

DISTRIBUTABLE: (68)

(1) TUNGAMIRAI MADZOKERE (2) YVONE MUSARURWA (3)
LAST MAENGAHAMA (4) PHINEAS NHATARIKWA
v
THE STATE

**SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MAKARAU JA & MAVANGIRA JA
HARARE: 3 MARCH 2020 & 4 JUNE 2021**

B. Mtetwa with C. Kwaramba, for the appellants

F. I. Nyahunzvi and S. Kachidza, for the respondent

**Judgment No. SC 71/21
Criminal Appeal No. SC 790/16**

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MAKARAU JA: This is an appeal against the judgment of the High Court sitting at Harare, handed down on 12 December 2016. In the judgment, the court *a quo* found the first three appellants guilty of murder and the fourth appellant guilty as an accessory after the fact, of public violence. The first three appellants were sentenced each to 20 years imprisonment. The fourth appellant was sentenced to a fine of \$500-00 or in default, three months' imprisonment with a further three years imprisonment suspended on conditions.

The appeal is against the convictions and the sentences.

Background facts

On 29 May 2011, a political party, “the MDC-T”, held a political gathering at a shopping center in one of the suburbs in Harare. The purpose of the gathering was to celebrate the party’s T-shirt visibility programme. A group of police officers led by the deceased, was dispatched to disperse the gathering which was deemed illegal. When ordered by the police officers to disperse, the group did not resist but pleaded with the police to first complete their food preparations which included a barbecue, before they could disperse. The police agreed to this arrangement and left.

Reports later reached the police that the group had thereafter relocated to another shopping centre in the same suburb. The police, once again led by the deceased, reacted and followed to the new location. When the officers tried to disperse the gathering at the new location, they were met with stiff resistance. In the melee that ensued, the deceased was stoned by an unidentified assailant. He fell down onto the tarmac. He died as a result of a severe injury to his head which depressed his skull and caused damage to his brain.

On 12 March 2012, the appellants and 25 others were arraigned before the court *a quo* facing one count of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] and alternatively or concurrently, with public violence as defined in s 36. After a protracted trial lasting over four years, the appellants were duly convicted and sentenced as detailed above. The court *a quo* found that the first three appellants had, on 29 May 2011, unlawfully and with actual intent to kill, murdered the deceased by hitting him on the head with a brick, causing injuries from which he later died. It found the fourth appellant guilty as an accessory after the fact to the crime of public violence, which it held to be subsumed in the crime

of murder. The fourth appellant had ferried the first two appellants from the scene of the crime in the vehicle he was driving.

In finding the first three appellants guilty of murder, the court was clear in its mind that the guilt of the accused persons hinged on whether or not the appellants participated in the commission of the crime either directly or by association. In particular, it was its view that the case against the three appellants hinged on the applicability of the common law doctrine of common purpose, which it dealt with extensively, before convicting the appellants as detailed above.

The appeal

As indicated above, the appellants were aggrieved by the convictions and sentences.

In noting this appeal, they raised six grounds. I cite them here in full.

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- “1. The court *a quo* erred and seriously misdirected itself when it failed to properly apply the law and discharge the appellants as it was obliged to at the close of the State’s case in terms of s 198 (2) of the Criminal Procedure and Evidence Code, when no evidence justifying their placement on their defence had been led and in doing so denied them a fair trial with the result that the conviction and sentence must be vacated.
2. The court *a quo* further erred and misdirected itself in finding the appellants guilty on the basis of the doctrine of common purpose when in law the doctrine is no longer part of our law, the criminal law of Zimbabwe, having been codified in the Criminal Law Codification and Reform Code, which specifically outlaws Roman-Dutch Criminal Law.
3. The court *a quo* further erred and misdirected itself when it convicted the fourth appellant as an accessory after the fact to the crime of public violence when there is no actual perpetrator convicted of public violence.
4. The court *a quo* further erred and misdirected itself when it failed to find as an extenuating circumstance the fact that none of the appellants were shown to have directly participated in the melee that resulted in the deceased’s death, thus reducing their moral blameworthiness.
5. Taking into account the full circumstances of the case, the court *a quo*’s sentence of 20 years imprisonment induces a sense of shock in its excessiveness.

6. The court *a quo* erred and misdirected itself when it suspended a portion of the sentence on wide incompetent terms unrelated to the crime under which the appellant was convicted.”

