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S v Lifumbela and Others 2022 (1) NR 205 (SC)

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The *Lifumbela* case stems straight from the High Treason Trial, Namibia's longest and – probably – most expensive judicial saga. In *S v Lifumbela,*[2] the Supreme Court of Namibia had to settle an appeal against the convictions and sentences of 30 accused implicated in the High Treason Trial.[3] Despite the big stakes involved in this matter, the apex court did not manage to rise to this once-in-a-lifetime occasion and seize this historic moment.

By confirming that the appellants committed high treason, murder, and attempted murder on the basis of conspiracy (i.e., an incomplete crime), the Namibian Supreme Court upended the principles of criminal law on participation and incomplete offenses. All the parties to the case – the state and the defense attorneys alike – all posited and argued that the trial judge's guilty verdict rested on the doctrine of common purpose, but the Supreme Court persisted in holding that the trial judge passed the verdict based on conspiracy. Strangely, the appeal court treated conspiracy more like common purpose, i.e., more like a liability principle, than a distinct and specific substantive crime. In holding so, the Supreme Court pulled down the wall separating the principles regulating participation from those defining incomplete crimes, thereby introducing in Namibian criminal law an anomaly and a bad precedent.

Particularly, the Supreme Court faced questions whether the High Court of Namibia erred in finding the accused guilty in circumstances where the accused's participation in the high treason were uncertain. The questions also related to irregularities observed in the way the prosecutor handled state witnesses, as the prosecution showed them photographs of the accused before the witnesses testified.

All these questions convey the unbelievable complexity of this matter – a matter that featured prominently high treason, both a formal and political crime. And in the midst of this complexity the Court strove to distinguish between conspiracy and common purpose. This commentary proves that the court's efforts came to naught.

Facts

On August 2nd, 1999, nine years after Namibia earned its independence from South Africa, a group of armed men attempted to forcefully break the Caprivi region away from the rest of Namibia. Created in 1989, the Caprivi Liberation Army (CLA) claimed that German South West Africa (the former name of Namibia) never comprised the Caprivi region (the present-day Zambezi region of Namibia); hence Caprivi did not belong to Namibia then, nor at Independence on March 21st, 1990. The appellants allegedly met at places inside and outside Namibia, privately and publicly, and hatched a plan before they struck Katima Mulilo, Caprivi's capital.

On that fateful day of August 2nd in the early morning hours, the armed group lit into the town of Katima Mulilo where they attacked military and police bases, the town's police station, the offices of the national broadcaster, a border post, and the local branch of a Namibian bank.

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[2] *S v Lifumbela and Others* 2022 (1) NR 205 (SC) (hereinafter referred to as the '*Lifumbela'* case).

[3] *State v Malumo* (CC 32/2001) [2015] NAHCMD 213 (7-14 September 2015) (hereinafter the '*Malumo'* case).

These attacks led to the death of some people, seriously injured others, and damaged state property.

Namibia's military intervened, and the attempted secession failed. The Namibian government arrested a number of individuals who allegedly participated in those treasonous acts and prosecuted them. The High Court of Namibia effectively started to hear this matter on February 24th, 2004.

In September 2015, Elton Hoff J handed down his judgment in the main trial, *State v Malumo.* He concluded that the state proved beyond reasonable doubt that 30 accused had committed high treason and the other offenses the state charged them with. Accordingly, the judge found them guilty.[4] The High Court sentenced the 30 accused persons to jail terms ranging from three to 30 years. On the other hand, the learned judge found that the state had not discharged its onus regarding 35 accused. Hoff J therefore acquitted those 35 accused.[5]

Grounds of appeal and cross-appeal

In *S v Lifumbela,* the 30 persons convicted of high treason and other offences in *Malumo* appealed against the *Malumo* judgment to the Supreme Court, praying the apex court to set aside their convictions and sentences. The Supreme Court distinguished between the accused's general and common grounds of appeal.[6] It summed up the appellant's general grounds of appeal in four points: The appellants submitted that the trial court

(a) erred in convicting some of the appellants in their absence, thereby infringing the provisions of sections 159(2)*(a)* and 160 of the Criminal Procedure Act 51 of 1977 as well as the provisions of Article 12 (i.e., fair trial) of the Namibian Constitution;

(b) erred in relying on evidence of accomplices without it being corroborated by independent witnesses;

