11/90

Box 90 (4)

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

RUFUS NATO NZO ..... FIRST APPELLANT

DOUGLAS MNYISILE TYUTYU ..... SECOND APPELLANT

and

THE STATE ..... RESPONDENT

CORAM : HEFER, NESTADT et STEYN JJA.

HEARD : 23 NOVEMBER 1989.

DELIVERED : 8 MARCH 1990.

JUDGMENT BY J J F HEFER JA.

HEFER JA :

From the second half of 1981 to May 1983 a group of terrorists operated in Port Elizabeth. They had been sent by the African National Congress ("the A N C") and had infiltrated the country from Lesotho. First to arrive, were James and Walk Tall. They were followed in November 1982 by the present first appellant and two confederates, Joe and Mkuseli. Shortly thereafter Walk Tall returned to Lesotho and from then onwards first appellant was the leader of the group. Second appellant, a member of the A N C who was employed in the city, acted as the group's so-called underground contact. In that capacity he arranged for their accommodation in the homes of local residents and took charge of and saw to

the concealment of considerable quantities of arms and explosives despatched to him from Lesotho for use by the terrorists. True to custom the group concentrated its attention on public buildings like those in which the magistrates' courts and the Administration Board were situated; through its activities these buildings as also a shopping centre and a railway track at Swartkops were extensively damaged by explosions in which a number of people were injured. A fuel depot was selected as the next target but before it could be attacked certain incidents occurred which caused a dramatic turn of events.

James was killed in January 1983 in the explosion in the Administration Board building in New Brighton. Before his death he had been billeted in the house of Vukile

Tshiwula. On 10 April 1983 Mrs Tshiwula, whose marriage had suffered as a result of her husband's association with the group, threatened to lay a charge against Tshiwula for having harboured James. The threat was uttered in the house where first appellant was staying and was overheard by him. He reported it to Joe who warned Mrs Tshiwula that he would shoot her were she to "combine her family affairs" with the terrorists since she knew that he was a terrorist himself. Shortly afterwards Tshiwula left his wife and three weeks later, on the evening of 8 May 1983, Joe murdered Mrs Tshiwula.

During the morning of 8 May 1983 first appellant happened to pass through Aliwal North en route to

Lesotho when he was accosted by members of the local security branch and found to be in possession of an identity document that had apparently been tampered with. Upon being questioned about the document he revealed to the police that he had been trained as a terrorist and that he had been involved in the terrorist campaign in Port Elizabeth. (His disclosures will later be dealt with in detail.) As a result of information that he gave the police the following day, second appellant was arrested. Several other arrests followed but Joe managed to escape to Lesotho and was never brought to justice.

The appellants (as accused Nos 1 and 2) and nine co-accused were subsequently charged in the Eastern Cape Provincial Division with a variety of offences including the murder of Mrs Tshiwula. On the murder charge (count 7) the appellants

alone were convicted. With leave granted by the trial judge they have now appealed against their convictions and sentences on that count.

The trial court rightly found that the appellants could not be convicted of the murder as co-perpetrators since neither of them had taken any part therein. The crime was nevertheless found to have been committed with the aim of preventing the deceased from giving information to the police that could compromise the members of the group and their local supporters and impede the successful performance of their task. It was committed, the court found, in the execution of the common purpose. Since the murder had been foreseen by the appellants and since they had associated themselves with and

persisted in furthering the common design despite such foresight, it was an act for which they were legally responsible. How the conclusion was arrived at that they had foreseen the possibility of the murder and were responsible for it appears from the following passages from the court's judgment:

> "Turning to the facts, there is no evidence here of a common purpose to kill or to attack or injure, whether aimed at the deceased or anyone else. What did exist, however, was a common purpose on the part of the terrorists and some accused to commit acts of sabotage, in the execution of which design the possibility of certain categories of fatality must have been foreseen and by inference, were foreseen by the participants to that common purpose. This conclusion is based on the extent and locality of the acts of sabotage proved to have been attributable to the group concerned, the fact that these were going to be effected by explosives, and the possession by the terrorists of lethal weaponry."

Having indicated further that the parties to the common

purpose must have foreseen the possible - if not the probable - death of those who might come within the range of the explosions and others who might try to forestall them, the trial judge proceeded as follows:

"As to what must have been foreseen as regards potential or likely informers there is evidence that ANC pamphlets have described as traitors certain persons who have given evidence as State witnesses in prosecutions in which the accused have been ANC members or supporters. In those pamphlets it has been urged that such witnesses be killed. Other ANC publications have advocated that informers be treated as traitors. ..... The conclusion is justified that the attitude of the organisation towards informers would have been no less belligerent towards anyone who threatened to give information about its activities, or about its supporters and what they were doing. Indeed, in that sort of situation, there would be even more reason to take action before any disclosure were made rather than afterwards. The organisation's attitude in these general respects must have been known to the ter-

rorists and to accused nos. 1 and 2, all of whom were members of the ANC and must have known from the inside, as it were, how those at the head of the organisation thought and acted.

