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## Progressive or regressive rape case law?

*Tshabalala v S; Ntuli v S 2020  
2 SACR 38 CC*

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*The Constitutional Court's decision in Tshabalala v S; Ntuli v S 2020 2 SACR 38 CC is undoubtedly a step in the right direction towards rape law reform in South Africa, however, this article challenges the court's decision to extend the application of the common law doctrine to common law rape. It is argued that the court could have highlighted the power dynamics at play during the commission of rape without denouncing instrumentality as a central element of the crime. This article further argues that the Constitutional Court, in developing common law rape, should have taken into account that rape is a conduct/instrumental crime under the Criminal Law (Sexual Offences and Related Matters) Amendment 32 of 2007. Instead, the judgment now has the effect of creating different elements for common law rape, in cases where there is more than one perpetrator.*

### Introduction

In South Africa, rape is not a rare or exceptional incident, rather, it is a common experience in the daily lives of women. Despite the enactment of progressive gender-based violence laws, the country has battled this scourge for many years, thereby earning the dubious title of being the 'rape capital of the world'.<sup>2</sup> Courts and local

news editorials bear testament to the frequency with which rape occurs across the country and the gruesome nature of such incidents.<sup>3</sup> Group rape (also known as multiple perpetrator rape or gang rape), in particular, has reached alarming proportions over the years.<sup>4</sup>

One of the loopholes in South African law, which has created difficulties for prosecuting

sexual crimes, is the narrow definition of rape under the common law. The Constitutional Court has taken several steps to develop this definition of rape so that it can properly reflect and respond to the wrongs of sexual violence. For instance, in *S v Masiya*,<sup>5</sup> the court extended this definition to include anal rape and recently, in *Tshabalala v S*; *Ntuli v S*,<sup>6</sup> the court took the opportunity to highlight how the existing legal and social construction of rape promotes rape culture and facilitates the normalisation of sexual violence against women.

Upon closer inspection, however, a number of issues arise from the court's approach of extending the application of the common purpose doctrine to common law rape. The first section of this article provides a brief discussion of the doctrine of common purpose, which is a central tenet of this case, followed by a brief background of the facts in the *Tshabalala* case. Thereafter, the approach of the Supreme Court of Appeal (SCA) will be analysed in juxtaposition to the Constitutional Court's line of reasoning. The court's decision to eliminate the instrumentality approach in rape cases will be discussed in more detail, as this formed the basis for the extension of the common purpose doctrine to common law rape.

While this article supports the application of the common purpose doctrine to common law rape, the main critique of this case arises from the court's failure to settle the uncertainty that has long existed in our legislation regarding the nature of rape as a conduct or consequence crime. This article argues that, contrary to the court's findings, instrumentality is still a requirement for rape in the Criminal Law (Sexual Offences and Related Matters) Amendment Act (SORMA),<sup>7</sup> thereby making rape a conduct crime. The effect of the *Tshabalala* judgment is that it unduly extends the definition of rape.

## The doctrine of common purpose

The doctrine of common purpose finds application in either one of two scenarios; where parties have a prior agreement (expressed or implied) to carry out a specific crime or where the participant(s) actively associate in a joint enterprise to commit the crime.<sup>8</sup> The latter form brooked much debate as to its precise meaning until the Appellant Division in *S v Mgedezi*,<sup>9</sup> provided much-needed clarity in setting out the requirements for active association as:

- i. "Presence at the scene where the ultimate unlawful consequence was being committed;
- ii. Awareness of the ultimate unlawful consequence;
- iii. Intention to make common cause with those who were actually perpetrating the ultimate unlawful consequence;
- iv. Manifestation of a sharing of a common purpose with the perpetrators of the ultimate unlawful consequence by performing some act of association with the conduct of the others; and
- v. The requisite fault."

