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The Common Purpose Doctrine and *Dolus Eventualis* Incorrectly Applied (Again): *Mawela v S* (377/2021) [2022] ZASC 18 (16 February 2022)

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Abstract

On 16 February 2022 the SCA, per Mothle JA in Mawela v S (377/2021) [2022] ZASC 18, heard an appeal from the Limpopo Division of the High Court, Polokwane after the first and second appellants were convicted on various counts, including murder, and were sentenced to 12 years in prison. The murder convictions were based on the doctrine of common purpose and dolus eventualis. For purposes of this discussion, only the convictions of, and appeal against the murder convictions, are relevant. The purpose of this note is to critically analyse the incorrect application of the common purpose doctrine and dolus eventualis by the court a quo.

The SCA has often warned against the incorrect application of the common purpose doctrine, and it is argued that the conviction of innocent persons is the inherent danger of such an incorrect application. There exists a pressing need for courts to exercise caution to ensure that innocent persons are not convicted. This note underlines the warning by Snyman that the mere fact that a person happened to be present at the crime scene cannot serve as a basis for holding them liable for the crime. Even if a person tacitly approves of the actual perpetrator's

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crime, there is still no basis for an inference that they actively associated themselves with the commission of the crime.

A critical analyses of the High Court's decision also illustrates that dolus eventualis as a form of intention was applied incorrectly. The court a quo's erroneous statement regarding dolus eventualis resembles the unfortunate rhetorical question by Masipa J in S v Pistorius: "[h]ow could the accused reasonably have foreseen that the shots he fired would kill the deceased or whoever was behind the door?" The court in Pistorius, like the High Court in Mawela, wrongly applied an objective rather than a subjective approach to the question of dolus.

Keywords: Common purpose doctrine; *dolus eventualis*; intention; negligence; subjective foresight; objective foreseeability.

1 INTRODUCTION AND BACKGROUND

In *Mawela v S* (377/2021) [2022] ZASC 18 (16 February 2022) the SCA, per Mothle JA (coram Mathopo JJA, Mbatha JJA, Kgoele AJJA and Phatshoana AJJA) heard an appeal from the Limpopo Division of the High Court, Polokwane (the High Court) after the first and second appellants were convicted of various counts, including murder, malicious injury to property, and assault with intent to do grievous bodily harm. Both appellants were sentenced to 12 years in prison for murder. For purposes of this discussion, only the convictions of, and appeal against the murder convictions, are relevant.

The doctrine of common purpose originates from English law and was first introduced as part of the South African common law in *R v Garnsworthy* 1923 WLD 17.¹ It has since become a well-established doctrine in our law that enables the prosecution to overcome the prosecutorial burden of proving individual causation in cases where the application of the general principles of liability (and especially the *conditio sine qua non*) makes it impossible to prove individual causation.²

Where two or more people have a common purpose to commit a crime and they act together to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others. If the State can prove that the doctrine of common purpose finds application and that each participant had the required *mens rea* in the form of *dolus* or *culpa*, each participant can be convicted as a co-perpetrator of the crime.³ The Constitutional Court in *Tshabalala v S; Ntuli v S* 2020 2 SACR 38 (CC)⁴ stated that the purpose of the doctrine is to avoid an otherwise unjust result which offends the legal convictions of society, by eliminating the element of individual causation from criminal liability and replacing it, in appropriate circumstances, with imputing

1 *Garnsworthy* para 19.

2 Snyman *Criminal Law* 7 ed (2020) 226; Rabie "The Doctrine of Common Purpose in Criminal Law" 1971 *SALJ* 227; *S v Safatsa* 1988 1 SA 868 (A) 901; *S v Mgedezi* 1989 1 SA 687 (A) 705–706; *S v Dewnath* 2014 ZASCA 57 para 16; *S v Tsotetsi* 2019 2 SACR 594 (WCC) para 19; *S v Mzwempi* 2011 2 SACR 237 (ECM) 45–46; *S v Nkabinde* 2017 2 SACR 431 (SCA) 40.