In the context of the mission itself, on which the terrorists concerned were engaged, the need to prevent disclosure being made by a threatening informer would clearly have been keenly felt. They stood to be exposed far away from their base and the secrecy and success of their mission would thereby be endangered. This risk was one that they must have foreseen before ever they entered South Africa on this mission. .....Another person who would necessarily have been aware of the problem of what can be called a security leak was accused no. 2 who was responsible, with Mavimbela (an ANC official with whom second appellant dealt in Lesotho), for organising the the mission and who was thereafter responsible for seeing to the storage of its armoury and explosives and for finding the terrorists accomodation. The matter of safe accomodation was of particular importance. Obviously he had to make every endeavour to find households among the members of which there was the least possibility of loose talk and any security risk. He must necessarily have been as much on the watch for that sort of danger materialising,

> as were the terrorists themselves..... In all these circumstances the inference is overwhelming that the terrorists and accused no. 2 foresaw that a threatening informer would probably, or at least might possibly, be dealt with drastically before he could contact the police. Drastic action in this situation, we consider, involved the foreseen possibility of the person concerned being killed."

It will be noticed that the death of a "threatening informer" was thus found to be a foreseen possibility even before Mrs Tshiwula had threatened to expose her husband and before Joe had warned her of the possible consequence of her threat. In regard to the threat and Joe's warning the learned judge said:

> "That foreseen possibility was confirmed by Joe's warning on 10 April which was heard by accused no. 1. The compelling inference, undisturbed by evidence from accused no.2, is that he also knew of that warning. ..... To

sum up, we find beyond reasonable doubt that accused no. 1 must, on all the evidence and at all material times from 10 April onwards, have foreseen the killing of the deceased possibly occurring in the prosecution of the common purpose. In other words, he must have foreseen the possibility that it might become necessary for Joe to kill her in order to preserve the security and success of the mission on which they were engaged. With that foresight, and reckless as to whether such death occurred, he continued to associate in the common purpose right up to the time of his arrest 8 hours before the murder. ..... On the same line of reasoning indicated in respect of accused no.1, we find that beyond reasonable doubt the circumstances were such that accused no. 2 must have foreseen the possibility that the deceased might implement her threat to make her report to the police, and he must have contemplated that in such event fatality might well result, if not would result. Aware of these considerations, he continued in the furtherance of the common purpose, and was still so associating in it at the time of the murder."

As will presently appear the finding that the appellants foresaw the possibility of the murder is crucial. Yet their counsel did not seriously challenge it; and it is plainly correct. When the terrorists came to South Africa and when second appellant became associated with them they must, as the trial judge has shown, all have foreseen the possibility that people who threatened the secrecy of their mission and the proper performance of their task might have to be killed. That possibility became a very real one when Mrs Tshiwula uttered the threat. Of this both the appellants were aware. They were, moreover, aware of Joe's warning and, when matters came to a head six days later when Tshiwula finally left his wife, they must have appreciated the increased

risk of her going to the police and the need for preventing her from doing so. News of her death could hardly have come as a surprise to either of them. Their counsel suggested that they might have been under the impression that Joe's threat might be sufficient to dissuade Mrs Tshiwula from doing what she had threatened to do and that it might accordingly not become necessary to silence her forcibly. But apart from there being no evidence of such an impression, first appellant was the leader of the group and second appellant "the key local figure" ; Joe's attitude was that she should be killed and, had the appellants thought differently, it is hardly likely that his view would have been allowed to prevail.

The finding that the murder was committed in the

execution of the common purpose was not challenged either. Appellants' counsel suggested at one stage of his argument that Joe might have killed the deceased for his own undisclosed reasons, but rightly conceded that such a suggestion is not supported by the evidence and is entirely unrealistic. The evidence overwhelmingly points to her being killed in order to silence her and thus to remove the threat that she posed to the group and to the continuation of its activities.

What appellants' counsel did challenge - in a way that will presently be seen - was the finding that his clients associated themselves with and persisted in the furtherance of the common purpose. This finding must be viewed in the light of the following facts which are

not in issue.

First appellant was responsible, first with James and later with Joe, for planting the bombs that exploded in New Brighton and at Swartkops and thus actively participated in the execution of the common purpose. He was the one who informed Joe of Mrs Tshiwula's threat. By doing so he set the train of events in motion that eventually led to her death. It will be recalled, moreover, that he became the leader of the group in about November 1982 and when he was on his way to Lesotho on 8 May 1983 his purpose was to receive further instructions in regard to the group's activities. Before leaving he had told one of the State witnesses that he would be back after a few months with "many others". To what has

been said earlier about second appellant's role may be added that he visited Maseru during May 1982 after James and Walk Tall had been in the area for some time and urged the A N C officials to step up the campaign in Port Elizabeth. It was after this visit that he started receiving regular consignments of arms and explosives and It was no doubt as a result of his urging that the number of terrorists was increased. The trial judge described him as the "key local figure in the setting up and furtherance of the terrorism campaign in Port Elizabeth and in the receipt, storage and concealment of ammunition and explosives". Second appellant constructed a table with a hidden compartment in which explosives

were kept. At the time of Mrs Tshiwula's threat the table was in the house where first appellant stayed and where the threat was uttered. I mentioned earlier that first appellant overheard the threat and that he reported it to Joe when the latter arrived at the house shortly afterwards. I also referred to Joe's counter-threat. Having warned Mrs Tshuwila in the way described earlier Joe left the house with first appellant. The trial court found that they must have gone to inform second appellant for no sooner had they left than second appellant arrived and had the table with the explosives removed to another house.