(c) should not have admitted Exhibit F4, which dealt with a previous bail application, to prove the truthfulness of that piece of evidence; and

(d) misdirected itself by overlooking material contradictions between witnesses.[7]

The state cross-appealed[8] on the appellant's sentences. Through its five general grounds of cross-appeal, the state urged the court to rule that

(a) the appellants filed a notice of appeal, not because the court a quo really misdirected itself or erred in law or fact, but because they have nothing to lose;

(b) even without the evidence ruled inadmissible, the remaining evidence against the appellants was such that the court a quo could only convict them;

(c) the learned judge a quo erred or misdirected himself in law or fact when he ordered that the whole of the unsuspended periods of imprisonment on murder and attempted murder should run concurrently with the unsuspended period of imprisonment on the high treason count; and

[4] *Malumo* (n 3) [1].
[5] ibid [2].
[6] *Lifumbela* (n 2) [11]-[15].
[7] ibid [11].
[8] A cross-appeal differs from an appeal depending on which party filed the request first. Thus, if both the state and the accused request a higher court to review a lower court's decision, the higher court will treat the state's request as an appeal if the state filed the request first and the accused's request as a cross-appeal. Vice versa, the higher court will treat – as it did in *Lifumbela* – the accused's request as an appeal if the accused filed it first and the state's request as a cross-appeal.

(d) the whole or at least part of the unsuspended period of imprisonment should run consecutively with the period of imprisonment on the high treason count.[9]

And, as a fifth ground of cross-appeal, the state basically argued that the Supreme Court should increase the appellants' sentences.[10]

The Supreme Court moved on to present the accused's two common grounds of appeal. The appellants submitted that the trial judge erred or misdirected himself:[11]

(a) in finding that the appellants are guilty of the crimes charged, whilst predicating its finding on the evidence of state witnesses, where a special entry in terms of s 317 of the CPA was entered. Such an irregularity caused the appellants not to receive a fair trial as contemplated by art 12 of the Constitution; and

(b) in respect of the crimes of murder and attempted murder, in finding that the state had proved beyond reasonable doubt that the appellants were guilty of murder and attempted murder by association, without evidence being led connecting the appellants to such murder or attempted murder; or proving their association with other appellants who may have been the actual perpetrators.

This commentary concentrates on the second common ground – the one that alleges that the court erred in finding the appellants guilty by association without evidence that proves their association with the accused persons who actually perpetrated murder and attempted murder. This ground alludes to the common purpose doctrine.

The Supreme Court judgment

The Supreme Court recalled that the court a quo convicted the 30 appellants on one count of high treason, nine counts of murder, and 91 counts of attempted murder.[12] The 30 appellants all appealed against their convictions, but only 11 of them appealed against their sentences as well.[13] Eventually, 27 appellants appeared before the Supreme Court after three of their original number either withdrew or abandoned their appeals.[14]

To adjudicate on the matter, the Namibian judiciary enlisted three seasoned foreign judges, namely Ernest Sakala (former Chief Justice of Zambia), Jeremiah Buti Zwelibanzi Shongwe (former judge of the South African Supreme Court of Appeal), and Moses Chinhengo (Acting Justice of the Court of Appeal of the Kingdom of Lesotho, and former judge of the High Court of Zimbabwe). Deciding unanimously and impersonally as 'the court', the three judges confirmed the appellants' convictions in their entirety[15] but allowed the appeals on the sentences in part.

The Supreme Court agreed with the findings of the trial court that, considering the evidence that Hoff J summarized, the appellants 'assembled in meetings to discuss the cessation[sic] of the Caprivi Region from the rest of Namibia' and committed the crime of high treason.[16] The court accepted the prosecutor's argument that an agreement existed amongst the appellants to commit acts of high treason.[17]

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[9] *Lifumbela* (n 2) [12].
[10] ibid.
[11] ibid [14].
[12] ibid [13].
[13] See ibid.
[14] ibid (n) [1].
[15] ibid [330].
[16] ibid [41]. See also ibid [330].
[17] *Lifumbela* (n 2) [70].

