Zambia. The provisions of the penal code will be analysed and identify controversial elements of the doctrine. The Zambian Penal Code will be explained and establish how the sections relevant to the doctrine are applied in relation to the common design. The law applicable to the common design doctrine in the Zambian Legal system is the Penal Code, Cap 87 of the Laws of Zambia. Part V, Sections 21, 22 and 23 of the Zambian Penal Code, provides for the participation in crime, describing the parties to a crime. Section 22 particularly provides that parties to a crime will be deemed to have committed the offense.

2.2.0. Participation in Crime

We must note that it is not in all cases that there would be one accused (defendant) to a criminal action. This is because a particular criminal act may be committed by multiple offenders. It is likely that at some stage either in the planning or commission of the crime other persons may become involved.\textsuperscript{10} All persons who participate in committing a group crime are considered to have committed the offence. When two or more persons take part in the commission of an offence, they are regarded as jointly participating in effecting the commission of the offence.\textsuperscript{11}

\textsuperscript{10} M.C.V. Clarkson, H.M. Keating, and S.R. Cunningham, Clarkson and Keating Criminal Law, Text and Materials 6\textsuperscript{th} ed., 543.

\textsuperscript{11} Kulusika, Text, cases and Materials on Criminal Law in Zambia, 147.
However, the multiple parties to a criminal venture may be involved in the crime in different ways. There may be some differences not only in the roles played, but also in the degree of involvement in the quest of achieving the desired criminal end result. The concern of the criminal law is to assess the role of the parties\textsuperscript{12} and to determine the proper scope of criminal liability\textsuperscript{13} of the parties to the joint unlawful enterprise.

People become parties to a crime when they assist, aid and abet (help), incite, or otherwise encourage others to commit crimes.\textsuperscript{14} The Zambian Penal Code describes different parties to a crime. Thus, in terms of section 21 subsection 1 of the Penal Code, it is provided that a crime will be deemed to have been committed by each of the participants who actually does the act or omit the act, who actually does or act in order to enable or aid another person to commit an offence; any person who aids or abet another person in committing the offence; and any person who counsels or procures another. A counsellor or procurer will be deemed to have committed the offence himself. A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence. Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part, is guilty of an offence of the same kind and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission.\textsuperscript{15}

\textsuperscript{12} Kulusika, Text, cases and Materials on Criminal Law in Zambia, 147.
\textsuperscript{13} A. Ashworth, Principles of Criminal Law 3\textsuperscript{rd} ed., (Oxford: Oxford University Press, 1999), 425
\textsuperscript{14} J. A. Inciardi, Criminal Justice 8\textsuperscript{th} ed., (New York: McGraw-Hill, 2007), 36
\textsuperscript{15} Section 21 (2)
Section 21 of the Zambian Penal Code entails that any sort of participation in crime makes the participant become the principle offender, whereby he is charged with the offence as though he committed it himself in actuality. The section can be delimitated into four categories of offenders:

(i) offenders who *actually* commit the offence;

(ii) those who enable or assist in the commission of the offence;

(iii) offenders who *aid* or *abet* the commission of an offence; and

(iv) those persons who, may not be present at the place of the offence, ‘counsel’, or procure another or other persons to commit the offence.\(^{16}\) Section 21 however, classifies all these participants into one crime\(^{17}\) and are amenable to the same punishment under the Penal Code.

2.2.1. Types of Parties to a Crime

(a) Principal Offenders

The leading participant in any offence is the actual perpetrator of the crime. This type of principal offender includes the actual doer of the criminal deed as in section 21 (1) (a) of the Zambian Penal Code. There are sometimes when a person may do an act without knowing the nature of that act. This happens where one uses another without him knowing that a particular action amounts to criminal liability. Such a person is an innocent agent who is not culpable. For example, a person who uses a person under the age of eight years or a mad man to commit a crime for him is guilty as if he himself had actually committed that crime. Another example would be where someone makes another person believe that he is delivering a parcel which is

\(^{16}\) Kulusika, *Text, cases and Materials on Criminal Law in Zambia*, (Lusaka: UNZA Press, 2006), 147

in the actual fact a bomb. Liability for death that results from it exploding will not be imputed on the person who has delivered it, but on the person who sent him to deliver it.

A person can become a principal offender by merely facilitating the commission of the crime. A person becomes a principal offender by reason of facilitating the commission of the crime by knowingly and designedly supplying instruments with which the crime is committed. Whilst knowledge of a design to commit a crime with the instrument or means supplied is necessary in the supplier, yet, knowledge of the contemplated crime need not be precise or detailed.¹⁸

(b) Aider or Abettor

An aider or abettor is a person who actually being present at the scene of the crime assists in its commission or incite or instigates and encourage the commission of the offence.¹⁹ So in fact an aider or abettor must be present at the fact.²⁰ A person may however, be regarded as sufficiently present at the scene of the crime for this purpose, if, being near enough, he was prepared to go to the aid of the actual perpetrator of the crime if and when required to do so. This includes persons who aid or abet at the time even by merely keeping watch at a distance. The question as to what conduct amounts to aiding or abetting is a matter of both law and fact.²¹ Mere presence at the commission of the crime is not legally enough, but it should be factually found that the accused by his presence at the scene of the crime encouraged and concurred in its commission. Such a person can be convicted as an aider or abettor of the

---

¹⁸ John Hatchard, *Criminal Law and Criminology in Zambia*, 44.
²¹ *Ibid*. 45
crime no matter how far away from the spot he may be.\textsuperscript{22} The crucial point is that he is rendering aid or assistance or encouragement to the actual perpetrator at the very time when he is effecting the criminal purpose.