In view of this clear evidence of the appellants' continuing participation in the execution of the common

design despite their foresight of the possibility of the murder they would appear to fall squarely under paragraph (c) of the well-known dictum in S v Madlala 1969(2) S A 637 (A) at 640H to the effect that the parties to a common purpose are liable for every foreseen offence committed by any of them in the execution of the design if they persist, reckless as to its possible occurrence. Appellants' counsel argued, however, that this principle does not apply in a case like the present one. His argument went as follows: The A N C is an organisation with thousands of members in this country and several others. Some of its members are known to have committed a multitude of crimes in the execution and furtherance of its objectives. It is foreseeable that they may also do so in

future. But, since liability cannot conceivably be imputed to every member for every foreseen crime so committed by all other members, the imputed liability of a member is limited to crimes with which he specifically associates himself. This is so because liability on the basis of the doctrine of common purpose arises from the accused's association with a particular crime and is not imputed to him where he associates himself, not with a particular crime, but with a criminal campaign involving the commission of a series of crimes. In such a case he can be convicted, apart from crimes in which he personally participated, only of those with which he specifically associated himself. And in the present case, although the appellants were actively

involved in the campaign, there is no evidence that they associated themselves with Mrs Tshiwula's murder.

I am unable to agree. The argument is shrouded in a veil of irrelevant matter. We are not concerned in the present case with the general question of the liability of members of the A N C for crimes committed by other members nor with the appellants' liability merely as members of the organisation. The introduction of these questions into the enquiry only serves to cloud the issue and to obscure the fact that what we are really dealing with concerns the actions of three individuals - Joe and the two appellants - who formed the active core of the A N C cell in Port Elizabeth after Walk tall had left and James had

been killed. It can be inferred from all the available evidence (eg of their conduct when Mrs Tshiwula uttered the threat) that the three of them functioned as a cohesive unit in which each performed his own allotted task. Their design was to wage a localised campaign of terror and destruction; and it was in the furtherance of this design and for the preservation of the unit and the protection of each of its members that the murder was committed. This being the narrow ambit within which their liability falls to be decided it is clear that they cannot derive material assistence from McKenzie v Van der Merwe 1917 A D 41 in which the plaintiff unsuccessfully sought to hold the defendant (who had joined a rebel commando during the 1914 rebellion) liable in damages

by virtue of the doctrine of common purpose for delicts committed by other rebels. All the members of the court were agreed in that case that the claim could only succeed if it had been shown that the defendant had authorized the acts in question and the majority took the view that this had not been done. As INNES CJ pointed out at 47 -

> ".....where it is sought to affix liability on an accused for a delict, which he neither instigated, perpetrated, aided nor abetted, it must be shown that he authorised it, so as to make the act complained of his act. And that must depend upon the circumstances of each case; do they or do they not justify the inference that the perpetrator was the agent of the accused to do the particular act? "

There is no resemblance between the facts in McKenzie's

case and the facts of the present case. Remarks such as those of INNES CJ (at 45) that a rebel's mere act of joining a commando could not confer upon his fellow insurgents a mandate "to seize horses and stock or to destroy property in furtherance of his operations" and (at 47) that "every member of a commando is (not), by the mere fact of his membership, liable for the acts of every other member 'within the scope of the objects of the rebellion' " do not assist the appellants.

Be that as it may, the nub of the argument is that the appellants' participation in the execution of the common design is insufficient and that evidence of their association with the murder as such is required to

render them liable. This submission entails a disavowal of the principles stated in Madlala's case (supra) at 640 G-H. It is trite that the parties to a common purpose to commit murder may be convicted of that offence once it is committed by one of them . This is what paragraph(b) of the relevant passage says. But there is also paragraph (c) to which I referred earlier and with which the submission cannot be reconciled. Appellants' counsel sought to overcome this difficulty by submitting that the reference in paragraph (c) to "some other crime" was intended as a reference to a particular crime and not a series of crimes. This is plainly not so.

In a case like the present one there is no logical distinction between a common design relating to a particular offence and one relating to a series of offences and I can conceive of no reason for drawing such a distinction. (Cf S v Motaung and Another 1961(2) S A 209 (A) at 210H - 211A ; S v Nhiri 1976(2) S A 789 (R A D) at 790E-791H.) In my judgment the appellants' liabili-y ty in terms of paragraph (c) of Madlala's case has been established. I say this, however, subject to what follows.

In an alternative argument appellants' counsel challenged first appellant's conviction on

the ground that he had already dissociated himself from the common purpose by the time that the murder was committed. First appellant, it will be recalled, left Port Elizabeth for Lesotho on the very day of the murder but was detained at Aliwal North in connection with his identity document. (As will presently appear he was not formally arrested at Aliwal North but for convenience I shall refer to his "detention" there.) Mrs Tshiwula was murdered about ten hours after his detention. The court a quo considered the question of his possible withdrawal from the common purpose in the context of

his departure for Lesotho. His departure as such, it was found, cannot be regarded as an act of dissociation since he had every intention of returning to continue the campaign. His counsel submitted, however, that his dissociation came after his detention when he confessed to being a trained terrorist and his involvement in some of the explosions in Port Elizabeth. The court a quo's view of this part of his conduct will be mentioned after the evidence has been reviewed.