Though the Supreme Court endorsed the method followed generally by the trial judge to sentence the appellants, it found that the court a quo misdirected itself on two fronts.[18] First, the apex court agreed with the prosecutor that the suspended periods were 'far too long and unprecedented'.[19] The court thus reduced those suspended periods, which resulted in the effective sentences increasing. Second, the Supreme Court thought that the trial judge should have factored in the sentence the incarceration period prior to sentence, which would have shortened the sentences on murder.[20] In other words, the court partly allowed the appellants' appeal on their murder sentences.

Significance

Lifumbela is a spin-off of the historic High Treason Trial. Also known as 'Caprivi Treason Trial' and officially as *State v Malumo,* the High Treason Trial has spun off several cases that touched on several aspects of criminal law and the legal system in Namibia, for example, aspects pertaining to legal aid and fair trial rights,[21] to the jurisdiction of courts in Namibia to try accused persons arrested in neighboring countries,[22] and to questions whether the state prosecuted the accused maliciously.[23]

Against this backdrop, the uniqueness and value of *Lifumbela* is that, unlike other offshoots, it emanates from the High Treason Trial *directly*: The appellants in *Lifumbela* directly appealed against the trial judgment in *Malumo.* Moreover, and crucially, *Lifumbela* rounds off the Treason Trial.

Readers, including constitutionalists and criminal lawyers, will mark *Lifumbela* as an important judgment, but certainly not because of the way it (mis)handled participation in crime and incomplete crimes. If anything, *Lifumbela* exemplifies the sort of fuzzy logic that judges should fiercely guard against. One could, nevertheless, single out as noteworthy the court's efforts to discern conspiracy and common purpose.

The court in *Lifumbela* rightly established that the term 'conspiracy' has an ordinary and a technical sense.[24] It clarified that the technical sense of the term 'denotes 'a crime of conspiracy'.[25] Later on, to define 'conspiracy', the court relied on 'the elements of the crime of conspiracy at statutory law,'[26] which indicates that the sense of the term that the court bore in mind was technical. The statutory law that applies to conspiracy in Namibia is section 9(2) of the General Law Amendment Ordinance, which provides that

> any person who conspires with any other person to aid or procure the commission of or to commit any offence shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.[27]

[18] ibid [350].
[19] ibid.
[20] ibid.
[21] *Government of the Republic of Namibia and Others v Mwilima and All Other Accused in the Caprivi Treason Trial* 2002 NR 235 (SC).
[22] *S v Likanyi* 2017 (3) NR 771 (SC).
[23] *Minister of Safety and Security v Mwamba* (SA 20 of 2018) [2021] NASC 54 (09 September 2021).
[24] See *Lifumbela* (n 2) [37].
[25] See ibid.
[26] ibid [352].
[27] General Law Amendment Ordinance, s 9(2)(a). See also Riotous Assemblies Act, s 18(2)(a) (containing the same definition).

More precisely, the conspiracy involved in *Lifumbela* consisted of 'an agreement to commit a crime of high treason, specifically the commission of an overt act with a hostile intent.'[28]

The agreement between the parties constitutes the unlawful element of the conspiracy.[29] Investigators and judges can infer that such an argument exists from surrounding facts and circumstantial evidence.[30] In addition to the agreement, the conspirators must have intended to commit the crime in question.[31]

That said, the judgment in *Lifumbela* is deeply flawed. And, insofar as it concerns conspiracy, the judgment in *Malumo* suffers from the same defects. The flaw comes from the two courts' confusion over the doctrines that really undergirded their judgments.

Confusing conspiracy and common purpose

The Supreme Court correctly remarked that some people use conspiracy and common purpose interchangeably.[32] This remark dimly mirrored the argument advanced by Mr. Kauta, one of the defense lawyers, that the trial judge used these two doctrines as synonyms.[33] The court presented the common purpose doctrine as an appeal ground common to all defense attorneys, but in fact this understanding of the case is shared by all parties. Indeed, the prosecutor and all defense lawyers (especially Ms. Agenbach, Mr. Kauta, and Mr. Kavendjii) disputed the doctrine on which the trial court claimed to have rested its judgment.