(c) Counsellor or Procurer

A counsellor or procurer though party to a crime is never present at the crime scene unless his presence at the scene is accidental.\textsuperscript{23} The Penal Code in section 23 provides about the counsellor as follows:

23. When a person counsels another to commit an offence, and an offence is actually committed after such counsel by the person to whom it is given, it is immaterial whether the offence actually committed is the same as that counselled or a different one, or whether the offence is committed in the way counselled or in a different way, provided in either case that the facts constituting the offence actually committed are a probable consequence of carrying out the counsel. In either case the person who gave the counsel is deemed to have counselled the other person to commit the offence actually committed by him.

For one to be liable as a counsellor, the crime must be committed by a person so counselled or procured to commit it. This means that it is logical that if the counselled person who

\textsuperscript{22} Hatchard, \textit{Criminal Law and Criminology in Zambia}, (Lusaka: Multimedia Publications, 1994), 44

\textsuperscript{23} Hatchard, \textit{Criminal Law and Criminology in Zambia}, 44.
committed the offence is acquitted, then the counsellor is acquitted too as it was in *Shindano v The People*\(^{24}\) In this case, the court remarked as follows:

> It is trite law that if one such alleged conspirator is acquitted the charge against the other cannot stand as the essence of the offence of conspiracy is the plotting by at least two people to commit the forbidden act. Similarly no man can be an aider and abetter unless there is a second person whom he aided and abetted. If the second person is found not guilty then the charge against the so-called aider and abetter cannot subsist.

The counsellor can however be guilty of the offence committed out of the probable consequence of the commission of the offence counselled. The mode of executing the counselled offence does not negative the culpability of the counsellor even if another crime is committed in the process of effecting the crime in that manner.

**d) Accessory after the Fact**

Any person who receives or assists another who is, to his knowledge, guilty of an offence, in order to enable him to escape punishment, is said to become an accessory after the fact to the offence.\(^{25}\) Accessory after the fact to a crime is a person who after the crime has been committed and knowing of its commission by the offender harbours him or otherwise assists him with a view to enabling him to escape punishment for the crime.\(^{26}\) There are two ways in which one can become an accessory after the fact: he may render personal assistance to the criminal by shielding or by harbouring him.

---

\(^{24}\) [1972] ZR 155

\(^{25}\) Section 397 of the Penal Code Act, Cap 87 of the Laws of Zambia.

\(^{26}\) *ibid.*
2.3.0. The Doctrine of the Common Purpose

A person can be held liable for a crime as a principal offender if the crime in question was committed in pursuit of a common unlawful purpose with whoever was its actual perpetrator. Section 22 of the Zambian Penal Code provides as thus couched;

22. 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.

The elements of the joint unlawful enterprise are that, firstly, the venture must be committed by two or more persons, and secondly, there must be prior agreement that a common purpose must be carried out. This agreement could be express or implied in the action of the parties to a criminal venture. It was held in Mutambo and others v The People\textsuperscript{27} 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 them and each does so with the intention of participating in that prosecution with any other persons.

The effect of the common design doctrine is that a secondary party is liable for offences committed in the course of executing the criminal joint venture, irrespective of the actual part played in the joint venture by the parties to a venture in question. What matters most is the common intention to commit the crime. Thus, where a member of an unlawful enterprise

\textsuperscript{27} [1963-64] ZR 160
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.\textsuperscript{28}

The common design doctrine works well when there is no proper definition as to who actually committed the offence. An offence committed in pursuit of the common purpose then, warrants all the participants equally liable, especially when the actual perpetrator is not known. For the doctrine to apply, however, the offence actually committed must be the original one envisaged by the parties.\textsuperscript{29} Alternatively, it may also be a probable consequence of doing what was originally contemplated by the parties.

In \textit{Petro and Another v The People}\textsuperscript{30} the first appellant was held to have known about the prosecution of armed robbery and hence death that resulted from that robbery was as well an offence which he was rightly convicted of. The second appellant in the same case was held not to have formed the common purpose to prosecute the crime with a gun. He was not aware that the perpetrators were armed. Consequently, his sentence and conviction for murder were quashed.

The offence committed which is not the probable consequence of the commission of the contemplated offence does not make liable the people who are participants to the crime. The perpetrator is the one who would be solely liable. In \textit{Mwape v The People}\textsuperscript{31} the robbers in an aggravated robbery agreed in pursuit of the common purpose to steal, that they should not be noticed by the watchman. One of them murdered the watchman. The court held that the violence used by the appellant's confederates against the watchman was in breach of the

\begin{itemize}
\item \textsuperscript{28} Kulusika, \textit{Text, cases and Materials on Criminal Law in Zambia}, 147
\item \textsuperscript{29} Hatchard, \textit{Criminal Law and Criminology in Zambia}, (Lusaka: Multimedia Publications, 1994), 44.
\item \textsuperscript{30} (1967) Z.R. 140 (C.A.)
\item \textsuperscript{31} (1976) Z.R. 160 (S.C.)
\end{itemize}
common purpose to which the appellant had agreed and that such violence was not a probable consequence of the prosecution of the common purpose to which the appellant was party.

In *Verreyne v R*[^32] a ganger ordered a boss boy, who held a blasting licence, to blast before the authorised time and in the process the boss boy committed various offences against the mining regulations, the ganger could not be guilty of procuring these offences, which were not the probable consequences of his order.

In both aforementioned cases, it can be concluded that the departure from the common purpose excludes liability of those who agree on one purpose other than that committed by one or some of the members to the group. Where the act was not originally contemplated, an adventurer will only be relieved of liability if the criminal act of his confederates falls wholly outside the common purpose.

It is however not an excuse if the resulting offence other than the common purpose was reasonably foreseeable or contemplated. For example, the offence would be murder if the intention of the parties in the common design was to cause grievous bodily harm. A party to such criminal enterprise will not give an excuse to state that the intention was not to kill but only to cause grievous bodily harm.