Regardless of the form, where a court applies the doctrine of common purpose, each individual is held liable for the criminal conduct committed by a member of the group, since the conduct falls within their common design.<sup>10</sup> Therefore, all participants are regarded as co-perpetrators and may be convicted of the substantial crime.<sup>11</sup>

The doctrine of common purpose was imported from England's Native Territories Penal Code by the apartheid government as a response to the perceived security threat posed by the majority black African population to the white minority population.<sup>12</sup> The doctrine made it easy to convict suspects as it was applicable

in situations where the exact identity of the main perpetrator was unknown. The doctrine would be applied if it could be established that the suspect was a member of the group that brought about the ultimate unlawful consequence.<sup>13</sup> As a result, there was no need for the prosecution to prove beyond reasonable doubt that each participant was responsible for the commission of the prohibited *actus reus*.<sup>14</sup>

Due to this historical and political context, the doctrine was largely criticised by various academics. According to Parker, South Africa's history of the common purpose doctrine 'exemplifies what happens when the principles of good law are subordinated to social deterrence'.<sup>15</sup> Burchell raises similar concerns and argues that the doctrine unjustifiably infringes on an accused's presumption of innocence as it removes the burden on the prosecution to prove all the elements of liability beyond reasonable doubt.<sup>16</sup> Despite much criticism, the doctrine passed constitutional muster in *S v Thebus*.<sup>17</sup>

The court reasoned that the doctrine's application does not result in the arbitrary deprivation of freedom as it is rationally connected to the control of joint criminal enterprises.<sup>18</sup> Furthermore, crimes committed by a group of persons tend to cause greater harm to the South African society by virtue of there being many more actors. Although it took cognisance of the difficulty of proving causal links where crimes are committed by a group of persons, the court found the doctrine suitable for the successful prosecution of more than one accused person.<sup>19</sup> Following this decision, the common purpose doctrine was generally applied to murder, assault and robbery cases.<sup>20</sup> Prior to the Constitutional Court's decision in *Tshabalala*, it was unclear whether the doctrine was applicable to common law rape. In a number of decisions, courts refused to apply the doctrine for the conviction of a co-accused

person where he did not personally penetrate the victim. For instance, in *S v Saffier*,<sup>21</sup> the court held that common law rape could only be perpetrated personally by the accused not through the instrumentality of others. This is known as the instrumentality approach. Snyman explains the approach as follows: 'if the crime is of such a nature that it can by definition be committed only with one's own body, it is not possible to commit the crime through the instrumentality of somebody else. Examples of such crimes are rape'.<sup>22</sup>

### **The facts and case history of *Tshabalala v S; Ntuli v S***

The facts of this case stemmed from a rampage executed by a group of men one night in 1998 when they forced entry into several shacks in the neighbourhood of Thembisa, which is generally inhabited by marginalised members of society. The group ransacked the shacks, assaulted the occupants and raped eight women, some repeatedly.<sup>23</sup> However, not all members of the group took active part in raping the victims, as some members were posted outside to act as look-outs. Following the arrest of the accused men, the High Court relied on circumstantial evidence to draw the conclusion that these attacks were premeditated and therefore the 'prior agreement' requirement for the application of the common purpose doctrine was established.<sup>24</sup> The offenders were convicted and sentenced on various charges including several counts of common law rape based upon the application of the doctrine of common purpose.

One of the members of the group, Mr Phetoe appealed his conviction to the High Court's full bench. The majority of the court agreed with his submission that he was wrongly convicted of rape because the doctrine of common purpose does not apply to crimes committed through the instrumentality of another person's body.<sup>25</sup> However, the court also found that

Phetoe associated himself with the gang that had committed or facilitated the rape of the complainants. Due to his association with those that raped the victims, he was found guilty as an accomplice and not a co-perpetrator of rape.