Ms. Agenbach argued that the trial court founded its verdict on the common purpose doctrine before she claimed that the court erred in proceeding in that "incorrect and unconstitutional" fashion.[34] Specifically, she submitted that the common purpose doctrine underpinned the trial court's conviction on murder and attempted murder.[35] But the Supreme Court brushed aside her submissions as 'clearly wrong and unfounded'.[36]

Another lawyer for some of the appellants, Mr. Kavendjii, pleaded that the trial court misapplied both the doctrine of conspiracy and the doctrine of common purpose.[37] For Mr. Kauta, one of the lawyers representing one group of appellants, Hoff J failed to state whether his guilty verdict 'was based on the doctrine of common purpose or on the strength of a conspiracy to which each of the appellant was a participant'.[38]

The Supreme Court nonetheless held that the trial court 'did not say or found the convictions on the basis of common purpose'.[39] The appeal court further noted that:[40]

> As far as we can ascertain, nowhere in the body of the judgment of the court a quo does the court refer to common purpose, save in the beginning of its judgment on conviction where certain legal principles of law are discussed in general.

Curiously, the Supreme Court even passed over the submission by the prosecutor (Mr. Campher) that the state's case rested on the common purpose doctrine as well as

[28] *Lifumbela* (n 2) [39].
[29] Jonathan Burchell, *Principles of Criminal Law* (rev 4th edn, Juta 2014) 529.
[30] See *Lifumbela* (n 2) [38].
[31] ibid 531.
[32] See ibid [37].
[33] ibid [161].
[34] As paraphrased in *Lifumbela* (n 2) [15]. See also ibid [277] (paraphrasing Ms. Agenbach as contending that the trial judge applied the doctrine of common purpose in an 'incorrect and unconstitutional' manner).
[35] See *Lifumbela* (n 2) [42].
[36] ibid.
[37] See ibid [142].
[38] ibid [158].
[39] ibid [36].
[40] ibid [37].

conspiracy.[41] The bench refused to 'agree with the submission of *Mr. Campher* that the court a quo applied both the doctrine of common purpose and conspiracy'.[42] Yet Mr. Campher's submission aligns with the official charges against the accused in *Malumo*[43] because they expressly indict the accused for the main crimes (i.e., high treason, sedition, public violence), and not for conspiracy to perpetrate any of those offenses. As explained below, a court could only convict the appellants of the main charges directly if the court or the state resorts to the common purpose doctrine, not to conspiracy.

One compelling evidence of the disarray of the two courts vis-à-vis the doctrinal foundations of their analyses and the trial verdict: Both the High Court and, reluctantly, the Supreme Court split the accused into four classes. For the purposes of criminal liability and – especially – sentencing, both the High Court and the Supreme Court divided the accused in four classes: the leaders, the attackers or soldiers, the supporters, and the tight-lipped.[44] More than anything else, this classification proves that the court was actually trying to grade the appellants' participation in the high treason where it should have been examining whether the appellants met the requirements for the offense of conspiracy.

Even the Supreme Court reluctant at this classification. The Windhoek-based court did not see 'any cogent reason for the classification'.[45] For good reason, only doctrines speaking to criminal participation such as common purpose would seek to apportion liability among classes of people who participated in a crime; sentencing principles apply to convicted persons *individually,* and not collectively. By merging participation (i.e., common purpose) and incomplete crimes (i.e., conspiracy), the Supreme Court has thrown a major anomaly in the principles of Namibian criminal law.

Conspiracy and incomplete crimes

The Supreme Court mixed up complete crimes with incomplete ones. It highlighted that, before the High Court considered an appropriate sentence, that trial court convicted the accused 'of one count of high treason, nine counts of murder and 91 counts of attempted murder *on the basis of conspiracy'.*[46] Yet, except for high treason,[47] a court cannot find an accused person guilty of a complete crime (here, murder) on the basis of an incomplete crime (i.e., conspiracy): A court can either convict an accused of conspiracy to murder or of murder; it cannot adjudge him as guilty of murder *on the basis of conspiracy.* As Snyman pointed out, incomplete or inchoate crimes (i.e., conspiracy, incitement, and attempt) 'are all substantive crimes, not rules governing liability,' like the rules on unlawfulness and culpability.[48] In fact, criminalizing conspiracy and punishing conspiracy as a separate offense have been practiced for eons in common law countries.[49] This attests that conspiracy amounts to a distinct and stand-alone offense, albeit incomplete.