A person may also not be held liable if he expressly and actively withdraws or disassociates himself from the common purpose. It must be insisted that the withdrawal must be unequivocal. This was held in *Chisulo v R*[^33] where three people assaulted a man and beat him to death; the deceased suffered multiple injuries, but one was of real gravity. At some point

[^33]: [1961] R&N 116
during the fighting one of the accused persons had told the others that it was too much and that they ought to stop. He claimed that by this statement he had disassociated himself from the common design to assault. The court held that he had not effectively done so.

It should also be noted that for the doctrine of common purpose to apply there must be a common purpose with the party actually committing the crime, at the time the crime is committed, so that if two persons have been involved in one offence but no common purpose between them can be established then the guilt of each one must be proved separately; and if it is not certain which one committed the crime then both must be acquitted.

In *Haonga v The People*\(^3^4\) the appellants were convicted of the murder of a farmer, who was shot and killed during an armed robbery carried out by five men. It was however, not known who fired the shots. The court in acquitting the appellants held that where two or more persons are known to have been present at the scene of an offence and one of them must have committed it, but it is not known which one, they must all be acquitted of the offence unless it is proved that they acted with a common design.

2.4.0. Conclusion

It has been observed that the Zambian Penal Code has sections which link different parties to one crime. There could be aiders, abettors, counsellors, procurers, and other accessories like accessories after the fact. Different parties can participate to one crime in different ways. This participation has been seen in sections 21, 22, 23 and 397. The Zambian law has through the Penal Code and case law settled as follows:

\(^{34}\) (1976) Z.R. 200 (S.C.)
(i) That in order for the doctrine of common design to operate, two or more people must act in concert.

(ii) 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.

(iii) 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.

(iv) That where persons are engaged together in the commission of a felony and another offence arises from an act of one of those persons which goes beyond the common design to which the others were parties, those others cannot be convicted of the offence of which the one is guilty.

(v) That if an offence which is a result of the kind of an act which was part of the common design then all will be liable for that offence.

(vi) That where two or more persons are known to have been present at the scene of an offence and one of them must have committed it, but it is not known which one, they must all be acquitted of the offence unless it is proved that they acted with a common design.
The chapter has discussed situations where parties to a crime would be convicted and situations where some parties would not be liable, stating different circumstances which would exempt a party from criminal liability.
CHAPTER THREE

A COMPARATIVE ANALYSIS OF THE COMMON DESIGN DOCTRINE IN ZAMBIA AND OTHER JURISDICTIONS

3.1.0. Introduction

This chapter will discuss how the doctrine of common design applies to Zambia in relation to other jurisdictions. The principles and the law that govern the doctrine will be discussed from different jurisdictional perspectives. International law and other instruments dealing with the doctrine will be discussed, and how they apply to the respective jurisdictions. The comparison will make us appreciate the doctrine to a deeper level.

3.2.0. Liability based on common purpose in different Jurisdictions

3.2.1. England

English law recognises the doctrine of common purpose. It recognises that a person who takes part in a group crime in progress cannot automatically be seen to be an accomplice, but the intention of the participants in the robbery must be the same. A participant who does not have the same intention to commit the crime of robbery and, for example, only steals property while the other perpetrator is incidentally in the process of assaulting the victim with the intention to steal, will not be convicted of the crime of robbery.

English law prescribes that the required element of dishonesty must be satisfied in a criminal matter. The jury must decide whether the circumstances of the case, including the perpetrator’s motives and belief, indicate that he acted dishonestly in accordance with the

36 Ibid
criteria of the standards of reasonable and ordinary people, and then decide whether the accused was aware of the fact that his actions were dishonest, measured against the standards of ordinary people (the reasonable man). This test actually entails a subjective element and not the accused's own standards of honesty, but his awareness of the standards of ordinary persons. Should the accused thus believe that his behaviour or actions are not dishonest in accordance with the standards of ordinary people, then he is not acting dishonestly.

3.2.2. Canada

Common purpose doctrine is applied in Canada as well, but it is extended a bit further by making specific statutory provision for an alternative ground for accountability, where a person, notwithstanding the presence of common purpose, cannot be convicted as an accomplice. This extends the accountability of the perpetrator and other involved parties to crimes outside the original intended crime. This includes other crimes committed while the original intended crime is in process, where the additional crime is a probable consequence of the original crime.

The intention requirement here should be substantially the same as everyone involved in the crime when executing the common design. Liability in this case can extend to someone if it is sufficiently proved that such a one intended to execute the crime in question. Thus, one must have full responsibility and have the necessary mens rea to undertake the unlawful activity and so undertake it along with others.

3.2.3. Germany

In Germany, for there to be liability under common design, there must be common purpose, notwithstanding the fact that all the members of the group are not aware of the details of the manner in which the crime is to be committed.\(^{39}\) However, in the event of robbery with fatal consequences for example, the death can be caused intentionally or in a grossly negligent or reckless manner. It would appear that recklessness will include gross negligence in circumstances where the community would expect that the necessary care should be taken not to cause a person’s death. The culpability requirement, with regard to this crime, is thus that the perpetrator must at least have neglected the duty of care in his actions.\(^{40}\) The perpetrator must thus have caused the death of the victim through his own irresponsibility in the specific circumstances, or by not exercising the required care and respect for another’s life.

3.2.4. International Law

Doctrine and History International criminal prosecutors enjoy an array of liability theories with which to accuse an individual of having committed an international crime. Article 7(1) of the International Criminal Tribunal for former Yugoslavia (ICTY) Statute and Article 6(1) of the same statute describes the five forms of “direct responsibility” in identical terms:

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime . . . shall be individually responsible for the crime.