Disgruntled by the full bench's decision, Phetoe appealed his conviction to the SCA.<sup>26</sup> The SCA rejected the trial court's application of the common purpose doctrine, reasoning that the doctrine could not be established as the evidence did not point to a prior agreement to commit the crimes.<sup>27</sup> The court also found that the majority of the full bench erred in its finding that sufficient evidence had been presented to prove that the appellant facilitated, assisted or encouraged the commission of any of the crimes.<sup>28</sup> Moreover, convicting the accused on the basis of his mere presence subverted the criminal law principles of participation and liability as an accomplice.<sup>29</sup>

Although Phetoe's conduct of laughing at the victim and not preventing the rape was condemned by the court, it was held that his presence at the scene did not justify a conviction as an accomplice to the rape.<sup>30</sup> The SCA also held that the doctrine of common purpose was not applicable to all the crimes, as Phetoe was only positively identified at one of the houses that was robbed.<sup>31</sup> This led to the conclusion that no prior agreement existed between Phetoe and the rest of the gang. Therefore, the convictions and sentences relating to common law rape were set aside and the court only upheld the conviction in respect of robbery with aggravating circumstances.<sup>32</sup>

Inspired by Phetoe's success in the SCA, the other co-accused, Mr Tshabalala and Mr Ntuli applied for leave to appeal against their convictions and sentences to the Constitutional Court. The applicants relied on the same defence and contended that under common law, the crime of rape is an instrumentality offence.<sup>33</sup> The principal legal

issues before the court were first, whether the doctrine of common purpose applies to the common law crime of rape and, if not, whether there is any rational basis for a distinction between the common law crime of rape and other crimes where the doctrine applies.<sup>34</sup> Thirdly, the court had to determine whether the SCA's decision in *Phetoe* was correct and thereby applicable to the other co-accused.

### **A comparative analysis of the SCA and CC judgments**

In response to the third legal issue, the CC decided not to pronounce on the correctness of the approach taken by the SCA as the state elected not to cross-appeal the SCA decision.<sup>35</sup> Despite the absence of any commentary on the prior court's decision, the significant differences between the approaches of the CC and the SCA speak volumes. Firstly, the CC agreed with the finding of the High Court that a prior agreement existed between the participants to invade different households, and to rape the complainants.<sup>36</sup> In reaching this conclusion, the court found it unfathomable that the rape incidents were sudden or independent acts of one or more of the perpetrators.<sup>37</sup> The existence of a prior agreement was inferred from circumstantial evidence – an approach which was vehemently rejected by the SCA.

Secondly, the CC held that, since the common purpose doctrine has been applied to other common law crimes such as murder, there is no justification for denying the application of the doctrine to common law rape.<sup>38</sup> In the unanimous judgment penned by Mathopo AJ, the court explains that the object of the common purpose doctrine is to avoid an unjust result which offends the *boni mores* (legal convictions of the community). This object is achieved by removing the requirement for causation and imputing the conduct, which caused the crime, to all the co-perpetrators. Against this background, the court found that the

instrumentality argument is inconsistent with the main object of the doctrine, which is not only to criminalise collective criminal conduct but to also combat crime 'committed in the course of a joint enterprise'.<sup>39</sup>

The SCA also acknowledged the sensitive nature of violent crimes, particularly those perpetrated against women and children, however it highlighted 'a more onerous duty on courts to ensure that there is an adherence to the rule of law to the extent envisaged by our Constitution where everyone is treated equally before the law'.<sup>40</sup> This informed the SCA's finding that the accused was liable as an accomplice and not a co-perpetrator. At this stage, it is important to differentiate between an accomplice and a co-perpetrator.

The SCA correctly defined an accomplice as 'someone whose actions do not satisfy all the requirements for criminal liability in the definition of an offence, but who nonetheless furthers the commission of a crime by someone else who does comply with all the requirements (the perpetrator)'.<sup>41</sup> In cases where a group of people commit a crime together and each of them comply with the definition of the crime, they qualify as co-perpetrators.<sup>42</sup> Therefore, accomplices are not perpetrators because they do not comply with all the requirements for conviction of the crime in question.<sup>43</sup>

Despite sufficient circumstantial evidence that pointed towards a prior agreement by the group, the SCA did not convict the accused of rape as there was reasonable doubt that such an agreement existed. What the SCA failed to consider, in my view, is that the mere presence of Phetoe and the other accused intensified the helplessness of the victims and induced fear as it prevented any resistance from anyone else who could have assisted the victims. This fact was overlooked by the SCA in its finding that Phetoe did not facilitate, assist or encourage the rape of the complainant.<sup>44</sup>

It is interesting to note that, if the court had concluded that Phetoe actively associated in the rape incident, he would have been convicted as an accomplice. The CC went a step further and convicted Tshabalala and Ntuli, who played more or less the same role as Phetoe, as co-perpetrators. This was a particularly interesting approach as the court could have convicted them as accomplices and sentenced them to the same number of years as the main perpetrators.