The issues

The issues that fall for determination in this appeal are interwoven.

The first ground of appeal argues that the court *a quo* erred in failing to acquit the appellants at the close of the State case when there was no evidence justifying the continuation of the trial beyond that point. This seemingly raises the issue whether the court *a quo* erred as alleged. I use the word seemingly deliberately. This is so because of the settled position at law that failure to discharge an accused person at the close of the State case can only sustain an appeal where it is found that at the close of the State case there was no evidence justifying a conviction and the defence case furnished no such proof. The position, first debated in the controversial case of *Kachipare v S* 1998 (2) ZLR 271 (S), has gained traction and is accepted as the correct statement of our law. (See *S v Hunzvi* 2000 (1) ZLR 540 (SC).

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It has occurred to me that the rule in *Kachipare v S* (*supra*), can be understood in two distinct senses. In the one, it renders incompetent and unsustainable as a ground of appeal, one that simply alleges a failure by the lower court to acquit the appellant at the close of the State case without further alleging that there was no defence evidence proving guilt. In this sense it is an instruction to appellants not to seek to rely on the bare allegation that at the close of the State case there was insufficient evidence. The ground of appeal must of necessity attack the totality of the evidence led in the trial. In the other, it directs the appellate court determining the question

raised by such a ground to also consider the evidence led in the defence case before upholding or dismissing such a ground.

It is however not necessary that I debate to finality which of the two senses the court in *Kachipare* intended. For the purposes of determining this appeal, I will assume it is the latter.

In view of the fact that the court *a quo* relied on the common law doctrine of common purpose to place the appellants and others on their respective defences and in convicting the appellants at the end of the trial, it is only logical that I deal firstly with whether or not the common law doctrine of common purpose was, at the material time, part of the Zimbabwean criminal law. This is the issue that arises from the second ground of appeal.

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Depending on my findings on the above issue, I will proceed to determine whether there was sufficient evidence against the appellants to justify the continuation of their respective trials beyond the close of the State case on the basis of the applicable law. This will address the issue that arises from the first ground of appeal.

The issue relating to the propriety of the sentences imposed on the appellants shall thereafter be determined and only to the extent that this becomes necessary.

I have thus set up three issues which I now deal with *seriatim*. These are:

1. Whether at the material time, the common law principle of common purpose was part of the Zimbabwean criminal law;

2. Whether at the close of the State case there was evidence justifying the continuation of the trial; and
3. Whether the sentences imposed on the appellants are severe and induce a sense of shock.

The law

Was the common law doctrine of common purpose part of the Zimbabwean criminal law at the material time?

The criminal law of Zimbabwe was codified by the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], “the Code”. The Code was promulgated in 2005 and came into force on 1 July 2006.

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The purpose of the codification was partly to bring together under one statute the main aspects of the criminal law that were hitherto fragmented and partly, to reform and improve on the criminal law. This explains the lengthy and double- barreled title of the Code.¹ The Code therefore not only systematically arranged the existing material on criminal law conveniently under one legislation but also amended and modified the law.

Whilst the codification of the law brought with it convenience, the reform had wide-reaching ramifications. These ranged from the cosmetic, such as changing the nomenclature for some common law crimes, to the radical and fundamental. It changed the source of criminal law and supplanted itself and other statutes as the predominant source of the criminal law in the jurisdiction.

¹ Commentary on the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] by Professor G. Feltoe at p 5.

It appears to me that it was the clear intention of the law makers to make the Code and other statutes the sole sources of the criminal law in the jurisdiction after the fashion of the Napoleonic and other civil law penal codes. This it sought to achieve through the cumulative effect of the provisions of ss 3 and 9.

Section 3 of the Code provides that:

“3. **Roman-Dutch criminal law no longer to apply**

- (1) The non-statutory Roman-Dutch criminal law in force in the Colony of the Cape of Good Hope on 10 June 1891, as subsequently modified in Zimbabwe, shall no longer apply within Zimbabwe to the extent that this Code expressly or impliedly enacts, re-enacts, amends, modifies or repeals that law.
- (2) Subsection (1) shall not prevent a court, when interpreting any provisions of this Code, from obtaining guidance from judicial decisions and legal writings on relevant aspects of-
 - (a) the criminal law referred to in subs (1); or
 - (b) the criminal law that is or was in force in any country other than Zimbabwe”

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It further appears to me that the language used in the section was deliberately wide to oust as much of the common law as is possible and was intended to make the Code and other statutes the predominant sources of the criminal law in this jurisdiction with the common law providing a fallback position to avoid any possible gaps in the law. Thus, to widen the scope of its application and contrary to the general principle of interpretation of statutes that holds that statutes can only oust the application of the common law expressly and in clear language², s 3 of the Code permits and legitimizes the ousting of common criminal law by implication.