On its face, this provision encompasses five kinds of liability: two principal and three accessorional. A defendant can be found guilty if he “committed” a crime. He may also be liable

\(^{39}\) Ibid.
\(^{40}\) Ibid.
if he “planned” a crime; whether by himself or with others. Under either of these provisions, the defendant must either intend to plan or intend to commit the crime or be aware of the substantial likelihood that a criminal act or omission would occur as a consequence of his conduct.

An individual can also be liable for a crime based on his interaction with others: he can instigate, order, or aid and abet the commission of a crime by another. These forms of liability are accessorial, in that they rely on someone other than the defendant to commit a crime and thus incur liability both to the principal (the person physically committing the crime) and to the accessory (the defendant).

The command responsibility provisions of the ICTY and ICTR statutes, Articles 7(3) and 6(3) respectively, provide for another form of accessorial liability, namely that a person possessing command authority, whether as a civilian or military leader, may also be responsible for crimes committed by his subordinates if the leader fails to prevent the crimes or fails to punish the crimes once they occur. The fact that any of the acts was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable ensures to prevent such acts or to punish the perpetrators thereof.

The form of liability known as “joint criminal enterprise” or “common plan” is not explicit in the statute of the ICTY or ICTR, although the judges have found that it is implicitly included
in the language of Article 7(1). Under this form of liability, an individual may be held responsible for all crimes committed pursuant to the existence of a common plan or design.\footnote{Prosecutor v. Delalic, Judgment, Case No. IT-96-21-T (Nov. 16, 1998)}

The international statutes were enacted particularly directed at the most grave offenders. Offenders are those who are charged and brought before international tribunals who have fought in wars and engaged in dreadful conduct. However, their level of legal liability for collective criminal conduct is precisely what is at issue. Are they guilty for the actions of their co-conspirators or merely guilty for their own actions? The fact that the framers of the ICTY Statute sought to end impunity for war crimes does not help us answer this fundamental question of criminal law theory.

Although it is clear that the framers of the Statute intended to impose criminal liability for perpetrators, this fact alone tells us little about which theory of liability they wanted them prosecuted for and under what factual circumstances.

3.2.5. India

Indian jurisprudence attest that for joint criminal enterprise mens rea is required and it should be more than negligence. Thus, the cases of aiding and abetting require no proof of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice’s contribution.\footnote{Ibid.} The rationale behind the common design doctrine liability is that all those who participate in a common criminal action and share criminal intent should also share in criminal
liability, no matter their role in the crime, because each is indispensable to the result and it would be difficult to distinguish between their degrees of liability.\footnote{R. L. Haffajee, “Prosecuting Crimes of Rape and Sexual Violence at The ICTR: The Application of Joint Criminal Enterprise Theory” Harvard Journal of Law & Gender Vol. 29.}

Section 111 of the 1860 Indian Penal Code provides that liability of abettor when one act abetted and different act is done, the abettor is liable for the act done, in the same manner and to the same extent as if he had directly abetted it. This subsists provided that the act done was a probable consequence of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment.

Section 113 further provides that when an act is abetted with the intention on the part of the abettor of causing a particular effect, and an act for which the abettor is liable in consequence of the abetment, causes a different effect from that intended by the abettor, the abettor is liable for the effect caused, in the same manner and to the same extent as if he had abetted the act with the intention of causing that effect, provided he knew that the act abetted was likely to cause that effect. For example, if A instigates B to cause grievous hurt to Z. B, in consequence of the instigation, causes grievous hurt to Z. Z dies in consequence. Here, if A knew that the grievous hurt abetted was likely to cause death, A is liable to be punished with the punishment provided for murder.

3.3.0. Observations of the Doctrine from Different Jurisdictions

From the outline of the doctrine from different jurisdictions, it is seen that the general application of the law is the same in all jurisdictions. It must be noted that in international law, the doctrine applies much to genocide crimes and other crimes against humanity. Zambia's
Penal Code however, outlines different parties to a crime and hence makes it different from the other jurisdiction.

The outstanding feature of the doctrine in Canadian jurisdiction is that it makes specific statutory provision for an alternative ground for accountability on the part of the different parties. In Germany on the other hand, it is stated that the parties need not to know how the crime is to be executed. What is important, therefore, is the knowledge that a criminal enterprise is being embarked on. The Indian penal code does not however, provide for the parties as it is the case with the Zambian system where all the parties to a crime are provided for.

These variations are evident but there is nevertheless some elements linking different parties to one offence and provide for punishment of the different parties as though every participant participated in the same way and in exactly the same intensity in the effectuation of the crime.

3.4.0. Conclusion

The doctrine of common law design materially applies almost very similarly in all jurisdictions. Zambia as former British colony derives much of this doctrine from the British jurisdiction and common law principles. Thus, a large chunk of the law that applies o the doctrine is as similar in Zambia as in England. From this comparison, we can further determine how the law is applied and examine the challenges of its applicability as will be discussed in chapter four. This similarity shows that the general consequences of the applicability of the doctrine are the same.
CHAPTER FOUR

ANALYSIS OF THE DOCTRINE: STRENGTHS AND WEAKNESSES; IS THERE ANY REMEDY TO THE WEAKNESSES?

4.1.0. Introduction

This chapter will outline and identify specific elements of criminal liability. The chapter will explain the advantages of the applicability of the doctrine of common design and identify possible problems that may arise out of the doctrine in relation to the principles of criminal liability both in the Zambian context and other international jurisdictions such as England, South Africa, Canada, Germany, India and international law jurisdiction. The chapter intends to address the questions of criminal liability and the principle of proof beyond reasonable doubt in criminal law. A critique of the doctrine will be done and thereafter outline the possible measures that would make the complex doctrine be understood in entirety by common man.