Under the common law, rape was defined as the unlawful insertion of the male genitalia into the female genitalia. Generally, the applicants would therefore not be considered as co-perpetrators as they did not physically penetrate the victims. The applicants also argued that it is impossible to apply the doctrine to common law rape, as the definition does not allow the causal element to be imputed to a co-perpetrator. In other words, there was no causal connection between the conduct of the accused and the commission of the crime.

Although the applicants did not meet the explicit requirements of common law rape, the CC convicted them as co-perpetrators for two reasons. First, the majority judgment highlighted how irrational it is for the use of the perpetrator's body to be determinative in the crime of rape but not in respect of other common law crimes such as murder or assault.<sup>45</sup> Secondly, the court found that in light of the relationship between rape and power, the portrayal of rape as the insertion of the male genitalia into the female genitalia is unsustainable.<sup>46</sup>

As indicated above, a number of South African courts denied the application of the doctrine of common purpose in rape cases on the basis of the instrumentality argument. Interestingly, this argument was not supported in murder cases, where those who facilitated such crimes were convicted as co-perpetrators rather than accomplices. For instance, in *S v Madlala*,<sup>47</sup>

the court held that an accused shall be guilty of murder if it is proven that he was a party to a common purpose to commit a specific crime such as robbery, and he foresaw the possibility of a member of the group committing murder during the execution of the robbery, yet he followed through with the plan, regardless of such a fatal consequence.

In *S v Majosi*,<sup>48</sup> this principle was applied by the court where X, together with four other persons, agreed to rob a supermarket. X was aware that one of the robbers had borrowed a firearm before the occasion. During the robbery, X kept watch outside while the others entered the supermarket. One of the robbers shot and killed an employee inside the supermarket. Although X was absent at the scene of the murder, he was convicted using the doctrine on the basis that he had foreseen the possibility that somebody might be murdered during the robbery and had reconciled himself with this possibility.<sup>49</sup> Due to the application of the doctrine in such cases, the CC found no legitimate reason for the differentiation between murder and rape cases in as far as the doctrine of common purpose is concerned.

### **Instrumentality as an element for the crime of rape**

In order to justify the application of the common purpose doctrine to common law rape, the majority judgment extended the definition of common law rape. The reasoning behind this decision is explained comprehensively in a separate concurring judgment penned by Khampepe J. She reiterates that, although sexual penetration is a legal requirement ‘which relates to the biological element of sexual intercourse, victims do not experience rape in a sexual manner’.<sup>50</sup> On this basis, the court found it unsustainable to view rape simply as a physical act, as the essence of rape is the aggression, power and dominance that perpetrators express in a sexual manner over their victims.<sup>51</sup>

With reference to the work of feminist scholar, Colleen Hall, Khampepe J reiterated that rape is structurally generated by the power imbalances between the sexes.<sup>52</sup> Therefore, the learned judge emphasised that the prevalence of sexual violence is an indication that sexual entitlement is a strong feature in the South African construction of masculinity.<sup>53</sup> Due to this reasoning, the court found that the use of one’s body should not be determinative when convicting a perpetrator of rape, as such an approach infers that rape is simply a physical act. Therefore, the definition of common law rape was extended so that the commission of rape by more than one person is possible where other persons have the intention of exerting power and dominance over the victim in a sexual manner.<sup>54</sup>

*In casu*, the perpetrators evidently overpowered their victims by intimidation and assault, and ensured that any attempt to escape would not be possible. Therefore, the CC correctly found that it would be disingenuous for them to plead their innocence on the basis that they did not physically penetrate the complainants. While it is true that the accused were not innocent bystanders, the court downplayed the physical element of rape. The view that the use of one’s body (for sexual penetration) should not be determinative in crimes of rape is unacceptable.