During the morning of 8 May 1983 Lieutenant De Lange and Warrant Officer Bezuidenhout of the security branch at Aliwal North were on patrol when they encountered a Mikrobus on the outskirts of the town. Having

ordered the driver to stop De Lange requested the passengers to produce their identity documents. First appellant was one of the passengers. The document that he produced had been issued to Ndima Saliwa and appeared to De Lange to have been tampered with since the official stamp of the issuing authority did not cover the photograph. He decided to take first appellant to his office pending further investigation. On the way he informed first appellant of his suspicion about the document and asked him for his comment. First appellant's reply was that he wanted to tell De Lange the truth about his military training and the explosions at New Brighton and the Swartkops railway track. De Lange did not think at first that first appellant was

serious. In his office he asked him to elaborate on his allegations whereupon first appellant told him that his friend James had died in the explosion in New Brighton; that he (first appellant) had lost the magazine of a She-Peterson (a sub-machine gun) at Swartkops; that the document he had produced was false and that his real name was Rufus Nzo. Upon being asked about his knowledge of explosive devices he asked for a pen and paper and proceeded to sketch, first, what he said was the device he had used in New Brighton and which had killed his friend, and then another device which he said was the one he had used on the Swartkops railway track. On the second sketch he wrote the letters B P and explained that the next target was to be the B P fuel depot in Port Elizabeth. Still not entirely convinced, De

Lange handed him an album containing the photographs of a large number of fugitives from South Africa known to the police and asked him if he knew any of them. First appellant listed 31 of them as persons whom he recognised. This convinced De Lange that the appellant could well be a terrorist. He telephoned the security branch in Port Elizabeth and the result was that first appellant was fetched from Aliwal North that same evening and taken to Jeffreys Bay where he was detained. (It should perhaps be mentioned that Mrs Tshiwula was killed at about 9 o'clock that evening while the officers who had proceeded to Aliwal North to fetch first appellant were on their way.)

Certain events that occurred in Port Elizabeth

the next day may also conveniently be mentioned at this stage. These events were related to the trial court by Major Du Plessis, the investigating officer, who took charge of first appellant upon the latter's arrival in Port Elizabeth at about 4 o'clock in the morning. In the course of the day first appellant informed Du Plessis of the identity of his confederates in Port Elizabeth including second appellant to whom, he said, he had given arms and explosives to conceal. He also told Du Plessis about the means of communication between terrorists in South Africa and A N C officials in Lesotho and showed him a tube of toothpaste in the bag that had been taken from him at Aliwal North. Three coded messages were discovered in the tube. Later that afternoon he pointed

out second appellant as he was leaving the place where he was employed. Second appellant was detained. At first he denied that he knew first appellant or anything about concealed weapons. At Du Plessis's request first appellant then spoke to him and he told second appellant to surrender "die vuurwapens, of the AK's en plofstof wat hy vir hom gegee het om te versteek". This apparently caused second appellant to change his tune for he started to co-operate with the police and as a result the table with the hidden compartment and the explosives contained therein were discovered.

According to De Lange, Bezuidenhout and Du Plessis first appellant acted entirely voluntarily throughout. In cross-examination it was put to them that this was not

so and that first appellant had been severely assaulted. But, although a trial-within-a-trial was conducted to enquire into this allegation (and similar allegations by other accused against other police officers, in the course of which most of the accused testified under oath), first appellant was not called to do likewise. The result was that the police evidence stood uncontradicted and was accepted. It must accordingly be accepted that first appellant voluntarily revealed to De Lange and Bezuidenhout before the murder that he was a trained terrorist who had taken part in two explosions in Port Elizabeth and that a fuel depot in the city would be the next target. We must also accept that this information was completely unsolicited and that he did his utmost to

convince De Lange and Bezuidenhout of its truth when they tended at first to disbelieve him.

I am unable to support the court a quo's finding that first appellant's conduct at Aliwal North did not constitute a dissociation on his part from the common purpose. The trial judge said in the judgment that first appellant -

> ".....did nothing from his side, apart from his confession at Aliwal North as to his own role in certain aspects of the mission, to evidence at any time relevant to the murder dissociation of himself from the common purpose such as the obvious expedient of informing the police of Joe's presence in Port Elizabeth or of the danger hanging over the deceased. When he did mention the names of the people associated with him in Port Elizabeth that was the following day."

That his confession related only to his own role in the

campaign is not entirely correct for what the learned judge omitted to say is that first appellant told the police about the next target. He must have realized that this information would effectively put the target beyond the terrorists' reach or would at least impede an attack thereon. One does not expect this kind of information to be revealed by someone who still wanted to be associated with the execution of the common purpose.

But this is not my major concern about the finding. What weighs with me more is the manner in which the revelations came to be made and the obviously foreseeable consequences thereof. This is not a case of a

suspect who confesses his guilt realizing that the game is up and that he might as well confess. First appellant's game was by no means up. To his knowledge the police suspected no more than that his identity document had not been properly issued. Had he wished to do so he could have explained the apparent irregularity untruthfully; or he could have admitted it without revealing anything about his past activities which were of such a nature that he had every reason to suppress them particularly if he still desired to persist therein. What I find so remarkable is that this trained terrorist who had been involved in serious acts of sabotage ,suddenly turned traitor and almost anxiously told the police about his deeds when he had no reason to do so. He must

have realized that by doing so he was destroying every possible chance he still had of continuing his mission since the police would certainly not let him go after getting to know who and what he was and what he had done. And even if they would be foolish enough to release him, his anonymity was destroyed; he could be of no further use and would, on the contrary, rather be a liability to his confederates remaining in Port Elizabeth. Unless, therefore, he wanted no further part in the mission why did he behave in this manner?