4.2.0. Constitutive Elements of Criminal Liability

A criminal act worth of its sort constitutes two elements, that is, the actus reus and the mens rea. While the actus reus means the guilty act, mens rea means the guilty mind. The consequence of this is that the guilty act does not make a person guilty of a crime unless the mind is guilty, and, conversely, the act itself is guilty.\textsuperscript{44} It is therefore, out of these two elements that criminal charges generally, should aim at showing that the accused had the

necessary state of mind at the material time that the alleged criminal act was committed.\textsuperscript{45} It is out of the establishment of the above elements that criminal liability can be established.

*Actus reus* entails that the accused must have actually done or committed the act purported to be criminal. This means that a person who is made to do something is not deemed to have done it himself. Thus, if A takes the hand of B in which a weapon kills C, A is guilty of murder and B is excused.\textsuperscript{46} Simply put, a person charged with criminal responsibility must be a free agent of his own acts. Above all, the *actus reus* must consist of an act or omission occurring in defined surrounding circumstances and that the act or omission should cause any requisite prohibited consequence.\textsuperscript{47}

Further, it must be shown from the onset that there is a causal link between the criminal act and the crime in question. It must be shown that the act which was done was a substantive cause of the crime.\textsuperscript{48} The *actus reus* takes the form of failure to do something or the actual doing of something. Accordingly, the commission or omission of an act would amount to the *actus reus*. This means therefore, that it is not only the act itself that constitutes *actus reus*, but also the omission to act, or rather, failure to act in a particular manner under the circumstances which result into a criminal consequence.

It is possible to commit a crime by omitting to act. If there was a duty on the part of the accused to act and nevertheless, the person so accused does not act, then the omission is deemed to be a commission of a criminal act.\textsuperscript{49} Such duty may arise out of contract, out of a

\textsuperscript{45} Ibid.

\textsuperscript{46} Keenan, Smith and Keenan's English Law, "Text and case", 675.


\textsuperscript{48} Keenan, Smith and Keenan's English Law, "Text and case", 675.

\textsuperscript{49} Michael J. Allen, Textbook on Criminal Law 6\textsuperscript{th} ed. (London: Blackstone Press Limited, 2001) 27
relationship, and a duty arising from creation of a dangerous situation which requires the accused to act in order to prevent a dangerous event from causing harmful consequences.\textsuperscript{50}

*Mens rea* on the other hand, is a requirement that must accompany the *actus reus*. The *mens rea* and the *actus reus* must coincide in order to constitute a crime.\textsuperscript{51} *Mens rea* can however, be direct or implied. Implied *mens rea* can take the form of oblique intent, recklessness or negligence. Direct intent occurs where the accused has a desire at the material time to commit a crime.\textsuperscript{52} This is where for example, one wishes to kill another person, and in execution of that intent, a gun is used to shoot, and that the accused person kills another, the accused will be liable for criminal act. This is deliberate act which imputes guilt on such a person.

Oblique intent is where the criminal result is not desired as such, but the accused is further held to have committed the crime. Intention in this regard is not a bare wish to commit a criminal act but a combination of wish and act or other external element.\textsuperscript{53} Thus, a person will be held to intend an undesired event that he knows for sure he is bringing about. Oblique intention can quite naturally be seen as a species of intention once one realises that what is intended is that which is desired in the broad ‘package’ sense of the term.\textsuperscript{54}

Therefore, oblique intention includes the intention of means necessary to ends and of necessary side consequences to ends. This ultimately, is considered as a desire to achieve the end result. For example, in *Hyam v DPP* the accused burnt two victims in the house which

\textsuperscript{50} Ibid.
\textsuperscript{52} Ibid., 678
\textsuperscript{54} Ibid., 90
she set on fire in attempting to frighten the targeted rival for a lover who at that time had escaped. The accused was convicted despite not intending to burn the victims themselves. In this case, Lord Hailsham held as follows; “intention connotes a state of affairs which the party intending does more than contemplate: it connotes a state of affairs which on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition”

Recklessness is another form of *mens rea* where the accused does not desire the results but still is held liable. The basis of this is that the accused ought to have appreciated the risk of embarking on a particular act. The guilty mind is implied in this case because there is failure on the part of the accused to consider a risk.\textsuperscript{55} The accused in this case foresees that the particular kind of harm might be done and yet has gone on to take the risk of it, and that the risk was unreasonable for him to take.\textsuperscript{56} On the other hand, the accused can be said to possess *mens rea* when his act is reckless by taking on an act which creates a serious risk of harm despite having recognised the risk or not at all directing his mind that such a risk is intrinsic into his act.\textsuperscript{57}

Negligence by the accused will be deemed to be necessary *mens rea* which can qualify to impute criminal liability on such an accused. Thus, before, a person may be convicted, the prosecution must prove not only that the person did something but also actually intended to do a particular offensive act in criminal law. This is in line with the holding of Cave, J., in *Chisholm v Doulton*\textsuperscript{58} where he stated that, “It is a general principle of our criminal law that

\begin{footnotes}
\footnotetext[56]{R v Cunningham [1957] 2 Q.B. 396}
\footnotetext[57]{R v Caldwell [1982] A.C. 341}
\footnotetext[58]{(1889) AC 412}
\end{footnotes}
there must be as an essential ingredient in a criminal offence some blameworthy condition of mind – sometimes it is negligence, sometimes malice, sometimes guilty knowledge, but as a general rule there must be something of that kind which is designated by the expression *mens rea.*”

Transferred malice is another class of *mens rea* where one intends to execute a criminal act on one thing or person, and then end up causing criminal damage on another thing or person. This will then amount to transferred malice.\(^5^9\) If the death of someone other than the intended victim is caused then the doctrine of transferred malice will be used to convict the accused of murder.