Firstly, sexual penetration is one of the elements for common law rape; the prosecution is required to prove all the elements of rape beyond reasonable doubt. Furthermore, the preamble of SORMA makes it clear that the expanded statutory offence of rape is applicable to all forms of *sexual penetration* without consent. Secondly, overlooking the sexual penetration of a complainant does not seem logical, as this is a distinguishing factor between rape and other sexual offences.

The court in *Tshabalala* could have easily extended the doctrine of common purpose

to common law rape, while simultaneously recognising that rape is an instrumental offence. Instead, the court highlighted the irrationality and shortcomings of the instrumentality argument, in as far as it seeks to absolve accused persons from liability, who may not have committed the deed itself (penetration) but enabled the commission of the crime.<sup>55</sup> This is not a strong argument, because, under the doctrine of common purpose, a co-perpetrator does not have to satisfy the element of unlawful conduct. Such conduct is imputed to him/her by virtue of his/her prior agreement or active association in a common purpose with one or more persons to commit the crime. Therefore, the instrumentality approach would not have absolved the accused from liability. The doctrine would still find application even in cases where the accused did not personally penetrate the complainant.

### **The formal nature of rape in South African law**

The CC effectively convicted the applicants for conduct that caused the rape of the complainants. To this end, the court interpreted common law rape as a consequence crime rather than a conduct crime. Formally-defined crimes (conduct crimes) which prohibit specific conduct are distinguishable from materially-defined crimes (consequence crimes), which prohibit conduct that results in the occurrence of some prohibited consequence. Under the common law, rape was a formally-defined crime because it prohibited a certain type of conduct (sexual penetration without consent) irrespective of the outcome.<sup>56</sup> Murder, on the other hand, is a materially-defined crime as the focus is on the consequence caused (unlawful death) irrespective how it is achieved.

Prior to the *Tshabalala* case, the doctrine of common purpose only applied to consequence crimes such as murder, robbery and assault.<sup>57</sup>

The CC conceded the correctness of this observation.<sup>58</sup> It was generally accepted that rape, like all conduct crimes, can only be committed by an individual who personally performs the prohibited conduct of sexually penetrating the complainant without consent, thereby fulfilling the definitional elements of the crime. However, in *Tshabalala*, the CC focused on the power and dominance exerted by the group of men *as a result* of their presence through intimidation and assault during the rape incidents.<sup>59</sup> In other words, the outcome of the presence of the accused provided a justification for the application of the common purpose doctrine. The court thus interpreted rape as a materially-defined crime.

The court further referred to direct and indirect victims of rape incidents, the latter category of which refers to persons who were *affected* by the rape incident and the treatment of the direct victim.<sup>60</sup> This is an indication of the emphasis placed by the court on the 'harm *caused* by rape' (own emphasis).<sup>61</sup> Thus, the court's development of the common law crime of rape was influenced by the specific consequences created by the conduct of the accused. In this regard, the court alluded to the fact that SORMA supports the interpretation of rape as a consequence crime.<sup>62</sup>

The influence of SORMA on instrumentality was brought up by the Commission for Gender Equality (the Commission), in its capacity as the *amicus curiae*. The Commission submitted that the instrumentality approach is inconsistent with SORMA's expanded definition of rape.<sup>63</sup> This new definition, *inter alia*, prohibits the penetration of an individual's body by any inanimate object.<sup>64</sup> The Commission submitted that it would be arbitrary for the doctrine of common purpose to apply in the case where an inanimate object, and not a body part, is used to commit a crime.<sup>65</sup> The CC agreed that SORMA's definition of rape eliminates the instrumentality approach in the

SORMA. This was used as another justification for the extension of the doctrine of common purpose to common law rape.<sup>66</sup>

The Commission's submission, on the one hand, stems from a reading of section 3 together with section 1 of SORMA. Section 3 provides that, 'any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape'. The wording of section 3 has resulted in 'intellectual discomfort' amongst scholars and legal practitioners.<sup>67</sup> This is mostly because of the general view that the provision transformed rape from a formally-defined crime to a materially-defined crime.