His conduct the following day - particularly his insistence that second appellant should surrender the weapons and explosives he had been given - reveals what his attitude was. This was a plain act of abjuration

and, although it could at that stage no longer assist him, it is relevant to his state of mind at the time of his disclosures to De Lange. The trial court held it against him that he was not more informative when he spoke to De Lange. But de Lange made it quite clear that he did not interrogate first appellant properly; what he sought was some form of confirmation of the latter's allegation that he had been trained as a terrorist and when he received this he telephoned the security branch in Port Elizabeth and washed his hands of the matter. De Lange's evidence is that he sat around with first appellant for hours waiting for his colleagues from Port Elizabeth to arrive and that during all those hours he did not question first appellant further. When Major Du Plessis interviewed him the

next day he was brimming with information which he was only too willing to reveal.

I am accordingly of the view that first appellant dissociated himself from the common purpose before the murder was committed and thus absolved himself from liability therefor. A final point should be mentioned in this connection. First appellant's dissociation did not form part of his defence at the trial. On the contrary, as I mentioned earlier, it was suggested to De Lange and Bezuidenhout that first appellant did not speak to them of his own free will. It does not appear from the record , nor could counsel who appeared in this court inform us with certainty, whether the point was raised in argument or whether the trial judge dealt with it suo moto

in the judgment. But it seems to me to be immaterial whether it was raised by the defence or not. Bearing in mind that, in a case where liability is sought to be imputed to the accused as an alleged party to a common purpose, it is necessary for the State to prove his association with the common purpose at the time of the commission of the offence (cf S v Motaung and Another (supra) at 211 A), he should, in my view, be acquitted if it appears from the evidence that he dissociated himself before its commission. First appellant should thus have been acquitted.

There remains the question of second appellant's sentence for the murder. The trial court found that there were extenuating circumstances and sentenced him to fifteen

years' imprisonment of which ten years were ordered to be served concurrently with the sentence of twenty years' imprisonment imposed on him on count 1 for treason. The only submission on his behalf was that the sentence is disturbingly excessive. I do not agree. The sentence is a heavy one but I do not regard it as sufficiently inappropriate to entitle this court to interfere.

The result is that first appellant's appeal is upheld. His conviction and sentence on count 7 are set aside. Second appellant's appeal is dismissed.

J J F HEFER JA.

NESTADT JA)CONCURS.

CG SAAKNOMMER: 501/86

IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA

(APPÈL AFDELING)

In die saak van:

REFUS NATO NZO Appellant no 1

DOUGLAS MNYISILE TYUTYU Appellant no 2

en

DIE STAAT Respondent

CORAM: **HEFER, NESTADT et STEYN, ARR.**

AANGEHOOR: **23 NOVEMBER 1989**

GELEWER: **8 MAART 1990**

U I T S P R A A K

STEYN, AR.

Ek het die uitspraak van my kollega Hefer gelees. Ek gaan akkoord met sy uiteensetting van die basiese feite. Ek stem ook met hom saam dat die appèl van eerste appellant moet slaag, maar vir ander redes as dié deur hom genoem. Ek verskil egter met eerbied van hom dat die appèl van tweede appellant van die hand gewys moet word. Na my oordeel behoort beide appèlle te slaag omdat dit nie bewys is dat daar 'n gemeenskaplike doel tussen appellante en Joe was om die oorledene te vermoor nie. Die bestaan van die breë algemene, of oorkoepelende gemeenskaplike doel om sabotasie in die Port Elizabeth gebied te pleeg is, na my oordeel, nie genoegsaam om appellante sonder meer regtens aanspreeklik te hou vir die moord op die oorledene nie. Die feit dat hulle en Joe aan dieselfde terreur-sel behoort het verander na my mening ook nie die posisie nie. Appellante het nie met Joe ooreengekom om die oorledene te vermoor nie en het niks gedoen om hom met die pleging van die moord te help

nie. Dít blyk duidelik uit die volgende passasies in die uitspraak van die hof **a quo** op die meriete wat nie voor hierdie Hof betwis was nie:

> "It is not alleged that murder was one of the acts which the accused conspired to commit. ...
> There is no evidence in this case that any accused was present at the commission of the crime or did anything specifically connected with the act of killing. ...
> Turning to the facts, there is no evidence here of a common purpose to kill or attack and injure, whether aimed at the deceased or any one else."

Appellante was ook onbewus daarvan dat die moord gepleeg is. Hulle is skuldig bevind slegs op grond van die volgende, t.w.: die bestaan van die voormelde breë algemene, oorkoepelende, gemeenskaplike doel waaraan hulle en Joe deelgenote was, dat die moord gepleeg is ter uitvoering van daardie doel, dat hulle en Joe lede was van dieselfde, redelik kleine, terreur-sel en dat die moontlikheid van die moord vir hulle voorsienbaar was. Daardie algemene doel kan egter op baie verskillende

maniere en deur 'n groot getal verskillende deelgenote ter uitvoering gebring word. 'n Besondere deelgenoot kan gevolglik, beide wat tyd en plek betref, vêr verwyderd wees van die uitvoerende daad van 'n ander deelgenoot. So 'n deelgenoot mag boonop onbewus wees van die pleging van die besondere daad. Dit sou gevolglik regtens onhoudbaar wees om, slegs op grond van so 'n algemene gemeensaplike doel, iemand wat, sê, in die noorde van Transvaal doenig is met die uitvoering daarvan, aanspreeklik te hou vir 'n deelgenoot se uitvoerende daad in Kaapstad waarby hy nie betrokke was nie. Dieselfde oorweging geld egter ook vir die geval waar die werklike dader en 'n ander deelgenoot aan die oorkoepelende doel lede van dieselfde groep is. Hierdie oorweging is reeds deur hierdie Hof ingesien in McKENZIE v VAN DER MERWE 1917 AD 41, wat gegaan het oor 'n eis om skadevergoeding vir skade aan die eiser berokken deur rebelle in die Vrystaatse Riemland gedurende die rebellie van 1914. Die verweerder was deur die eiser