3 Burchell *Principles of Criminal Law* 5 ed (2016) 477–479; Snyman *Criminal Law* 225; Kemp *Criminal Law* 3 ed (2018) 277; J Dressler *Understanding Criminal Law* 3 ed (2001) 429; *S v Nooroodien* 1998 2 SACR 594 (WCC) 516f–h; *Magmoed v Janse van Rensburg* 1993 1 SACR para 36; Hoctor "A New Category of Common Purpose Liability?" 2016 *Obiter* 666; Hoctor "Of Housebreaking and Common Purpose: *S v Leshilo* 2017 JDR 1788 (GP)" 2018 *Obiter* 825 830; Hoctor "Voluntary Withdrawal in the Context of Attempt – a Defence?" (2021) 42 *Obiter* 148; Hoctor "Deindividuation and Criminal Responsibility" 2022 *Obiter* 834 841.

4 *Tshabalala v S; Ntuli v S* para 56.

that harm-causing conduct to all the co-perpetrators.⁵

It is submitted that the doctrine of common purpose can find application in three different scenarios and not only two, as was held by Moseneke J in *S v Thebus* 2003 2 SACR 319 (CC).⁶ Moseneke J held that the liability requirements of a joint criminal enterprise fall into two categories, namely liability arising from a prior agreement and liability arising from active association. Moseneke J relied on *Magmoed v Janse van Rensburg* 1993 1 SA 777 (A) where Corbett CJ held that “the doctrine of common purpose may arise by prior agreement between the participants or it may arise upon an impulse without prior consultation or agreement”.⁷ It is submitted that what Corbett CJ described as “an impulse” includes both liability arising from active association with a common purpose as well as liability arising from a common purpose that was formed spontaneously during the execution of another crime in respect of which the perpetrators had a common purpose.⁸ In *Maelangwe*’s case, Buys R found “... no rule in our law, where an accused was charged with murder on the basis of the doctrine of common purpose, that the enquiry must relate solely to his state of mind at the stage when the perpetrators embarked on their criminal enterprise.”⁹ Buys R held that what was important, was to determine what the accused’s state of mind was at the time of the commission of the murder. It can be inferred from the facts whether the accused foresaw the murder as a reasonable possibility and resigned himself to it. In *Maelangwe*, the perpetrators were found to have formed a common purpose to commit robbery by prior agreement, and a second common purpose, to also commit murder, was later formed spontaneously when the deceased unexpectedly arrived on the scene. In *S v Musingadi* 2005 1 SACR 395 (SCA)¹⁰ Comrie AJA held: “... the common purpose to rob was expanded, as events progressed, so as to include a common purpose to murder.” It is therefore argued that common purpose can be formed in three different manners: first, where there is a prior agreement, expressed or implied, between at least two parties to commit a crime as in *Safatsa*’s case. Second, where there is no clear prior agreement or no such agreement can be proved between the parties but they all actively associated themselves with the execution of the crime, as in *Mgedezi*’s case. Where no prior agreement between the parties can be proven, the court in *Mgedezi* set out five requirements that must be complied with before the doctrine of common purpose will find application: first, the accused must have been present at the scene of the crime. Second, the accused must have been aware of his co-accused’s harmful conduct on the victim. A third requirement is that the accused must have had the intention to make common cause with his co-accused. Fourth, the accused must have demonstrated his sharing of the common purpose by himself performing an act of association with the conduct of his co-accused. Lastly, the accused must have intended to cause the deceased’s death.¹¹

A third and last manner in which common purpose can be formed is spontaneously during the execution of another crime for which the parties had a common purpose (as in *Maelangwe*’s case).

It is common cause that South African criminal law is based on personal liability in which an

5 Cf Snyman *Criminal Law* 225; Paizes “*Dolus Eventualis* Reconsidered” 1988 *SALJ* 636–641; Hoctor: “The State of Common Purpose Liability in South Africa – *S v Mzwempi* [2011] ZAECMHC 5 (2) SACR 237” 2012 *Journal of Commonwealth Criminal Law* 180.

6 *Thebus* para 19; Davidson *The Doctrine of Swart Gevaar to the Doctrine of Common Purpose: A Constitutional and Principled Challenge to Participation in Crime* 2017 (LLM Masters Dissertation University of Cape Town) 1.

7 *Magmoed* para 810G.

8 As in *S v Maelangwe* 1 SACR 133 (NC); see also *Safatsa* para 95.

9 *Maelangwe* para 139 e-g.

10 *Musingadi* para 33.