Arguments that SORMA changes rape into a materially-defined crime arise from the definition of sexual penetration as:<sup>68</sup>

Any act which *causes* (own emphasis) penetration to any extent whatsoever by—

- (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
- (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
- (c) the genital organs of an animal, into or beyond the mouth of another person.

Van der Bijl and Snyman argue that the specific inclusion of the word 'causes' in this definition effectively converts the crime of rape from a conduct to a consequence crime.<sup>69</sup> They contend that section 1 abolishes instrumentality, as the focus of this provision is on whether a specific act results in sexual domination. This view formed the basis of the Commission's submission that SORMA precludes the instrumental approach.

However, such an interpretation of SORMA cannot be supported for a number of reasons. Firstly, section 1 requires the acts in section 1(a) to (c) to be personally committed by a perpetrator even when a human body part is not used for sexual penetration.<sup>70</sup> In other words, the act of penetration remains *prohibited conduct* under section 3 of SORMA if it meets at least one of the definitional elements in (a) to (c). There is no requirement that a prohibited consequence must result from the penetration in order to attract criminal liability.

The insertion of the word 'causes' in this provision should not be misunderstood to mean the same as *causation*. Causation is one of the criminal elements that must be met when an accused is charged with a consequence crime, to show that the accused's actions resulted in the prohibited consequence. In the context of section 1, the addition of the words, 'which causes' should be viewed as part of an interpretive aid rather than an inference that rape is now a consequence crime.

In every statute, the definition section serves as an interpretative aid by ascribing certain words a technical meaning that often deviates from their ordinary grammatical meaning.<sup>71</sup> Such an interpretative aid was necessary in SORMA as the ordinary grammatical meaning of sexual penetration reflects a heterosexual perspective of sexual relations. For instance, the Cambridge dictionary defines penetration as 'the act of a man putting his penis to his partner's body during sex'.<sup>72</sup> This ordinary meaning of the word does not reflect the power dynamics intrinsic to rape and the humiliation suffered by a victim during the commission of the crime. Furthermore, it excludes the possibility of a male victim to rape. This is one of the reasons why the common law definition was criticised by the court and various feminist scholars as 'too narrow' and 'inadequate'.<sup>73</sup>

The statutory definition of ‘sexual penetration’ was therefore added to reflect the legislature’s intention, to replace the common law crime of rape with a ‘new expanded statutory offence of rape, applicable to all forms of penetration without consent, irrespective of gender’.<sup>74</sup> Against this background, the words ‘which causes’ were inserted to make provision for female perpetrators of rape who ‘cause penetration’, as it is physically impossible for a woman to penetrate a complainant with her sexual organ.<sup>75</sup> It would be far-fetched to infer that the legislature intended to abolish instrumentality through this provision. The real intention was to amend the type of *conduct* that constitutes rape.

### **The meaning of ‘sexual penetration’ in SORMA**

The elements of rape as defined in section 3 are: (1) sexual penetration; (2) with a person; (3) without consent; (4) unlawfulness; and (5) intention.<sup>76</sup> The most contentious of these elements is ‘sexual penetration.’ If we are to accept that this element reinvents rape into a consequence crime, then we must also accept that the statutory definition of rape includes all forms of penetration, including situations in which a perpetrator persuades or compels an unwilling party to commit an act of sexual penetration. However, a separate section of SORMA prohibits the unlawful and intentional compelling of a third person to commit an act of sexual penetration with a complainant, without the consent of the complainant and the third person. SORMA, therefore, provides a clear distinction between rape in section 3, and compelled rape in s. 4. This is the first indication that section 3 was not intended to transform rape into a consequence crime.

The second indication that the legislature did not intend to transform the formal nature of rape stems from the fact that consequence crimes are by definition so broad that participatory

offences are never applicable. However, SORMA lists a number of participatory offences in section 55. Persons who aid or facilitate the crime of rape can be convicted under section 55 of SORMA, which reads as follows:

Any person who- (a) attempts;  
(b) conspires with any other person;  
or (c) aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person, to commit a sexual offence in terms of this Act, is guilty of an offence and may be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

If one considers the fundamental presumption of legislative interpretation, which states that legislation does not contain purposeless provisions, then it cannot be accepted that section 3 was intended to abolish instrumentality or create a consequence crime, as this would render section 55 nugatory. Furthermore, such an interpretation would effectively blur the line between participation liability under section 3 and section 55 of the Act.