² See *S v Matare* 1993 (2) ZLR 88 (SC).

Section 9 which anchors the legitimacy of any criminal conviction and penalty in this jurisdiction provides that:

“9 Liability for criminal conduct

A person shall not be guilty of or liable to be punished for a crime unless-

- (a) the crime is defined by this Code or any other enactment; and
- (b) the person committed the crime or was a party to its commission as provided in this Code or in the enactment concerned; and
- (c) his or her liability is based upon voluntary conduct; and
- (d) subject to subs (5) of section seventeen, the person engaged in the conduct constituting the crime with any of the blameworthy states of mind referred to in sections thirteen to sixteen of this Code or any other enactment may require; and
- (e) his or her liability is based upon unlawful conduct, that is upon conduct for which there is no lawful excuse affording that person a complete defence to the criminal charge, whether in terms of Chapter XIV or otherwise.”

I digress briefly to note that the position I have detailed above held possibly only up to 2013 when the new Constitution was adopted. I say so advisedly because s 89 of the Constitution, which was enacted after the Code provides that:

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“89 Law to be administered.

Subject to the provisions of any law for the time being in force in Zimbabwe relating to the application of African customary law, the law to be administered by the Supreme Court, the High Court and by any courts in Zimbabwe subordinate to the High Court shall be the law in force in the Cape of Good Hope on 10 June 1891, as modified by subsequent legislation having in Zimbabwe the force of law.”

There is therefore some scope to argue that through the provisions of s 89 above, the Constitution has reinstalled for all purposes and for all laws, including the criminal law, the Roman-Dutch common law as a source of law. Put differently, there is scope to argue that the provisions of s 89 of the Constitution have clouded and rendered ambiguous the language of s 3 of the Code which before the enactment of the Constitution was clear and required no interpretation.

I remain of the above view notwithstanding that the repealed constitution had a similarly worded s 89 on the law to be administered by the courts. The law in force in the Cape of Good Hope on 10 June 1891 or Roman-Dutch common law as it is appropriately called, was the applicable law together with subsequent legislation modifying the common law. The Code, having effect on a date subsequent to the adoption of the repealed constitution, was permissible “subsequent legislation” modifying the common law.

In summary therefore, the law of common purpose has seen major changes in 2006 when the Code took effect, possibly in 2013 when the Constitution was adopted and in 2016 when s 196 of the Code was amended.

Quite apart from the fact that we did not have the benefit of researched argument from counsel on it, this issue is not relevant for the determination of this appeal. This is so because the material date in this appeal is 29 May 2011, which fell well before the adoption of the Constitution.

I merely flag the possible impact of s 89 of the Constitution on s 3 of the Code for law development purposes. The issue illustrates how complex the determination of the applicable criminal law in any case after the codification of the criminal law may become and how it would appear that the codification and reform of the criminal law has created an unintended minefield for the unwary.

Returning to the issue under discussion, it is common cause that the material date in this appeal is 29 May 2011. This was the date of the commission of the crime. Section 3 of the code applied. Its language is clear and admits of no doubt. It therefore requires no interpretation.

To establish whether or not the common law principle of common purpose was applicable at the material time, I must perforce look to the text of the Code to establish whether or not the Code had at that time expressly or impliedly enacted, re-enacted, amended, modified or repealed the principle under challenge. If it had dealt with the principle in any manner as detailed in s 3, then, the common law principle was no longer applicable.

The reverse would also hold.

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What then is the common law doctrine of common purpose?

It is a principle that deems the participation of two or more persons in the commission of a crime where the two or more persons associate with a common intent to commit the crime and one of them does commit the crime. It thus provides for co-perpetrators of crime with a common intent.

In essence, the doctrine provides that if two or more people act together in pursuance of a common intent, every act done by one of them in furtherance of that common intent is deemed at law to be the act of them all.³

³ Macklin, Murphy and others (1838) 168 ER 1136; and Chauke v S 2000 (2) ZLR 494 (S).