[41] See ibid [70] and [172].
[42] ibid [176].
[43] See *Malumo* (n 3) [2]-[5].
[44] See *Lifumbela* (n 2) [340]-[341], [352].
[45] ibid [352].
[46] ibid [36]. Emphasis added.
[47] CR Snyman, *Criminal Law* (6th edn, LexisNexis 2014) 306.
[48] ibid 275.
[49] See Juliet R Amenge Okoth, *The Crime of Conspiracy in International Criminal Law* (Springer 2014) 195.

Neither can a judge or a litigant utilize conspiracy to back up a high treason accusation. No incomplete crime can support such accusation because any attempt, incitement, or conspiracy to commit high treason all constitute acts of high treason.[50]

The Supreme Court also erred in confirming the trial court's guilty verdict for attempted murder committed on the basis of conspiracy. Indeed, an accused cannot engage in a *conspiracy* (i.e., an incomplete crime) to *attempt* (i.e., an incomplete crime) to commit murder (i.e., a complete crime).[51] Notwithstanding the absence of legal authority for it, the Supreme Court in *Lifumbela* utilized the inchoate crime of conspiracy to uphold the trial court's guilty verdict against the appellants on charges of attempted murder.[52]

In light of the above, the court should have upheld the appellants' convictions and sentences for 'conspiracy to commit murder,' and not for murder and attempted murder based on conspiracy. Moreover, the court should have cited and analyzed the rules governing and the requirements for conspiracy in the section where the court indicated the '[c]riminal legal principles relevant to this appeal'.[53] The court omitted to do so and gives the impression that it did not regard conspiracy as a substantive and separate crime or, if it did, that the rules operationalizing it did not apply to the *Lifumbela* case.

Common purpose and participation in crime

In addition to mischaracterizing conspiracy, the court misguided itself by using conspiracy, instead of the common purpose doctrine, to determine the extent of the appellants' participation in the high treason. As explained earlier, conspiracy is a distinct, substantive offense whereas the common doctrine purpose avails to address the extent to which an accused allegedly participated in a crime. Hence, conspiracy cannot justify a court in assessing the accused's participation.

The law empowers law enforcement agents and judges to hold co-perpetrators jointly liable for a crime by invoking the doctrine of common purpose.[54] In *Motaung,* Hoexter JA defined 'common purpose' as 'a purpose shared by two or more persons who act in concert towards the accomplishment of a common aim'.[55] Quoting Hoexter JA's definition with approval, the High Court of Namibia in *Haikele* ruled that common purpose exists where two or more persons act in concert to achieve a common goal.[56] This common objective may appear from the manner in which they conduct themselves during and after the commission of the crime.[57]

Enforcement agents and judges may employ this doctrine to hold each member of a group liable for a crime committed by one of them, irrespective of whether or not some members caused the criminalized result. The law imputes the criminal act of one participant to the other participants, provided that they have the necessary *mens rea*.[58]

How the completion of crimes relates to participation

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[50] Snyman (n 47) 306. See also *Lifumbela* (n 2) [161] (paraphrasing Mr. Kauta, one of the defense counsel, arguing that the law does not provide for any offense called 'conspiracy or attempted high treason').
[51] Snyman (n 47) 296.
[52] See *Lifumbela* (n 2) [360].
[53] i.e., *Lifumbela* (n 2) [42]-[46].
[54] This paragraph and the next one draw from Dunia P Zongwe, *Principles of Namibian Criminal Law* (Langaa 2022) 152-153.
[55] *S v Motaung and Others* 1990 (4) SA 485 (A) 509.
[56] *S v Haikele and Others* 1992 NR 54 (HC) 68. See also *Eixab v State* (CA 64/2010) [2016] NAHCMD 64 (8 March 2016)[19](citing, with approval, the definition of 'common purpose' in *Haikele*).
[57] *Eixab* (n 56) [19].
[58] *S v Safatsa* 1988 (1) SA 868 (A) 896-897, 898-900.

Overall, the Supreme Court missed the point that anyone can participate in a crime, irrespective of the degree to which the person completed or executed the crime, as long as the law has criminalized the impugned conduct beforehand. Put another way, the degree of completion has little to no effect on the question whether an accused got involved in committing the crime. The court in *Lifumbela* lost sight of this fundamental point when it treated conspiracy like culpability, i.e., like a principle that delineates liability, instead of approaching it like a distinct and discrete offense.

