

Question six-one

An accomplice under South African law is a person who takes part in the commission of a crime, other than the perpetrator and other than the accessory after the fact.¹ In the case of *S v Williams*² Joubert JA sets out several requirements that have to be met before liability as an accomplice can be established. First of all the accessory nature of the accomplice's liability requires the committing of a crime by somebody else. This means that this other person has to be liable as a perpetrator. Secondly a person must have engaged in conduct whereby he furthers the commission of a crime by somebody else. The furthering of a crime includes any conduct whereby a person facilitates, assists or encourages the commission of a crime, gives advice concerning its commission, orders its commission or makes it possible for another to commit it. Joubert JA describes this as affording the perpetrator the opportunity, means or information which furthers the commission of the crime. Thirdly, Joubert JA points out that there must be a causal relationship between the accomplice's behavior and the commission of the crime by the perpetrator. Finally, in order to hold a person liable as the accomplice to a crime that person must have unlawfully and *intentionally* furthered the crime committed by someone else.³

This last requirement presupposes a certain *mens rea*. The test for determining whether an accomplice has the requisite *mens rea* is the same as the test for determining the existence of *mens rea* in general South African criminal law. The threshold lies with *dolus eventualis*.⁴ A person is therefore liable as an accomplice to a crime if that person foresaw that a crime was being or was about to be committed and nevertheless committed an act that furthered that crime.⁵ According to the case of *S v De Blom*⁶ a person must also know or foresee that his or her conduct is unlawful. It follows from the above that the accomplice must be aware of all the material facts or circumstances mentioned in the definitional elements.⁷ Negligence is therefore not sufficient to establish the accomplice's

¹ J. Burchell; Principles of Criminal Law (Juta & Co, 2005), at 599.

² *S v Williams* 1980 (1) SA 60 (A).

³ C.R. Snyman; Criminal Law (Butterworths, 4th edition), at 269-270.

⁴ *S v Kazi* 1963 4 SA 742 (W).

⁵ J. Burchell; Principles of Criminal Law (Juta & Co, 2005), at 354-355.

⁶ 1977 (3) SA 513 (A).

⁷ *S v Tshwape* 1964 4 SA 327 (C).

liability. A good example is the shop assistant who forgets to properly close the shop window. He will only be liable as an accomplice if he purposely leaves the window unlocked in order to facilitate the burglary he knows has been planned. It is not necessary that the principal offender is aware of the fact that his crime is being furthered by the act of the accomplice, there does not have to be a conscious cooperation.⁸

There is no jurisprudence so far to suggest that a South African court will impose a more lenient test to determine whether *mens rea* is present in cases involving particularly serious or egregious crime. Neither does jurisprudence suggest that this is the case for lesser types of offences.

The criminal liability of a corporation under South African law rests upon the imputation to the corporation of the crimes of persons acting on their behalf and is in fact based on derivative liability rather than vicarious liability. It has been suggested that when it comes to criminal liability of corporations South African law falls behind other jurisdictions where liability is increasingly imposed on the basis of direct or collective corporate responsibility independent of proof of misconduct of a particular individual.⁹ Section 332 (1) of the Criminal Procedure Act, 1977 deals with corporate liability;

For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law-

- a) any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body; and
- b) the omission, with or without particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body, in the exercise of his powers or in the performance of his duties as such director or servant, or in furthering or endeavoring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by that corporate body, or, as the case may be, to

⁸ C.R. Snyman; Criminal Law (Butterworths, 4th edition), at 272.

⁹ J. Burchell; Principles of Criminal Law (Juta & Co, 2005), at 563.

have been an omission (and with the same intent, if any) on the part of that corporate body.

This section removes the obstacle to imposing criminal liability to a corporation of crimes that require fault, such as complicity, since it has no mind. Burchell states that corporations can very well be found guilty of being an accomplice to crimes such as rape and murder. Should the corporation for instance knowingly provide a work environment that facilitates sexual assault, or at least does not seek to prevent such conduct, than it could be found guilty of complicity to rape if someone is raped on the premises.¹⁰

Question Six-Two

A, B, C, D) As mentioned above a test for determining whether an act was furthered by the accomplice was defined in the case of *S v Williams*. In this case the Court also decides that the assistance consciously rendered by the accomplice in the commission of a crime can consist of both an act and an omission to act. The act that constitutes the assistance or furtherance can take different forms and is not necessarily physical but can also be moral or verbal. Examples are the placing of one's home or property at the disposal of another so that he can commit a crime¹¹ or acting as an interpreter for a perpetrator.¹² Other acts which amount to the furthering of an act are the facilitating, aiding or encouraging of the act, or giving advice or ordering the act to be committed.¹³

An omission to act can also qualify as an act that furthers a crime but only if the accomplice has a legal duty to take action. The general rule in South African law is that a person is not under a duty to protect others from harm, prevent crime or inform the authorities of a crime. There are however exceptions to this rule. A duty to take action may arise where prior conduct by a person has created a potentially dangerous situation, a person has control of a potentially dangerous thing or animal, where a special or protective relationship exists between parties, where a person occupies a (semi-) public office or calling which imposes a duty to act or where a duty to act is imposed by statute

¹⁰ J. Burchell; *Principles of Criminal Law* (Juta & Co, 2005), at 565-566.