aangespreek vir skade deur sy mede-rebelle berokken in die gebied waarin hy ook opgetree het. Dit was egter nie bewys dat die verweerder by die skadeveroorsakende optrede betrokke was nie. Die eiser het nie in die Vrystaatse Hooggeregshof geslaag nie en sy appèl is deur hierdie Hof afgewys. (Dit is, sovêr my kennis strek, die eerste saak waarin die leerstuk van gemeenskaplike doel pertinent in ons regspraak ingevoer is: LAWSA Vol 6 par 117 p 113; et vid. die artikel deur M A Rabie in 1971 Vol 88 SALJ 227 op 230. Ek handel later met die vroeëre saak van STEENKAMP v KYD (1898) 15 SC 221.) In sy uitspraak het Hoofregter Innes o.m. die volgende gesê op pp 47-48:

> "... I am not prepared to hold that every member of a commando is, by the mere fact of such membership, liable for the acts of every other member 'within the scope of the objects of the rebellion'. The term 'commando' is an elastic one, and the members which compose it may sometimes be engaged in wholly distinct and different operations. I do not propose to lay down any general rule. As already remarked,

> where it is sought to affix liability on an accused for a delict, which he neither instigated, perpetrated, aided nor abetted, it must be shown that he authorised it, so as to make the act complained of his act. And that must depend upon the circumstances of each case; do they or do they not justify the inference that the perpetrator was the agent of the accused to do the particular act? And where there is no evidence of express authority the presence of accused at the time and his co-operation then in a common purpose would, of course, become an element of great importance."

Die geleerde Hoofregter het klaarblyklik nie die verweerder se deelname in die blote uitvoering van die oorkoepelende gemeenskaplike doel van die rebellie beskou as magtiging deur hom vir die daders se skadelike optrede nie. In die onderhawige geval was daar ook getuienis dat verskillende lede van die betrokke sel op verskillende tye betrokke was by verskillende en afsonderlike uitvoeringsdade. Eerste appellant se rit na Lesotho via Aliwal Noord is 'n goeie voorbeeld daarvan. In sy uitspraak in die McKENZIE saak, supra, het Solomon AR. in hierdie opsig tot dieselfde gevolgtrekking gekom;

op p 52 het hy dit só gestel:

> "Thus in COMBRINCK v WOLFAARDT (9 H.C.G. 138) and JACKSON v FREEDMAN (8 H.C.G. 332) there is no suggestion in the judgments in favour of any such rule as is now contended for. And certainly if we were to adopt it, it would be productive of very startling results, for as pointed out by the Chief Justice of the Orange Free State in his judgment 'it would make a rebel in this Province liable for the acts of another rebel in the district of Prieska in the Cape Province with whom he had no futher connection than that both of them were ultimately under the head command of General De Wet.'Moreover it would mean that every private in the rebel ranks would be civilly liable for everything done by the orders of the commander-in-chief in furtherance of the rebellion. No direct authority in our law has been produced for a doctrine which produces such startling results, and it was virtually admitted that it could only be based on the ground of agency. That no such agency is expressly constituted by a rebel when he enters into rebellion is undoubted, and I fail to see how it can be inferred from the mere fact of his joining such a movement."

Die McKENZIE saak het weliswaar oor deliktuele aanspreeklikheid gegaan, maar in h strafsaak geld voormelde benadering met selfs groter krag. In die

vierde uitgawe (1985) van De Wet en Swanepoel se STRAFREG word die volgende opsommenderwys daaroor gesê op 197:

> "In McKENZIE v VAN DER MERWE 1917 AD 41 het Hoofregter Innes al beklemtoon dat die bestaan van 'n mandaat nie sommer geredelik uit 'n vae en algemene gemeenskaplike doel afgelei moet word nie, en hierdie waarskuwing, gemaak in 'n siviele saak, geld met soveel meer klem in 'n kriminele saak."

Die leerstuk van gemeenskaplike doel het saak vir saak in die Engelse reg gestalte gekry t.a.v. besondere misdade waarby twee of meer persone betrokke was. In die McKENZIE saak, supra, het Hoofregter Innes daardie ontwikkeling in bondige terme só geskets op p 46:

> "Reliance was placed upon the well-known rule of English criminal law to the effect that those who take part in the execution of a common criminal purpose are individually liable in respect of every crime committed by any one of them in the execution of that purpose, and not foreign to it (see Stephen's DIG. CRIM. LAW par 39). Now that rule has not been deduced from general principles, but rests upon certain old decisions ...
> ... a reference to the old English decisions shows that they were cases in which the persons convicted were present, in pursuance of the

> cómmon purpose, at the commission of the crime charged."

Kyk ook na RABIE, op. c.t. 1971 SALJ 227-229, waar, op 229 ook die volgende gesê is:

> "From England the common purpose principle was introduced to South Africa via the Native Territories' Penal Code (Act 24 of 1886 (C)). Section 78 of this Act provides:
>
> > 'If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been, known to be a probable consequence of the prosecution of such common purpose.'"