The court’s development of the common law crime of rape, therefore, makes it difficult to read the common law together with existing legislation. In developing the common law, the court should have consulted SORMA extensively, particularly sections 3 and 55. A proper reading of the Act would reveal that section 3 of SORMA does not preclude instrumentality. Although the Constitutional Court correctly highlighted that the doctrine of common purpose applies to common law rape, this conclusion could have been reached without interpreting rape as a consequence crime. As indicated earlier, the accused could be held liable for rape, as co-perpetrators, since the conduct of some of the group members would be imputed to the rest of the group under the doctrine.

Finally, it is submitted that the conviction of the accused as perpetrators in *Tshabalala* is an intrinsically flawed verdict to the extent that the principle of legality is infringed. The common law principle, *nullum crimen sine lege* holds that there can be no conviction of, or punishment for, an act not previously declared to be a crime at common law. This principle has been enshrined in section 35(3) (1) of the Bill of Rights for the protection of the accused's rights.<sup>77</sup>

When the Constitutional Court developed the common law crime of rape to include the anal penetration of a female in the *Masiya* case, both the majority and minority were in agreement that the principle of legality required that the accused not be charged under the extended definition of rape.<sup>78</sup> The court held the view that 'fairness to an accused requires that the development not apply to him but only to those cases which arise after judgment in this matter has been handed down'.<sup>79</sup> No reason was advanced for the retrospective application of the court's extended definition in the *Tshabalala* judgment. Therefore, the conviction of the appellants for conduct that did not constitute rape at the time that the crime was committed constitutes, in my view, a clear violation of the principle of legality and section 35 of the Constitution.

## Conclusion

The Constitutional Court's landmark judgment in *Tshabalala* paved the way for the application of a victim-centred approach in future rape trials, by highlighting the importance of constructing the definition of rape in a manner that emphasises the power dynamics at play during the commission of crime. Indeed, the court's decision represents a significant departure from the conceptual grip of the traditional, common-law definition of rape. While the author supports the decision to apply the common purpose doctrine to common law rape, it has been argued that the steps taken to do so have no strong legal basis. The same conclusion

(extending the application of the doctrine) could have been reached by imputing the *conduct* of sexually penetrating the complainants to all the accused, as required by the doctrine.

This article has concluded that a proper interpretation of the term 'sexual penetration' in s. 1 demonstrates that the legislature did not intend to abolish the formal nature of rape and the enactment of the participatory offences in section 55 bears testament to this. By misinterpreting this fact, the Constitutional Court has created two starkly different and conflicting positions – in the common law and statute - with regards to who qualifies as a perpetrator of rape, where there is more than one actor. Finally, it has been argued that the court violated the principle of legality in so far as the newly developed crime of common law rape was applied to the appellants in *Tshabalala*. This article predicts that the court has not settled the true nature of rape (as a conduct crime) for good and its approach will require resolution of conflicting approaches in the future.



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## Notes

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- 2 Pieter Coetzer, "Rape in Contemporary South Africa – More Vexing and Vicious than Ever," *Journal for Contemporary History* 30, no. 3 (2005): 169–182, 176, <https://hdl.handle.net/10520/EJC28363>.
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- 5 *Masiya v Director of Public Prosecutions* 2007 2 SACR 435 CC.
- 6 *Tshabalala v S; Ntuli v S* 2020 2 SACR 38 CC.

- 7 Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 [SORMA].
- 8 *S v Thebus* 2003 6 SA 505 CC, para. 18.
- 9 *S v Mgedezi* 1989 1 SA 687 A.
- 10 *S v Thebus*, para. 18.
- 11 *S v Thebus*, para. 18.
- 12 Native Territories' Penal Code Act 24 of 1886.
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