Though it strove to distinguish between the common purpose doctrine (which broadly denotes participation in crimes) and conspiracy (which constitutes an incomplete crime),[59] the Supreme Court in *Lifumbela* ended up entangling the two. The court cited the 1998 South African case of *S v Nooroodien*[60] as authority to differentiate between the two claims based on the *actus reus* (i.e., physical) element, their requirements, and the averments necessary to sustain the two claims. It held that, unlike common purpose, where two or more persons plot to murder a victim, a conspiracy does not require that every conspirator performs an act which contributes to the death of the victim.[61] The law will still hold each one liable for the victim's death, even if he does not participate in the commission of the offence, and even if he is not present at the scene of the murder.[62]

The court in both *Lifumbela* and *Nooroodien* stated that, in pursuing common purpose, a prosecutor must satisfy certain prerequisites.[63] Taking the examples of assault or murder, the court held that the prosecutor must prove that the person was present at the scene, that he was aware of the assault, that he intended to make common cause with the others, that he manifested his sharing of the common purpose by himself performing some act of association, and that he had the requisite *mens rea* (in the case of murder, he must have intended to kill the deceased).[64]

Referring to the necessary averments, the *Lifumbela* court held that, where the prosecuting authority grounds its case on a conspiracy, it must prove beyond reasonable doubt that the accused convened a meeting or assembly at which they decided to kill the deceased, that they made the terms of the decision clear, that the accused were present at the meeting, and that they participated in making that decision.[65] Where the state has proved a conspiracy, the question of common purpose falls away.[66]

In *Gurirab,* the Supreme Court of Namibia confirmed that, where the state cannot prove prior agreement between and among the accused and where it cannot prove that an accused has contributed to the wounding or death of the deceased, the law can still hold the accused liable by virtue of the *Safatsa* decision.[67] Likewise, to buttress his contention that the common purpose doctrine applied to the matter, the prosecutor in *Lifumbela* cited *Safatasa.*[68]

In *Safatsa,* the court laid down the principles that govern the common purpose doctrine. Strydom AJA in *Gurirab* confirmed that a number of Namibian cases have firmly embedded

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[59] See *Lifumbela* (n 2) [40]; *S v Nooroodien en Andere* 1998 (2) SACR 510 (NC) 513 (underscoring the importance of not equating conspiracy and common purpose).
[60] *Nooroodien* (n 59) 513.
[61] *Lifumbela* (n 2) [40]; *Nooroodien* (n 59) 512-513.
[62] *Lifumbela* (n 2) [40]; *Nooroodien* (n 59) 513.
[63] *Nooroodien* (n 59) 513; *Lifumbela* (n 2) [38]. See also *S v Gurirab and Others* 2008 (1) NR 316 (SC) 322-323 (where the Supreme Court of Namibia quoted, with approval, the prerequisites listed in *S v Mgedezi and Others* 1989 (1) SA 687 (A) 705-706).
[64] *Nooroodien* (n 59) 513; *Lifumbela* (n 2) [38].
[65] *Lifumbela* (n 2) [40]; *Nooroodien* (n 59) 513.
[66] ibid.
[67] *S v Gurirab* (n 63) 322.
[68] See *Lifumbela* (n 2) [70].

the principles set forth in *Safatsa* in the criminal law and procedure of Namibia.[69] In *Safatsa*, a crowd of about one hundred angry people had been throwing stones and petrol bombs at the deceased's house.[70] The house caught fire, and when the deceased rushed out, the eight accused persons – from the angry crowd – assaulted him and set him alight.

In pronouncing six of the eight accused guilty of the deceased's murder based on the common purpose doctrine, the trial court spelled out the two most important principles of doctrine. First, once the state has proved beyond reasonable doubt that members of a group acted with a common purpose (i.e., common intention), each member of the group is guilty of the crime irrespective of whether he caused the prohibited result.[71] Second, to convict an individual of a crime committed by another based on the common purpose doctrine, evidence must show beyond a reasonable doubt that the accused *actively associated himself* with the execution of the common purpose.[72]

As a doctrine belonging to the general criminal law principles shaping participation, common purpose applies to almost all crimes, regardless of whether the accused completed the offense – as in murder – or whether he did not or could not carry it through – as in high treason, conspiracy, and attempted murder.

On the other hand, a person can only take part in a crime as a perpetrator, co-perpetrator, accomplice, or an accessory. Contrary to what the apex court said, a person cannot in theory perpetrate an offense as conspirators, instigators or inciters: Conspiracy, incitement, and attempts are crimes in their own right and in a manner similar to offenses like arson, murder, and robbery.