The common law doctrine of common purpose has a drag-net effect. This is self – evident. As the head-note to *S v Safatsa* 1998 (1) SA 869 AD has it:

“The principle applicable where there is shown to have been a common purpose is that the act of one participant in causing the death of the deceased is imputed, as a matter of law, to the other participants (provided, of course, that the necessary *mens rea* is present). A causal connection between the acts of every party to the common purpose and the death of the deceased need not be proved to sustain a conviction of murder in respect of each of the participants.”

When the Code was enacted, it provided in s 196 for the liability of co-perpetrators who associate with each other with the intention that each or any of them shall commit any crime. Broadly, this provision re-enacted the essence of the common law doctrine of common purpose.

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In terms of s 3 of the Code as detailed above, the direct application of the common law doctrine of common purpose in establishing the criminal liability of accused persons at the material time was therefore ousted by the enactment of s 196 of the Code. The criminal liability and punishment for two or more people who allegedly acted with a common intent at the time could only be imposed in accordance with the provisions of the Code.

On the basis of the above, it is my specific finding that at the time the appellants were charged with the crimes of murder and /or public violence, the common law doctrine of common purpose was not applicable in this jurisdiction. The then s 196 of the Code was the applicable law.

Before I proceed to analyse the decision *a quo* I wish to comment on the submission by counsel for the respondent, that the common law doctrine of common purpose is still applicable in our courts as this Court has applied it in two instances after the promulgation of the Code. Reference in this regard was made to the decisions of this Court in (1) *Vusimuzi Moyo* (2) *Khulekani Nkomo v S* SC 37/2013 and *Ncube v S* SC 58/2014. As indicated above, the law appears to be in flux in the wake of the adoption of the Constitution. The critical factor in my view is the date when the alleged crimes were committed. More importantly though, I am unable to find a discussion of s 3 in either of the two cases. I do not therefore hold the two cases as authority for the proposition that the common law doctrine of common purpose was the applicable law at the time the crimes alleged against the appellants herein were committed.

Analysis

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In placing the appellants and others on their respective defences at the close of the

State case, the court *a quo* had this to say:

“As I have stated elsewhere in this judgment, the State case is based on the common law doctrine of common purpose or conspiracy to commit a crime which has now been codified under s 188 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] which provides that:

- “(1) any person who enters into an agreement with one or more other persons for the commission of a crime in terms of this code or any other enactment:-
- (a) intending by that agreement to bring about the commission of the crime, or
 - (b) realizing that there is real risk or possibility that the agreement may bring about the commission of a crime.....”

The court *a quo* proceeded to refer to case law and legal texts on the common law doctrine of common purpose before stating as the basis of its decision that:

“.....anyone who is shown to have associated himself or herself at the material time with the group that eventually killed the deceased in the process of resisting police orders to disperse has a case to answer.”

In convicting the appellants, the court *a quo* applied the same law that it had applied in dismissing the application to discharge the appellants at the close of the State case. It applied the common law doctrine of common purpose. The provisions of ss 3 and 9 of the Code were not drawn to its attention and were therefore never considered by it.

The error that the court *a quo* fell into is self-evident. It applied the wrong law in establishing whether or not the appellants had participated or associated themselves with the commission of the crime in such a manner as to attract criminal liability. It applied the common law doctrine of common purpose instead of finding the liability of the appellants on the basis of the provisions of s 196 of the Code as it then was.

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Clearly but again in error, the court *a quo* was of the view that at the material time, the Code and the common law were of equal and interchangeable application. They were not. I say so because having found that the common law principle of common purpose had been codified in s 188, which provides for conspiracy, erroneous on its own, the court *a quo* was of the view that it could then revert to the common law principle of common purpose and apply it directly to the facts of the matter that was before it. It could not.

The intention of the law makers in enacting the Code appears to me to have been quite clear. Once a court finds that the common law has been enacted, re-enacted, modified or repealed in the Code, the Code takes over and becomes the sole source of the law and the

provisions of the Code become exclusively applicable, with precedent only acting as a guide in interpreting the provisions of the Code.