Die bogemelde "ou Engelse sake" het almal pertinent betrekking gehad op twee of meer persone wat saamgespan het om 'n besondere misdaad soos moord, roof, ens., te pleeg en het nie gegaan oor die geval waar 'n persoon op sy eie 'n besondere misdaad gepleeg het ter uitvoering van 'n breë, algemene gemeenskaplike doel waarby andere ook

betrek was, maar wat nie betrokke was by die pleging van die besondere misdaad nie. Daar is geen aanduidings dat die bedoeling by, of effek van die voormelde kode van 1886 was om die leerstuk na so 'n breër grondslag uit te brei nie. STEENKAMP v KYD, supra, het gegaan oor 'n eis om skadevergoeding weens skade berokken aan die eiser tydens 'n aanval op hom deur die verweerders in die loop van 'n politiek-geïnspireerde opstootjie in Griekwaland-Oos gedurende die 1890's. Die breë, algemene gemeenskaplike doel van die opstootjie, waaraan die verweerders deelgenote was, was om "oorlog te maak teen die regering". In die magistraatshof is uitspraak teen die verweerders gegee, o.a. met verwysing na art 78 van voormelde kode. In hul appèl na die Kaapse Hooggeregshof is namens die verweerders betoog dat hulle nie vir die skade aanspreeklik gehou kon word nie omdat hulle nie daadwerklik aan die aanval op die eiser deelgeneem het nie. Hul appèl het nietemin misluk. Hoofregter de

Villiers het sy beslissing baseer op die feit dat die aanval geloods is op bevel van 'n leier wat deur die verweerders en andere verkies was, maar hy het nie verwys na die leerstuk van gemeenskaplike doel nie. In sy samestemmende uitspraak het Buchanan R. egter soos volg **obiter** daarna verwys, en die feite bondig saamgevat, op 225:

> "I wholly concur in the judgment of the Chief Justice. If it had been necessary I would even have been prepared to dismiss the appeal on further grounds, for it has been shown by the evidence that there was a common purpose among all the parties present to attack Kyd. The party was formed into three troops, one troop, presumably composed of the boldest of the lot, to do the active work, the second party to support the first, while the third party was to be a reserve. There was thus a common purpose to attack Kyd, which should render them all, severally and individually, liable for the consequences."

Hierdie was 'n heel vroeë siening oor die toepassingsgebied van die leerstuk. Buchanan R. het geen melding gemaak van die onderliggende algemene doel van

die opstootjie ter uitvoering waarvan die aanval op Kyd gedoen was nie. Dit is myns insiens duidelik dat hy die leerstuk gesien het as toepasbaar slegs op 'n besondere misdadige optrede. Alhoewel sy uitlating **obiter** was, was dit nogtans in ooreenstemming met die voormelde bepalings van die Engelse reg van daardie tyd. Dat die destydse Engelse strafreg die leerstuk van gemeenskaplike doel beperk het tot die geval waar twee of meer nie-daders by die pleging van 'n besondere misdaad betrokke was, blyk na my mening ook heel duidelik uit die volgende passasie in par 528 van Vol 9 van die eerste uitgawe van HALSBURY, THE LAWS OF ENGLAND (1909):

> "To constitute a principal in the second degree mere presence at the crime is not enough; there must be a common purpose, an intent to aid or encourage the persons who commit the crime and an actual aiding or encouraging."

Die toepassing van die leerstuk van gemeenskaplike doel is sedert die McKENZIE saak sovêr ek kon vasstel, in ons regspraak ook deurgaans beperk tot die pleging van 'n

besondere misdaad, en tot die geval waar 'n ander nie-beoogde maar voorsienbare misdaad gepleeg is in die loop van die pleging of gepoogde pleging van die beoogde besondere misdaad. Die uitsprake van hierdie Hof in bv. S v MADLALA 1969 (2) SA 637 (A), (waarop my kollega Hefer pertinent staat maak), S v SEFATSA AND OTHERS 1988 (1) SA 868 (A) (verkeerdelik in die SA Regsverslae rapporteer as S v SAFATSA AND OTHERS), en S v MGEDEZI AND OTHERS 1989 (1) SA 687 (A), waarin die leerstuk weereens samevattend en verduidelikend uiteengesit is, het almal gegaan oor besondere misdade wat deur meerdere persone gepleeg is, en die uiteensettings van die leerstuk in daardie sake het pertinent toepassing gehad slegs op sulke gevalle. Die uitbreiding van die leerstuk na die voormelde breër grondslag is nie daarin beoog of behandel nie. Paragraaf (c) van die **dictum** in die MADLALA saak waarna my Kollega Hefer verwys, lui bv. só (p 640 G-H):

"Generally, and leaving aside the position of

> an accessory after the fact, an accused may be convicted of murder if the killing was unlawful and there is proof - ...
> (c) that he was a party to a common purpose to commit some other crime, and he foresaw the possibility of one or both of them causing death to someone in the execution of the plan, yet he persisted, reckless of such fatal consequence, and it occurred; see S v MALINGA AND OTHERS 1963 (1) SA 692 (AD) at p 694 F-H and 695; ..."