Conclusion: An ill-conceived judgment

The *Lifumbela* case brings down the curtain on a marathon trial that ran from 24 February 2004 to 5 December 2014. Surely, the Namibian public has good reasons to breathe a sigh a relief and loudly clap out this decade-long judicial spectacle. Regrettably, on 22 December 2021,[73] the Supreme Court provided the weary public with some convincing reasons to give it the thumbs down. After courtrooms in Windhoek echoed the noisy steps of the protagonists for nearly two decades,[74] after the indictment of 122 individuals on 279 counts,[75] after all the resources – including the taxpayer-funded legal aid – pumped into this trial, and after the 360 000 pages of recorded proceedings, the closing act bombed.

The judgment in *Lifumbela* is ill-conceived. Ignoring the submissions that all the defense lawyers and even the state prosecutor himself brandished – that the trial judge actually returned his guilty verdict on the basis of common purpose, the apex bench insisted that the trial verdict stood on the doctrine of conspiracy. This (mis)conception of the case has muddied the principles of criminal law on participation and incomplete crimes so thickly that one can only hope that the Supreme Court will – sooner rather than later – reverse its own decision in *Lifumbela* and cleanse criminal law of this anomaly.

Why did Hoff J and the Supreme Court remain deaf to the parties' common purpose pleadings? One can only speculate. Had the Supreme Court determined that the judge in the trial court

[69] *Gurirab* (n 63) 324.
[70] *Safatsa* (n 58).
[71] ibid 896-897.
[72] ibid 901.
[73] The main trial (i.e., *Malumo*) ended with sentencing in December 2015 whereas the appeal (i.e., *Lifumbela*) drew to a close in December 2021.
[74] i.e., from February 2004 to December 2021.
[75] See *Lifumbela* (n 2) [1].

actually leaned on that doctrine, it would have had to quash the convictions of some of the appellants because they apparently never attended the meetings at the heart of the conspiracy charges against them.[76]

In reality, the Supreme Court in *Lifumbela* relied on the way the trial court worded its judgment rather than the manner in which it reasoned. It therefore failed to see that, although the trial court did not explicitly declare that it founded its decision on that doctrine, it issued a judgment that reflected that doctrine instead of conspiracy. Particularly, it did not convict the accused of conspiracy to commit murder, it pronounced them guilty of the target crime of murder. As defense counsel Mr. Kauta nicely put it, the appellants could only be found guilty on the basis of conspiracy to secede using violence.[77]

Nonetheless, the *Lifumbela* judgment has some bright sides. First, the unanimous bench backdated the sentences so as to factor in the time the appellants already spent in jail prior to their sentence. Second, the judges showed a praiseworthy awareness of the political nature of the offense (i.e., high treason) while acknowledging the Herculean and thankless task that the trial judge, Hoff J, had to shoulder in handling a case of such mind-boggling complexity. In particular, the court noted that defense counsel Ms. Agenbach stressed the political nature of high treason by underscoring the fact that it lacks "the essential elements of a common crime".[78]

Third, readers of this judgment will commend the judges for extending the principle evolved in *Tcoeib*[79] and *Gaingob*[80] to convicted persons who have reached an old age.[81] This principle holds that a prison term should not last so long as to lead the convicted persons to lose hope that the state will release them on parole or other measures within their natural lives. Fourth, readers will also commend the bench for appreciating, like Hoff J did, that non-violent, democratic avenues avail for the accused and anyone in Namibia to vent their discontent with the state. The political, constitutional, and legal contexts of Namibia did not – and still don't – warrant secession or the country's dismemberment.

In fine, the apex court, while seeking to draw a cut between conspiracy and common doctrine, wound up confusing the two, unable to tell them apart when examining the express words in Hoff's judgment. Unlike the parties to the case, the Windhoek-based, eagle-shaped court could not pierce through the express verbiage of the trial judgment to unearth its underlying logic.

[76] See ibid [158] and [161].
[77] ibid [161].
[78] ibid [15].
[79] *S v Tcoeib* 1999 NR 24 (SC).
[80] *S v Gaingob and Others* 2018 (1) NR 211 (SC).
[81] See *Lifumbela* (n 2) [344].