Having established the two elements of criminal liability, it must be noted that once these elements occur independent of each other, there would not be criminal liability. The two elements must coincide. Coinciding of the two elements must not only be seen at the beginning of an act. It is not necessary that *mens rea* should be present at the inception of the *actus reus*; it can be superimposed on an existing act. This implies that it could also be in the due course of an act that malice (*mens rea*) can be formed, just as it was in the case of Fagan v Smith\(^6^0\) where the intention of the accused to tread with a car’s wheel on the police man’s foot was formed when the wheel was already on the foot of the police man. Criminal liability in that case only came in when the accused decided to rest a wheel on the foot of a policeman after realising that the wheel was actually on top of the policeman’s foot.

Another example could be in theft where there must be an intention to deprive someone of his or her property permanently. In this case, one may for example; take something belonging

\(^{5^9}\) Michael J. Allen, *Elliott and Wood’s Cases and Materials on Criminal Law* 8\(^{th}\) ed. 679

\(^{6^0}\) [1968] 3 All ER 422
to someone for safe keeping, but once that person decides to take that thing permanently, then from that time onwards, the criminal liability can be imputed on such a person.

The essence of these elements is that the law seeks to avoid making criminals out of people who are in no way morally at fault. Cave, J, said in Chisholm that "a person cannot be convicted and punished in a proceeding of a criminal nature unless it can be shown that he had a guilty mind." This is why before anyone may be convicted the prosecution must prove the case beyond all reasonable doubt that there was a commission or omission of an act amounting to criminal and that the accused was acting or not acting intentionally to effect the desired result directly or impliedly. To this effect, Lord Reid stated in Sweet v Parsley61 as couched thus,

"in the absence of a clear indication in the Act that an offence is intended to be an absolute offence, it is necessary to go outside the Act and examine all relevant circumstances in order to establish that this must have been the intention of parliament... there has for centuries been a presumption that parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that, whenever a section is silent as to mens rea, there is a presumption that, in order to give effect to the will of parliament, we must read in words appropriate to require mens rea... it is firmly established by a host of authorities that mens rea an essential ingredient of every offence unless some reason be found for holding that it is not necessary."

---

61 (1970) AC 132
So far, there would not be disputes as to what constitutes actus reus. However, mens rea seems a problem to establish in many instances. Zambian Penal Code has described different crimes, clearly defining the elements that constitute a particular criminal act. To appreciate this approach by the Zambian Penal Code, we shall explain the elements that constitute a criminal offence of murder, theft and aggravated robbery. These have been chosen because they are common place crimes where the doctrine of common design may apply.

4.2.1. Mens Rea in Murder and Manslaughter

Section 204 of the Zambian Penal Code states that Malice aforesought, which is in this case mens rea shall be deemed to be established by any of the following circumstances: (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 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.

This section entails that any actus reus carried out under the above circumstances amounts to a criminal act of murder. This occurs where one acts with express intent to cause death or to cause grievous harm to a person, where such a person knows that the act will cause death, or have intent to commit a felony, and intention to facilitate the escape of any person who has committed a felony.
4.2.2. Mens Rea in Theft

Section 265 outlines the elements of theft. A person is said to have stolen if he or she fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing.\(^{62}\) *Mens rea* of such a person subsist when the accused person intends to permanently deprive the general or special owner of the thing of it, to use the thing as a pledge or security, to part with it on a condition as to its return which the person taking or converting it may be unable to perform, and to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion; and in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner.\(^{63}\)

The ingredients of theft therefore, include dishonesty, property in question, misappropriation of that property, then that property must belong to another and the accused must intend to deprive the owner of the property permanently. All these are elements which must be present.

4.2.3. Mens Rea in Aggravated Robbery

Aggravated robbery is created by section 294 of the Penal Code. It is stated in this section that any person who, being armed with any offensive weapon or instrument, or being together with one person or more, steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property to obtain

---

\(^{62}\) Section 265 (1) of the Penal Code, Cap 87 of the laws of Zambia

\(^{63}\) Section 265 (2) of the Penal Code, Cap 87 of the Laws of Zambia
or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony of aggravated robbery.

*Mens rea* in aggravated robbery subsists in the decision to be armed with an offensive weapon, to be in the company of another person when stealing, and to use or threaten the use of violence to any property or person in order to effect the stealing.

4.3.0. Mens Rea in Crimes Arising out of the Common Design Doctrine

The general rule is criminal liability subsist when the accused is in the position to account for his or her acts and that the intention to come up with the desired result was formed. Apparently, in group crimes, common intention or common design seem to be the *mens rea* in the execution of a crime. Common intention may be inferred from circumstances disclosed in the evidence and should not be by express agreement.

The *mens rea* required of an accessory lies in the intention to assist or encourage the commission of the principal offence combined with knowledge of the circumstances which constitute the offence. The law of common design is such that the perpetrator might be the one who causes the *actus reus* but *mens rea* is applied severally and each of the participants is deemed to have committed that offence.

As the acts of the accessory do not cause the *actus reus*, the *mens rea* required cannot equate exactly to that of the perpetrator. The *mens rea* of the accessories is dependent on the *actus reus* of the perpetrator who possess both the *mens rea* and the *actus reus* of the crime.

---

64 Michael J. Allen, Textbook on Criminal Law, 219.
committed. This is why when the perpetrator is acquitted; the accessories have no case to answer too.

Knowledge of the circumstances in which the offence is committed is also deemed to be the mens rea on the part of the accessory. This means that before convicting a person as a participant in crime, he must himself at least be aware of the essential matters which constitute the resultant offence. He need not actually know that an offence has been committed, because he may not know that the facts constitute an offence.\(^6\) This refers to the circumstances of the actus reus, its consequences and the mens rea of the perpetrator.