11 Snyman *Criminal Law* 228.

individual is held liable for their own criminal conduct and is punished accordingly.¹² In light of this, two principal criticisms have been levelled against the doctrine of common purpose. The first is that, in some cases, the requirement of active association has been cast too widely or misapplied. The second criticism is that there are less invasive forms of criminal liability short of convicting a participant in common purpose as a principal. The doctrine has, however, passed constitutional muster in both Thebus's case and in *S v Jacobs*.¹³ In *Jacobs Goliath AJ* (coram Cachalia AJ, Froneman J, Khampepe J and Madlanga J) held that the doctrine of common purposes passes constitutional scrutiny. Although the decision by the court in *Thebus* must be welcomed, Snyman advances convincing reasons why the decision does not always "go to the core of the reason for the existence of the doctrine".¹⁴

Dolus eventualis, like the doctrine of common purpose, is also well-established in our criminal law.¹⁵ X acts with intention in the form of *dolus eventualis* if the unlawful conduct (in the form of an unlawful *commissio* or *omissio* or the causing of a prohibited result) is not X's main aim, but X subjectively foresees the possibility that, in proceeding to achieve their main aim, the unlawful conduct may be committed or the unlawful result may be caused, and X reconciles themselves to this possibility.¹⁶ For *dolus eventualis* to exist, the SCA has repeatedly held that X must subjectively foresee the prohibited result as a possibility.¹⁷

2 FACTS AND QUESTIONS BEFORE THE COURT

The facts in *Mawela v S* (377/2021) [2022] ZASC 18 (16 February 2022) were as follows:

The appellants (Mr Mawela [appellant 1] and Mr Mathibela [appellant 2]) were convicted by Kganyago J in the Limpopo Division of the High Court, Polokwane of various counts, including murder. The conviction of murder was based on common purpose and *dolus eventualis*. Both appellants were sentenced to 12 years in prison for the murder. With leave of the High Court, they both appealed against the conviction and sentences. Two brothers, Kleinbooi and Jackie Mashiyane, lost their lives at Magukubjane village in Limpopo. A group of about 100 people held a public meeting at a football field to discuss an incident of rape allegedly perpetrated by Jackie Mashiyane who was from Talane village nearby. The group then proceeded to the Mashiyanes' homestead in Talane village to look for the suspect to bring him back to their village and summon the police.¹⁸ On arrival at the Mashiyanes' homestead in Talane village, events took a violent turn which resulted in Kleinbooi Mashiyane's death.

The father of the two deceased Mashiyane brothers testified in the High Court that he received a call from the group, who summoned him to the homestead. On arrival back to the homestead he was accompanied by his son, Kleinbooi Mashiyane, and another relative. The father's vehicle was damaged by members of the group, and he was assaulted by the group. Kleinbooi

12 Matlala "Introducing Feminist Legal Theory as a Basis for South African Judicial Jurisprudence: Insights from *S v Tshabalala*" 2022 139 *SALJ* 274; *Minister of Justice and Constitutional Development v Masingili* [2013] ZACC 41 para 36; *S v Manamela* 2000 5 BCLR 491 (CC) para 100; Snyman *Criminal Law* 212.

13 2019 1 SACR 623 (CC).

14 231 n 60. See also Burchell *Principles of Criminal Law* 486.

15 Cf Loubser and Rabie "Defining *Dolus Eventualis*: A Voluntary Element?" 1988 *SACJ* 415.

16 Cf *S v Humpreys* 2013 2 SACR 1 (SCA) para 12; *S v Makgatho* 2013 2 SACR 13 (SCA) para 10; *S v De Oliveira* 1993 2 SACR 59 (A) 65i-j; *S v Brown* [2015] 1 All SA 452 (SCA) para 104; *S v Beukes* 1988 1 SA 511 (A) 32.

17 Cf Parker "South Africa and the Common Purpose Rule in Crowd Murders" 1996 *Journal of African Law* 78; Tshela "Distinguishing between Dolus Directus and Dolus Eventualis: *Ngobeni v The State* (1041/2017) ZASCA 127 (27 September 2018)" 2021 *SACJ* 128; Hoctor "The Degree of Foresight in *Dolus Eventualis*" 2021 *SACJ* 131; *S v Mavhungu* 1981 1 SA 56 (A) 66G-H; *S v Ngubane* 1985 3 SA 677 (A) 685-686; *S v Talane* 1986 3 SA 196 (A) 208A; *S v Majosi* 1991 2 SACR 532 (A) 537c-d.