(MALINGA se saak waarna hier verwys word, het ook slegs gegaan oor betrokkenheid by die pleging van 'n besondere misdaad.) In die verband waarin hierdie **dictum** geformuleer is het dit klaarblyklik slegs die toepassing van die leerstuk op die beperkte grondslag van 'n besondere misdaad beoog. Dit het nie te doen gehad nie met die aanspreeklikheid van deelgenote aan 'n algemene gemeenskaplike doel vir 'n besondere misdaad gepleeg deur 'n ander "algemene deelgenoot" ter uitvoering van daardie doel, maar by die pleging waarvan hulle nie betrokke was nie.

Die feit dat appellante en Joe lede was van 'n

klein terreur-groep, is, soos reeds gemeld, myns insiens, nie hier deurslaggewend nie. Die lede van daardie groep het, soos ook reeds gemeld, herhaaldelik afsonderlik opgetree en besondere misdade apart gepleeg ter uitvoering van die oorkoepelende doel. Die lede van daardie groep moet gevolglik in dieselfde lig gesien word, en op dieselfde wyse behandel word as die kommando-lede in die McKENZIE saak, supra. Ek kan met eerbied nie met my Kollega Hefer saamstem dat die McKENZIE-saak nie op die onderhawige geval van toepassing is nie. Na my mening is dit om die reedsgenoemde oorwegings inderdaad hier baie pertinent van toepassing. Daar, net soos hier, het dit gegaan oor die regswerking van 'n breë, algemene gemeenskaplike doel ter uitvoering waarvan die gewraakte besondere daad gepleeg was. In die onderhawige geval was volgehoue deelname aan die uitvoering van só 'n doel, en nie die grootte van die betrokke groep of sel nie, ongetwyfeld die grondslag vir appellante se

skuldigbevinding aan die moord op die oorledene. Sonder daardie volgehoue "algemene" deelname sou daar geen grondslag vir hul skuldigbevinding bestaan het nie. Die waarskuwings aan die oorledene, die navrae oor wat sy gesê het en die verwydering van die tafel was iets heel anders as 'n besluit om haar dood te maak. Dit was alles trouens daarmee vereenselwigbaar dat sy bly lewe. Die McKENZIE-saak is na my mening steeds 'n heilsame vermaning teen pogings om die toepassing van die leerstuk van gemeenskaplike doel uit te brei na gevalle waarvoor dit nie bedoel was nie. Ek kan ook nie met my Kollega Hefer saamstem dat appellante se advokaat hierdie aspek van sy betoog benewel het deur dit met irrelevanthede te besluier nie. Na my mening was daardie deel van sy argument pertinent gerig op die kern van die hele aangeleentheid. Ek meen sy betoog was regtens goed gegrond. Dit is die beginsel waarop die leerstuk gegrond is wat hier ter sprake is, en die toevallige grootte van

'n besondere groep deelgenote aan 'n breë gemeenskaplike doel is nie sonder meer ter sake nie.

Die leerstuk van gemeenskaplike doel is, na my oordeel, in die geval van 'n nie-dader gegrond op die beginsel van "nabyheid" (feitelik en regtens) van so 'n nie-dader aan die pleging van die betrokke misdaad. In die onderhawige geval was die appellante regtens en feitelik baie ver verwyderd van die moord op die oorledene. Appellante se kennis van die oorledene se dreigement en van Joe se waarskuwing aan haar daaromtrent, die navrae deur tweede appellant oor wat sy gesê het en sy daaropvolgende verwydering van die tafel met die geheime laai, kom nie neer op magtiging deur hulle aan Joe om haar te vermoor nie. Die blote voorsienbaarheid van die feit dat sy moontlik deur Joe of iemand anders vermoor kon word, sonder hul toedoen, en hul deurlopende verbondenheid tot die breë algemene gemeenskaplike doel kom, na my mening, tesame met die

ander reeds genoemde feite, ook nie sonder meer op sulke magtiging vir of deelname aan die moord neer nie. En daar is niks meer nie.

Die voorsienbaarheid van 'n moontlike moord op die oorledene waarby appellante nie betrokke sou wees nie, en hul voortgesette verbondenheid tot die voormelde algemene gemeenskaplike doel en lidmaatskap van hul terreur-groep is gevolglik, na my mening, nie hier ter sake nie. Die leerstuk van gemeenskaplike doel is volgens my oordeel nie reeds deur ons regspraak verbreed om 'n geval soos die onderhawige te dek nie, en daar bestaan geen regverdiging om dit in hierdie geval te doen nie. Onder voormelde omstandighede is die gaping tussen appellante se lidmaatskap van die gemelde groep en verbondenheid tot die breë algemene gemeenskaplike doel aan die een kant, en die moord op die oorledene aan die ander kant, gevolglik te groot om deur die leerstuk van gemeenskaplike doel oorbrug te word. Daar was in die

onderhawige geval verkeerdelik gepoog om daardie leerstuk toe te pas op 'n feite-kompleks waarop dit nie toepasbaar is nie en waarvoor dit nie bedoel is nie. Die skuld van die appellante aan die moord is derhalwe nie bewys nie.

Ek mag ten slotte net meld dat alhoewel ek dit met Hefer AR. eens is dat eerste appellant hom reeds op Aliwal Noord aan die gemelde algemene gemeenskaplike doel onttrek het, daardie onttrekking in die lig van die bogaande nie ter sake was by die moord nie.

Na my mening behoort die appèlle van albei appellante gevolglik te slaag en behoort hul skuldigbevindings aan en vonnisse op die moordklag ter syde gestel te word.

M T STEYN, AR.