Knowledge of the type of the offence is another ground for liability on the accessory. This means that a person who is aware that a gun has been carried to shoot anyone who makes any resistance to the execution of the crime, then such an accessory who possesses such details is deemed to have necessary mens rea.

From the principles of this doctrine, it appears that an accessory is more harshly treated than the principal as the latter can only be convicted of murder where he intended to kill or cause grievous bodily harm, whereas the accessory will be liable if he foresaw the resultant crime as a possible incident of the joint enterprise. This is problematic because the mens rea of the accessory does not relate to the actus reus of the offence but to his own participation; he is liable because of his intentional participation in the contemplated offence.

---

\(^6\) *ibid.*
4.4.0. Strengths of the Doctrine of Common Design

1. Convicting an accessory who only foresees, and not intend, that the principal will kill of manslaughter, for example, would perform a deterrence function. The doctrine performs a deterrent role as a principle of sentencing. Both the participant and those who would wish to participate in criminal activities would be deterred from committing and encouraging the criminal act.

2. The strengths lies in the point that the person who withdraws from the joint enterprise is not liable on the offence in question. Levels of participation are differentiated and hence liability too is differentiated. The extent to which this is done is solely dependent on the proof by the accused that he or she withdrew and that he or she was not aware of the circumstances under which the offence was committed. In this case, the evidential burden of proof shifts on the accused. To give such an accused chance to recuse himself of the alleged criminal act.

3. The mere fact that someone participates in criminal venture, he or she chooses to associate himself or herself with the perpetrator. Liability for such participants is therefore befitting. This is because an accessory intentionally assisted the principal. His intentional conduct therefore, is equivalent to manifesting consent to liability.

4.4.0. The Critique of the Doctrine of Common Design

While the doctrine has its advantages in the application of the criminal law principles, it has its own inherent weaknesses. The most significant challenge that the doctrine faces is the liability of accessories where mens rea and actus reus are concerned. Mens rea and actus reus requirements for the accessory is not direct because it is the principal who intends to commit a
particular act at that material time and he is the one who has necessary elements of the crime, i.e., the actus reus and the mens rea.

Regard must be had to the fact that there should be a necessary state of mind for a person to be held criminally liable. Common design doctrine on the contrary holds a person criminally liable who did not directly possess the requisite criminal elements. This is also the case even where one did not intend to bring about a certain result that the common design doctrine has imputed criminal liability on him.66

It is acknowledged that the doctrine of the common design suffers from some deficiencies. Firstly, there is a high risk of mistaken attribution of criminal liability for contributors who do not intend to further the criminal purpose of the enterprise. Criminal intent might not be the same in all parties. The imposition of criminal liability for the foreseeable acts of one’s co-conspirators and the mistaken claim that all members of a joint enterprise are equally culpable for the actions of its members is an irregularity where criminal law liability principles are concerned.67

Secondly, the collective moral guilt suggested by these crimes cannot be used as a justification to blindly impose criminal liability on all members of a group, regardless of their level of participation. Culpability must be relative to the contribution involved. A defendant who makes a small contribution is not as guilty as someone who makes a large contribution.68

---

66 R. K. Punja, what is the distinction between "joint criminal enterprise" as defined by the ICTY case law and conspiracy in common law jurisdictions? (2003)
68 Ibid.
Thirdly, just as we punish we do not punish a person for planning to commit an evil crime until he has gone beyond mere preparation and commit an attempt, even so we must not punish a person who has offered help to someone who may be some time too far away from committing an offense.

On the other hand, mens rea for an accessory is that he must be aware or must have foreseen that a kind of a crime will result out of the commission of the joint enterprise. For example, in murder, it is sufficient that an accessory must have foreseen that death will ensue. If this is proved, then such an accessory will be liable. This means that mens rea for an accessory to murder is not the same as that required for the principal in a manslaughter case where only foresight of death is required for recklessness manslaughter.\(^69\)

It must be noted that a person cannot be punished without criminal fault, and he cannot commit an offence beyond his or her capacities. Further, it must also be noted that there must be proportionality between culpability and penal liability. Arising from the aforementioned principles, the common design doctrine does not fit well in the sense that it punishes an accessory who does not cause the actus reus as though he was the principle offender, who actually possessed both the mens rea and the actus reus.

The Zambian Penal Code is far from being clear on the mens rea of an accessory, and there is no known Zambian caselaw that has directly dealt with the issue. It must be appreciated that the accessorial mens rea and liability is difficult to interpret. The questions to be asked would be: is it possible to attribute someone’s actus reus to another person? What proper measure can there be for the blameworthiness?

The problem that arises out of this doctrine under the Zambian Penal Code is that the doctrine arises out of the occurrence of the commission of a criminal enterprise that are well outlined by the penal code. The penal code outlines the offences and also the constituent elements, it could be murder, theft, robbery, and so on. Out of this situation, a problem arises in that the principles of the common design would bring in different elements to the same crime that is provided for by the penal code. For example, in murder, a person should have malice aforethought, and must commit the act itself. In common design, the elements would simply be the knowledge that under the circumstances, a resultant crime would be committed. It is under this doctrine that the accused can be convicted for the crime which they did not themselves commit.

There could be deviation from the common design by one or more parties to the crime and there could be common law defences availed to such people such as defence of provocation, duress, or self-defence.\(^7^0\) What then happens when an accessory does his part to effect the crime committed by the principal offender, but then at the same time there is a defence on the part of the principal? Will the defence be applied to the accessory as well?