18 *Mawela* para 2.

Mashiyane alighted from the vehicle and ran away but was struck with a stone and fell.¹⁹ The father, seeing his son lying on the ground bleeding, attempted to assist but to no avail. Kleinboo Mashiyane was later certified dead by the paramedics. The alleged rapist, Jackie Mashiyane, later committed suicide.

Three salient features of the case, as it was presented to the High Court, must be mentioned. The first and most important salient feature is the contradictory evidence presented by the State. The State's case was essentially based on the evidence of three members of the group who were State witnesses in terms of section 204 of the Criminal Procedure Act 51 of 1977, in return for immunity from prosecution.²⁰ Before they testified in the High Court, they were warned that they would be implicated by the commission of the crimes in the capacity of accomplices and thus had to answer questions posed to them honestly. Consequently, they each sought to exculpate themselves when testifying. They sought to minimise their role to the point of distancing themselves from the mob as bystanders and in doing so, attempted to cast the blame on the appellants. The first State witness testified that she "saw a person running, after alighting from the vehicle, and was struck by a stone that came from the crowd". She also testified that she saw appellant 1 in possession of a golf club, chasing the deceased and striking him with it.²¹

The evidence was materially contradicted by state witnesses 2 and 3. They testified that state witness 1 was not the innocent bystander but was the leader of the group and that she actively participated in giving instructions. There were further discrepancies in the evidence of the assault on the deceased. Only state witness 1 testified that she saw appellant 1 chase after the deceased and assault him with a golf club. This evidence is at odds with the evidence of state witness 3 who testified that appellant 1 hit the deceased once with an open hand where after the deceased ran into the darkness. Not only was the evidence of the state witnesses contradictory in material respects, but the State presented no evidence pointing to the existence of a common purpose between appellants 1 and 2 to cause somebody's death, least of all that of Kleinboo Mashiyane.

The second salient feature of the case is the existence of a conspiracy between community members to implicate those who had made statements to the police subsequent to their arrest. Appellant 1 was the first to be arrested and made certain statements to the police. As a result, another community meeting was called where the group of members forced appellant 1 to tell them what he told the police.²² After appellant 1 did so, the community in turn conspired that whoever is called as a witness must implicate those who made statements to the police for the commission of the crimes.²³ The SCA held that the High Court downplayed the significance of the community's conspiracy to implicate those who had made statements to the police, including appellant 1. The contradictory evidence presented by the State was also tainted by the conspiracy.²⁴ The SCA, per Mothle JA, found it very suspicious that the three State witnesses inexplicably appeared to have directed their focus on the conduct of the two appellants out of more than 100 people present at the scene.

The third salient and disconcerting feature of the judgment of the High Court is that, according to the medical legal post-mortem examination (the autopsy report), the cause of the deceased's death was "blunt force trauma to the head".²⁵ The autopsy report was admitted at the end of the

19 *Mawela* para 3.

20 *Mawela* para 8.

21 *Mawela* para 8.

22 *Mawela* para 13.

23 *Mawela* para 13.

24 *Mawela* para 14.

25 *Mawela* para 19.

State's case and none of the parties made an attempt to make reference to the autopsy report in their submissions to the court.²⁶ The High Court erroneously found, contrary to the autopsy report and without any evidence to base its finding on, that the deceased died consequent to being hit by a stone, and no other object, when running from the vehicle. The State presented no evidence that excluded the possibility that the deceased sustained additional injuries from the group, apart from the stone that made him slump. With no evidence of a common purpose between the persons who participated in the stoning, this fact alone negates a conviction of murder of appellant 1.

The questions before the SCA were, first, whether the State had proven common purpose against the appellants and, second, whether the High Court correctly applied the legal principle of *dolus eventualis*.