Thus, even assuming for a moment that conspiracy and the doctrine of common purpose are the same, as noted above, a finding by the court *a quo* that the doctrine of common purpose had been provided for under the Code as “conspiracy” would have debarred it from further proceeding to apply the common law principle directly. This was the essence of the provision of s 3 of the Code at the material time as discussed above.

Again and quite erroneously, the court *a quo* based its application of the common law doctrine of common purpose on the codification of conspiracy. It was of the view that the two are one and the same concepts both under the Code and at common law. They are not. It is however not necessary that I burden this judgment with a discussion of the differences between the two concepts. Suffice it to say that they are provided for separately in the Code and have different requirements.

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On the basis of the above, I am compelled to find that the court *a quo* misdirected itself, and gravely so, in finding the appellants guilty as it did on the application of a law that was not applicable in this jurisdiction at the time of the commission of the crimes with which the appellants were charged.

The conviction of the appellants cannot stand and must be set aside. This however does not entitle the appellants to their acquittal for I must now turn to consider whether the

appellants were guilty as charged on the basis of the provisions of s 196 of the Code as it then was, the law that the court *a quo* ought to have applied.

Whether at the close of the State case there was evidence justifying the continuation of the trial.

Section 196 of the Code itself has seen some major changes since the promulgation of the Code. These changes have seen a progressive narrowing down of the applicability of the common law doctrine of common purpose.

The original s 196 when the Code was enacted was repealed and replaced in 2016 through the provisions of the General Laws Amendment Act, 2016. This amendment took effect on 1 July 2016. Notwithstanding that the trial of this matter was concluded in 2016 after the amendment had taken effect, the applicable law in the trial of the appellants remained the law that was in force in 2011 when the crimes were allegedly committed. This is so because of the hallowed principle of our law that guards against the retrospectivity of statutes in general and of crimes in particular.

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The changes in the law may explain the joint but erroneous submission by both counsel before us that the Code did not provide for instances that fell to be determined under the doctrine. It does and at the material time, it did.

At the material time, s 196 (1) of the Code provided as follows:

“196 Liability of co-perpetrators

(1) Subject to this section, where-,

- (a) two or more persons knowingly associate with each other with the intention that each or any of them shall commit or be prepared to commit any crime; and
- (b) any one of the persons referred to in para (a) (“the actual perpetrator”) commits the crime; and
- (c) any one of the persons referred to in para (a) other than the actual perpetrator (“the co-perpetrator”) is present with the actual perpetrator during the commission of the crime; the conduct of the actual perpetrator shall be deemed also to be the conduct of every co-perpetrator, whether or not the conduct of the co-perpetrator contributed directly in any way to the commission of the crime by the actual perpetrator.”

The entire section as cited above was in 2016, repealed and replaced by a new section that deals with a different subject matter. A new section, s 196A was inserted to deal with the liability of co-perpetrators who knowingly associate for common purpose of committing a crime or crimes. It provides as follows:

“196A Liability of co-perpetrators

- (1) If two or more persons are accused of committing a crime in association with each other and the State adduces evidence to show that each of them had the requisite *mens rea* to commit the crime, whether by virtue of having the intention to commit or the knowledge that it would be committed, or the realization of a real risk or possibility that a crime of the kind in question would be committed, then they may be convicted as co-perpetrators, in which event the conduct of the actual perpetrator (even if none of them is identified as the actual perpetrator) shall be deemed also to be the conduct of every co-perpetrator, whether or not the co-perpetrator contributed directly in any way to the commission of the crime by the actual perpetrator.
- (2) The following shall be indicative (but not, in themselves, necessarily decisive) factors tending to prove that two or more persons accused of committing a crime in association with each other together had the requisite *mens rea* to commit the crime, namely, if they-
 - (a) were present at or in the vicinity of the scene of the crime in circumstances which implicate them directly or indirectly in the commission of that crime; or
 - (b) were associated together in any conduct that is preparatory to the conduct which resulted in the crime for which they are charged; or
 - (c) engaged in any criminal behavior as a team or group prior to the conduct which resulted in the crime for which they are charged.”

As indicated above, s 196A does not have retrospective effect and is of no application to the facts of this appeal.

Accepting then as we must, that at the material time, the common law principle of common purpose had been reenacted with modification that restricted its application, the liability of each accused person stood to be proved on the basis of the provisions of s 196 of the Code as it then was.