The burden of proof shifts from the prosecution onto the accused. This brings in some subjective element in determining liability. In other words, there is no definite pronouncement on what elements amount to disassociation, withdrawal or non-awareness of the crime. It is upon the accused to state that he or she was not aware of the other party possessing a dangerous weapon, or that he had withdrawn or disassociated himself or herself. In \textit{Petro v the people}, the second appellant was not aware that perpetrators of murder in the course of

\(^7^0\) Weston, Criminal Complicity: A Comparative Analysis of Homicide Liability, 2002, PhD Thesis, University of Wales, Swansea
robbery had carried guns, to make it armed robbery. The appellant was to prove that he was not aware of the guns carried by other parties to that criminal venture. What then if that person was just denying to excuse himself of the crime? There are high possibilities here for the accused to use the non-common intention as a scapegoat.

The other problem of the doctrine is that there is a problem in the way the doctrine has been applied in the Zambian context. It is law today in Zambia as it was held in *Shindano v the people* that the accessory must be acquitted if the principal is acquitted. What remains here is an insinuation that the accessory never did anything at all. This applicability of law is left without clarification because the accessory might have already accomplished his task.

In *Haonga v the people*, it was held that if no one who has committed a particular act is not known to have committed an offence, then all must be acquitted; unless it is proved that the parties acted in common design. This law leaves room for great abuse because it is for the parties to prove that they never acted together and that by conspiring to act together, they can agree not to be acting together.

### 4.5.0. Conclusion

*Mens rea* and *actus reus* requirements for the accessory is not direct. All what accessorrial liability is based on is the act of the principal. It is the principal who intends to do an act, and actually does it and whatever follows from that, will be deemed to be an act with *mens rea* for all the participants. The *mens rea* and *actus reus* for the accessory is not direct, but for the principal. The question which arises is whether or not one’s criminal elements can be used to hold others criminally liable.
It can be concluded that the doctrine is complex and is a recipe for contradiction of the penal code provisions. As noted above, the penal code provides for the elements of the crime and then, at the same time, the general rules of the common design principles will be applied while specific rules of the crime in question are well outlined.
CHAPTER FIVE

RECOMMENDATIONS AND FURTHER RESEARCH

5.1.0. Introduction

This chapter will give a synopsis of the essay and conclude the research by making some recommendations for possible solutions to the problems inherent in the doctrine of the common design. Further research on the issues concerning the doctrine will be suggested.

5.2.0. Synopsis of the Research

The research has outlined the law applicable to the doctrine of common design in Zambia and in other jurisdictions. The penal codes in general are the key law that applies to the doctrine in many jurisdictions. To be noted herein is that criminal liability for all members is the same for as long as there was common intention to execute the crime in question. It does not matter here whether or not any of the participants did not actually cause the crime in question through the action of his or her own volition. Liability extends to all participants severally.

However, the general exception to this law is that one who is not aware of the crime, and one who does not intend and consent that a particular crime should be committed, is excused from criminal liability. This requires that the participant prove to the prosecution that he or she did not intend that a particular crime be committed. The burden of proof in such cases shifts from the prosecution to the accused. What needs to be proved here is the fact that there was no common design on the part of the participant where a particular crime is concerned.
The essay has outlined the strengths that are associated with the doctrine and has as well outlined the weaknesses in the way it applies, bearing in mind different criminal law principles of liability. It is therefore, recommended under this chapter that there be some reforms that may well define the doctrine for its easier applicability without having recourse to the complicated rules that need to be invoked to find the parties to a crime criminally liable.

5.3.0. Recommendations

1. The law should ask whether the accessory was the cause of the crime that the principal committed. The question would be; was the accessory of the causal influence on the principal? It is hereby required that the rules of causation should be widened in relation to the doctrine of the common design.

2. The current law in Zambia does not define in a precise manner the *mens rea* and *actus reus* of an accessory. The Penal Codes should therefore define in a precise manner the wrong committed by the accessory.

3. It is also recommended that there should be special statutory offence that should be created to cover all forms of accessorial liability. This means that there should be an Act of Parliament which must take care of accessorial liability. For example, there would be *Accessorial (Criminal) Liability Act* or *Participation in Crime Act*. This would do away with complicated myriad of rules covering accessorial liability. This will help the court avoid determining criminal liability using the *actus reus* and *mens rea* of the principals.

47
This reform will fine tune the liability of parties to a crime because culpability will be relative to the contribution involved. A defendant who makes a small contribution is not as guilty as someone who makes a large contribution.

4. The law must separate liability of the principal offenders and accessories because the accessories will have nevertheless participated and committed the offence, even if there is no liability on the part of the purported principal. This is so in the sense that the current law states that if the principal is acquitted, then the accessory should be acquitted. The accessory will have performed his part where the crime was concerned and hence, deserves his portion of penal liability.

5.4.0. Further Research

The complexity of the doctrine needs to be investigated to a deeper level. There is need that different circumstances in which people get involved in group crime be studied in order to find a way of apportioning the blame to different parties. This is suggested as such because other than from being an innocent agent, socio-economic factors are other reasons why people may engage in crime. Sociological legal studies must be considered for the full appreciation of the doctrine.

5.5.0. Conclusion

Our research has uncovered the doctrine of common design in general and its applicability particularly in Zambia. Criminal law has set some general rules to which all other criminal law principles must conform. Such rules are rules of liability and rules of burden of proof and other general rules. It is known that liability for the accused is measured accordingly. The
essay has therefore, identified strengths and weaknesses which arises out of the applicability of the common design doctrine to the criminal liability principles and rules. It is only and only when the law governing the common design is expanded that the identified problems would be addressed whereby improving our legal system and strengthen the justice system in Zambia.
REFERENCES

BOOKS


OTHER WORKS


Punja, R. K. what is the distinction between “joint criminal enterprise” as defined by the ICTY case law and conspiracy in common law jurisdictions? (2003)