3 DISCUSSION

The first words that come to mind when analysing the High Court's erroneous conviction on the basis of common purpose are:

It must always be borne in mind, however, that the modern approach is that there is no magical power contained in the doctrine of common purpose and that where there is participation in a crime, each of the participants must satisfy all the requirements of the definition of the crime in question before he can properly be convicted as a co-perpetrator.²⁷

These words have been echoed numerous times by our courts.²⁸ Courts have often warned against the indiscriminate application of the common purpose doctrine. It is imperative for courts to exercise caution to ensure that innocent persons are not convicted for crimes committed by others, for such is the inherent danger of the doctrine of common purpose. As explained by the court in *Mgedezi*, Snyman agrees that the mere fact that a person happened to be present at the crime scene cannot serve as a basis for holding them liable for the crime.²⁹ Even if a person tacitly approves of the actual perpetrator's crime, there is still no basis for an inference that they actively associated themselves with the commission of the crime.³⁰

In the same vein, the SCA has made it clear that criminal liability can also not be based on *ex post facto* ratification of another person's unlawful conduct.³¹ Where no common purpose can be proved, no liability can arise in terms of the doctrine of common purpose.³²

The SCA in *Mawela*, per Mothle JA (coram Mathopo JJA, Mbatha JJA, Kgoele AJJA and Phatshoana AJJA) correctly set aside the murder convictions and sentences imposed by the High Court. The material contradictions present in the State's case could not sustain a conviction for murder.³³ Mothle JA held that the spectre of the tainted evidence of a conspiracy to falsely implicate others detracted from the credibility and reliability of the State's evidence. Not only

26 *Mawela* para 20.

27 Grosskopf JA in *Mokoena v R* para 6, judgment delivered by the Lesotho Appeal Court (LAC) on 11 April 2008 (coram Steyn, P Grosskopf, JA and Melunsky, JA).

28 Cf Botha JA in *Safatsa* para 98 (coram Botha, JJA Hefer, JJA Smalberger JJA, Boshoff AJJA and Steyn AJJA); Viljoen JA in *S v Maxaba* 1981 1 SA 1148 (A) 1155E-G; Grosskopf JA in *Mokoena* para 6; Joubert JA in *S v Williams* 1980 1 SA 60 (A) para 63 (coram Joubert JA, Rumpff CJ and Muller JA); Corbett JA in *S v Khoza* 1982 3 SA 1019 (A) 1032E (Botha AJA concurring).

29 Snyman 228; *Thebus* para 49.

30 Cf Moosa J in *S v Mbanyaru* 2009 1 SACR 631 (C) paras 14–16.

31 Cf *S v Motaung* 1990 4 SACR 485 (A) 520–521; *S v Thomo* 1969 1 SA 385 (A) 399; *Mgedezi* 702H-I; *S v Williams* 1970 2 SA 654 (A) 658–659.

32 Botha AJ in *S v Petersen* 1989 (3) SA 420 (A) 425G–426A; Goliath AJ in *Jacobs* para 34.

33 *Mawela* para 12.

did the State in the High Court not prove the existence of a common purpose between the appellants and the rest of the group, but the State also failed to prove that either of the appellants actually threw a stone at the deceased. In addition to this, the State also failed to prove that the said stone struck a fatal blow or was actually the cause of the blunt force trauma. The High Court's finding that the fatal blow came from the stone negates any evidence that the fatal blow could have resulted from another object, such as the golf club which appellant 1 allegedly had in his possession at the crime scene. The critical causal nexus between the appellants' specific conduct and Kleinbooi Mashiyane's eventual death had not been proved by the State.³⁴

There is another fatal flaw in the High Court's finding. This error concerns the application of *dolus eventualis*. In the penultimate paragraph of his judgment in the High Court, Kganyago J concluded as follows:

In this case when a stone was thrown to [Kleinbooi], it cannot be said that the intention was to kill him. The intention was to stop him from fleeing, but by stopping him from fleeing with a stone, they were gambling with his life, and they should have foreseen that it might struck a fatal blow. In my view, the two accused are guilty of murder in [the form] of *dolus eventualis*.

It is clear that the High Court incorrectly dealt with *dolus eventualis* as a form of intention. Kganyago J's incorrect statement resembles the rhetorical question by Masipa J in *S v Pistorius* of "[h]ow could the accused reasonably have foreseen that the shots he fired would kill the deceased or whoever was behind the door?"³⁵ The court in *Pistorius*, like the High Court in *Mawela*, wrongly applied an objective rather than a subjective approach to the question of *dolus*. The issue was not what was reasonably foreseeable when the accused fired at the toilet door but whether he actually foresaw that death might occur when he did.