Principally, the State had to lead evidence tending to prove firstly that the appellants knowingly associated with the person who killed the deceased, secondly that such association was with the intention that each or any of them would kill or be prepared to kill the deceased and, thirdly, that the appellants were present with the actual perpetrator when the fatal blow was delivered.

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It is however common cause that the scene of the crime was a busy shopping centre where there was a beer outlet, a car wash, vendors, including some who were cooking meals for sale, a flea market and other members of the public who were waiting to use public transport. This was a Sunday afternoon falling at the end of the month. The crowd at the scene of the crime was not homogenous. It was made up of these members of the public and members of the MDC-T who had relocated from the first venue of their celebrations. No evidence was led that the crowd had a common intent.

The first and second appellants alleged in their defence outlines that they were at the shopping centre accompanying a friend whose shoe was being repaired in the car park. The third appellant alleged that he was attending a church service and adduced into evidence a video tape that proved his attendance at the church. The video tape however only recorded the church proceedings up to 12.30 in the afternoon. The alleged crime was committed after 12.30 pm, between 2.00 pm and 4.00pm.

It was not in dispute that the fourth appellant, employed as a driver, was sent to pick up crockery from the celebrations. When he saw the disturbances at the shopping centre, he decided to make a U-turn. In the process he picked up the first and second appellants.

It is further common cause that the actual perpetrator of the crime, who was unidentified, came from within the crowd that gathered at the shopping centre during the melee.

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Against the backdrop that I have painted above, it is difficult to envisage how the crowd, including the appellants, could have knowingly come together with one intent for the purposes of the law. In any event, the evidence led *a quo* showed that the crowd had not come together but that persons making up the crowd found themselves at the shopping centre at the same time that the conflict between the police and the members of the MDC-T erupted.

I pause to observe that the cases where the common law principle of common purpose was applied successfully in this jurisdiction invariably involved a team or group of persons setting out to commit a crime or crimes. The accused persons knowingly embarked on

their respective criminal enterprises. An appreciable number of the cases involve a pair or teams of robbers, (See *S v Mubaiwa & Anor* 1992 (2) ZLR 362 (SC); *S v Ndebu & Anor* 1985 (2) ZLR 45 (SC); *Matende & Machokoto v S* AD 55/79. In *Chauke v S* (*supra*), the accused persons were a group of prisoners that teamed up to escape from lawful custody.

The crowd in *casu* pre-existed the violence with no commonality unlike the mob in *S v Safatsa* (*supra*). In that case, the mob gathered and formed with the specific intention to attack the deceased in protest against an increase in the levies by their local council, in which the deceased was the Deputy Mayor. The mob had set out to attack the deceased and others who were viewed to have voted for the increase in levies.

To ascribe a common intention or individual *mens rea* to each member of the crowd in such circumstances of this appeal in my view is to stretch the applicability of the common purpose doctrine beyond its highest water mark. The crowd that was at the scene of the crime did not plan the outing as a criminal enterprise. It did not set out to attack the police. Individual members of the crowd were not armed with stones when they went to the shopping centre. The stoning of the deceased was unpremeditated by the crowd and the regrettable tragedy was unforeseen. It was a riotous reaction to the presence of the police.

Quite understandably, at the close of the state case, there was no evidence tending to show that the crowd had come together at any one stage.

Further and again understandably so, there was no evidence at the end of the State case that the crowd harbored a single intention. In this regard, a contrast may be made to the

facts in *S v Safatsa and Others* (*supra*) where the court found that the accused shared a common purpose with the crowd to kill the deceased and consequently the acts of the mob were imputed to each of the accused. *Per contra*, in *casu*, there was no evidence led *a quo* that the crowd coalesced around a single intention to assault and/or to attack the police. Instead, the evidence from the State witnesses shows that the crowd had different intentions as shown by their different reactions to the presence of the police at the shopping centre. Some ran away. Some remained where they were and only ran away to hide when the violence unfolded. Some may have joined in the violence with unknown intentions. To be fair to the respondent, it was never its contention that the crowd had one intention.

Some members of the crowd must have remained strangers to each other with their separate and individual intentions.

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The law as provided in s 196 sought to penalise two or more people who, knowingly, embarked on a criminal enterprise. It was not the intention of this law to penalise two or more persons whose criminal intentions may have coincided as may have happened with the crowd in *casu*. The possibility that this is what in fact happened was not shifted beyond a reasonable doubt.