The SCA, per Leach JJA in *Director of Public Prosecutions, Gauteng v Pistorius* had the opportunity to revisit the decision of Masipa J in the court *a quo*.³⁶ A crucial question that served before the SCA was whether the accused had acted with *dolus eventualis* when he fired the fatal shots through the door of the toilet cubicle which caused the death of the deceased. In pointing out the incorrect application of *dolus eventualis* by the court *a quo*, the SCA proceeded to quote Holmes J in *Sigwaha*:

The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a [reasonable person] in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred.³⁷

The SCA evaluated the finding of the court *a quo* that the accused had not subjectively foreseen that he would kill whoever was behind the toilet door. The court *a quo*'s reasoning was that if the accused had the intention to kill the person behind the door, he would have aimed higher than he did. In this regard, the SCA correctly found that the test applied by Masipa J in the court *a quo* incorrectly conflates the test for *dolus directus* with the test for *dolus eventualis*.³⁸ To establish *dolus eventualis*, the question should never be whether the accused had as his direct aim to cause the death of the person behind the door. Instead, the correct question would be whether the accused had foreseen the death of the person behind the door as a possibility only and reconciled himself with such a possibility. Due to the incorrect application of the test for *dolus eventualis*, the court *a quo* erroneously concluded that the accused had not foreseen the

34 *Mawela* para 19

35 Case No CC113-2013, judgment delivered 11 and 12 September 2014 (3328).

36 2016 1 SA 346 (SCA) (coram Mpati P, Mhlantla, Leach JJA, Majiedt JJA and Baartman AJA).

37 1967 4 SA 566 (A) para 28.

38 *Pistorius* para 29; cf Tshehla 2021 *SACJ* 128.

possibility of death resulting from his actions. This stems from the fact that the accused did not have the direct intent to cause the death of the person behind the cubicle door, according to the court *a quo*. It was already stated above that X acts with intention in the form of *dolus eventualis* if the unlawful conduct (in the form of an unlawful *commissio* or *omissio* or the causing of a prohibited result) is not X's main aim, but X subjectively foresees the possibility that, in proceeding to achieve their main aim, the unlawful conduct may be committed or the unlawful result may be caused, and X reconciles themselves to this possibility.³⁹ For *dolus eventualis* to exist, X must subjectively have foreseen the prohibited result as a possibility and reconciled to that possibility. The question is therefore not what X "should have foreseen" or "could have foreseen" or whether the prohibited result was "objectively foreseeable", but what X, in fact, did subjectively foresee. This is a purely subjective inquiry. The question of foreseeability is one that pertains to the objective inquiry into negligence.⁴⁰

The SCA in *Mawela*, per Mothe JA (coram Mathopo JJA, Mbatha JJA, Kgoele AJJA and Phatshoana AJJA) correctly set aside two convictions of murder in an appeal from the Limpopo Division of the High Court, Polokwane. Clearly, the High Court incorrectly applied the doctrine of common purpose as a basis for liability. The High Court also erred by employing an objective rather than a purely subjective test to the question of whether the appellants had the necessary *mens rea* in the form of *dolus eventualis* to sustain a conviction of murder. The test for *dolus* is a purely subjective one and the subjective state of mind of the accused at the time of the commission of the unlawful act is decisive. If several persons participate in an assault or malicious injury to property, and in the execution of that crime one participant kills somebody, the mere fact that they all had the intention to assault or to commit malicious injury to property is not sufficient to warrant the inference that all the participants also had the common purpose to commit murder.⁴¹

39 Cf *Humpreys* para 12; *Makgatho* para 10; *De Oliveira* 65i-j; *Brown* para 104; *Beukes* 32.

40 Cf *Snyman Criminal Law* 162; *S v Combrink* 2012 1 SACR 93 (SCA) para 16; *S v Nkosi* 2016 1 SACR 301 (SCA) paras 5–10; *S v De Bruyn* 1968 4 SA 498 (A) 507E; *S v Nkombani* 1963 4 SA 877 (A) 891C-D.

41 Cf *Gamble AJ* in *S v Gedezi* 2010 2 SACR 363 (WCC) para 55.