I have examined the evidence that was led *a quo* to establish if there is any basis upon which I can infer that the crowd did come together with the intention of killing the deceased. I find none.

The crowd remained a typical weekend crowd found at any busy shopping centre. There was no evidence at the close of the State case that it had a common intention to commit any crime. The defence case did not proffer such evidence.

Even if one were to infer that some members of the MDC-T formed the intention to repel the police with force, there is no evidence that this intention was shared with the members of the public who then knowingly associated with the political party in its alleged criminal intent.

I therefore find that at the close of the State case there was no evidence that the crowd knowingly came together with the intention of murdering the deceased and that the crowd in fact had that common intention. No such evidence was adduced during the defence case.

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On the basis of the finding that I make above, the appellants were entitled to their discharge on the main charge at the close of the State case.

Assuming that I have erred in making the above finding, the convictions of the first three appellants of murder would in any event be invalidated by the provisions of the repealed s 196(8) which provided that:

“(8) For the avoidance of doubt it is declared that this section may not be used to convict a co-perpetrator of murder unless he or she was present with the actual perpetrator while the victim was still alive and before a mortal wound or mortal wounds had been inflicted.”

Because the respondent was oblivious of the provisions of s 196 in its entirety, no evidence was led to show that the appellants were present with the actual perpetrator when the deceased was felled by the brick that caused the mortal wound. In the absence of such evidence,

the law clearly provided at the material time that the appellants could not be convicted of the murder of the deceased.

It is therefore my finding that there was no evidence *a quo* that the appellants had knowingly associated with the actual perpetrator of the crime with the intention of committing the crime or any crime and that they were present with the actual perpetrator when the crime was committed. The defence case did not supply the missing evidence.

The requirements of s 196 of the Code were not satisfied.

In the absence of evidence that the appellants participated in the commission of the crime as provided for in the Code, they cannot be convicted. They are therefore entitled to an acquittal on the charge of murder.

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The appellants were charged concurrently or in the alternative with the crime of public violence. The crime is created by the provisions of s 36 which reads:

- “(1) Any person who, acting in concert with one or more other persons, forcibly and to a serious extent-
- (a) disturbs the peace, security or order of the public or any section of the public; or
 - (b) invades the rights of other people; intending such disturbance or invasion or realizing that there is a real risk or possibility that such disturbance or invasion may occur, shall be guilty of public violence and liable to a fine.....”

The crime of public violence as re-enacted in the Code has similar essential elements as the common law crime. These consist of the unlawful and intentional commission by a

number of persons acting in concert, of acts of sufficiently serious dimensions which are intended to violently disturb the public peace or invade the rights of others. The crowd need not have acted with pre-meditation. The obstruction of the police from performing their duties as happened in *casu* has been accepted at common law as constituting the common crime of public violence. (*R v Cele* 1958 (1) SA 144 (N)). It constitutes the crime of public violence as defined in s 36 of the Code.

I therefore find that the melee between the police and members of the MDC-T at the second venue of the celebrations degenerated into acts of public violence by the crowd that included members of the MDC-T.

In view of the defence outlines filed in respect of each of the first three appellants, the point of disputation in this case is whether the appellants participated in the acts of public violence as alleged or at all.

Whilst it is largely unnecessary that I burden this judgment with an analysis of all the evidence that was adduced at the trial, I wish to comment in general that the evidence from all the state witnesses did not tell a seamless story. There were too many loose ends. The scene was riotous and was very mobile and very fast moving. Whilst none of the witnesses could be expected to have had a helicopter view of the scene, however, even from their different viewpoints, the State evidence must have told the same consistent story, being the version that the State wished to rely on to found the criminal liability of the appellants. Instead, not only was the evidence remarkably disjointed, it was contradictory in some respects. An impeachment of

one of the witnesses by the State would have had the effect of leaving only one story as the State's version of what occurred at the material times.

The evidence implicating the first and second appellant came from one Inspector Nyararai who knew them both before the date of the alleged crime. He was part of the officers led by the deceased, dispatched to disperse the MDC-T members. He testified that upon their arrival at the scene, he observed the first and second appellants in the verandah of the bar chanting their party's slogans. It was his further testimony that the two did not leave the front part of the bar upon the arrival of the police but remained there chanting slogans and inciting the crowd to attack the police by chanting "Kill the frogs!" in apparent reference to the police.

The testimony of Inspector Nyararai in this regard is contradicted firstly by that of one Chikwira, who arrived at the scene before the police did. Chikwira, a member of the public, had gone to the bar to drink. He testified that all members of the MDC-T went into the bar upon the arrival of the police. He was in the verandah, drinking a beer. His evidence in this regard was corroborated by the evidence of Mutsigwa, Mushaninga and Magutarima. Mutsigwa, a police officer and driver of the police vehicle on the day in question, testified that upon the arrival of the police, all the people who were in the verandah of the bar fled. Mushaninga, a member of the stick of police officers who went into the bar with the deceased, on the other hand testified that there were no members of the MDC-T in the verandah when the police arrived. Magutarima, another police officer who went into the bar with Mushaninga also testified that upon their arrival, all members of the MDC-T who were in the verandah went into the bar and

only a few elderly people remained in the verandah. He and Mushaninga addressed this group and ordered them to disperse which they did.

I find the evidence of Nyararai unsafe to rely on in the circumstances. He is the only witness who testified that there were members of the MDC-T in the verandah of the bar, including the first and second appellants, who were chanting slogans and urging the crowd to attack the police. There is other State evidence that the confrontation between the police and the MDC-T members started at the back of the bar and it is there that one youth urged the others to attack the police by shouting “kill the frogs!” Before then, no one had urged the others to “kill the frogs”. No effort was made by the State to tie these two versions together.

In the result, I find that there was no reliable evidence at the close of the State case upon which a court acting carefully, would convict the first and second appellants of public violence.

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Similarly, the evidence identifying the third appellant as being present at the scene on the day in question is unsafe. It comes from Mushaninga. He did not know the third appellant prior to the day of the crime. He testified that he saw the appellant for a brief moment inside the bar when the third appellant assaulted him with a stool frame.

Again the same handicap that makes the evidence of Nyararai unsafe afflicts the evidence of Mushaninga in identifying the third appellant. If one compares the evidence of Mushaninga to the other evidence led on behalf of the State, it appears that Mushaninga had poor observation skills on the day or poor recollection after the event. He did not see the people who

were in the verandah when the police arrived yet the others in his company did. This is where Chikwira, one of the State witnesses was, drinking his beer. He did not see any members of the public at the shopping centre, yet the other witnesses did. He did not see any vendors at the shopping centre. The other witnesses did and one of the vendors gave evidence as a State witness. Before entering the bar, he did not recollect stopping to address the patrons who were drinking in the verandah of the bar. Magutarima testified that he and Mushaninga did. Again, the respondent made no efforts to tie up these loose ends.

I therefore find that at the close of the State case, the evidence identifying the third appellant was manifestly unreliable.

The first to third appellants were entitled to a discharge on the public violence charge at the close of the State case.

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In view of the findings that I make regarding the liability of the first and second appellants in this matter, the conviction of the fourth appellant naturally falls away.

It is also unnecessary that I determine the third issue in this appeal. Following their respective acquittals, the sentences imposed on each of them must be quashed.

Disposition

The appellants were entitled to a discharge at the close of the State case on both the main and alternative/concurrent charges. This was so because the State did not adduce sufficient evidence upon which a court, acting carefully, might have convicted the appellants. The

identification evidence of the third appellant was manifestly unreliable. No evidence proving the appellants' guilt on both charges was adduced in the defence cases. The first ground of appeal has therefore been sustained and succeeds.

In keeping with the general position at law regarding costs in criminal appeals, no order as to costs shall be made.

In the result I make the following order: `

1. The appeal is allowed with no order as to costs.
2. The judgment of the court *a quo* convicting the first to third appellants of the crime of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act, [Chapter 9:23], and the fourth appellant as an accessory after the fact to the crime of public violence as defined in s 36 of the Criminal Law (Codification and Reform) Act [Chapter 9:23], is set aside and substituted with the following:

“The seven accused persons are found not guilty and are duly acquitted of both the main and the alternative/concurrent charges.”

3. The sentences imposed on the appellants are hereby quashed and set aside.
4. The first and third appellants are entitled to their immediate release.

GWAUNZA DCJ : I agree

MAVANGIRA JA : I agree

Mtewa & Nyambirai, appellants' legal practitioners

The National Prosecuting Authority, respondent's legal practitioners