¹¹ *Jackelson* 1920 AD 486; *Wallace* 1927 TPD 557; *Wiese* 1928 TPD 149.

¹² *Peerkhan and Lalloo* 1906 TS 789.

¹³ *Jackelson* 1920 AD 486; *Mbande* 1933 AD 382; *Pfakacaha* 1964 2 SA 32 (F); *Quinta* 1974 1 SA 544 (T) 547; *Williams* 1980 1 SA 60 (A) 63B-C.

or contract.¹⁴ In *R v Shikuri*¹⁵ an employer who failed to control his employee's actions while being driven by him was held liable as an accomplice for failing to stop after an accident. Merely being a passive spectator of the commission of a crime does not constitute furthering it.¹⁶ This is of course not the case when the spectator has agreed with the perpetrator to assist him by standing by or if the omission to act in any other way amounts to participation in the crime or assistance, authorization or encouragement of the perpetrator.¹⁷ The failure of a person to alert the authorities or the intended victim when that person has knowledge of a crime that is about to be committed can also not be considered as a furthering of the crime. Neither can the failure of a person to inform the authorities of a crime that he knows has been committed or the approval of a crime after it has been committed be regarded as the furthering of a crime.¹⁸

(One could debate that a business entity that is in business with a repressive government guilty of grave breaches of international criminal law or does business in a state where such acts take place has a special position. This special position would render a business entity liable as an accomplice to these grave breaches of international criminal law if it does not undertake action after it has been informed of breaches of international criminal law.)

E) In accordance with general principles the assistance or furthering of the act may be slight as long as there is some act, whereby an omission to act can also qualify as an act.¹⁹ Whether this act must have amounted to a substantial contribution towards the commission of the crime is not completely clear under South African criminal law. In *S v Williams* Joubert JA stated that in terms of general principles there must be a causal relation between the accomplice's assistance and the commission of the crime by the perpetrator. In *S v Khoza*²⁰ Corbett JA observes that requiring a causal relation between the accomplice's behavior and the commission of the crime, in this case the death of the

¹⁴ J. Burchell, J.J. Milton; Principles of Criminal Law (Juta & Co, 1991), at 83-84.

¹⁵ *R v Shikuri* 1939 AD 225

¹⁶ *S v Ndabambi* 2001 (1) SACR 98 (C)

¹⁷ J. Burchell, Principles of Criminal Law (Juta & Co) at 603.

¹⁸ C.R. Snyman; Criminal Law (Butterworths, 2nd edition), at 267-268.

¹⁹ C.R Snyman; Criminal Law (Butterworths, 4th edition) at 271.

²⁰ *S v Khoza* 1982 3 SA 1019 (A).

deceased would ‘virtually eliminate the distinction between participation as a perpetrator and participation as an accomplice in the crime of murder.’ Convictions of complicity to result crimes would therefore be less likely than convictions of complicity in conduct crimes.²¹ Corbett JA’s view is based on the premise that actual or effective furthering is required for accomplice liability. Explaining Joubert JA’s statement in *S v Williams* Botha JA in *S v Khoza* stated that it is only necessary for accomplice liability that there is a causal relation between the alleged accomplice’s conduct and the conduct of the perpetrator. In Botha’s opinion therefore an actual, real or effective furthering of the crime is necessary that does not, in the *Botha* case, causally contribute to the death of the deceased. Later on in his judgment however Botha JA is of the opinion that the conduct of an accused whose assistance was ineffective and did not contribute anything to the causing of death still qualified as the *actus reus* of an accomplice.

In *S v Maxaba*²² the Appellate Division put forward the question whether “further” means to “causally further” or of it means to “do something with a view to bringing about a result,” but fails to answer it. In 1960 THRHR 95 Strauss suggests that a subjective approach should be followed and that furthering a crime should be defined as: “doing something with a view to bring about the result” actually caused by the perpetrator. This view is supported by many others.²³ Visser and Mare view the standpoint that actual, effective or causal furthering is *not* required for accomplice liability as the most acceptable. In supporting their argument they point out the difficulties relating to proof which may arise if effective or causal furthering is required and to the incongruity of demanding effective or causal assistance for accomplice liability but not for liability as a perpetrator in terms of the doctrine of common purpose.²⁴

Various other writers have however noted that “further” must mean to causally further.²⁵ South African courts have emphasized the need of both factual and legal causation in

²¹ P.J. Visser, M.C. Mare; *General Principles of Criminal Law through the Cases* (Butterworths, 3rd edition), at 684.

²² *S v Maxaba* 1981 (1) SA 1148 (A).

²³ Rabie 1971 SACJ 334 345; 1988 SACJ 35; Hugo 1969 SALJ 391 394; Van Wyk 1980 THRHR 195; Ellis 1983 *De Jure* 355; Franzsen 1984 *De Jure* 393, Van Oosten 1979 *De Jure* 346 and Mare 1990 SACJ 24 28.

²⁴ P.J. Visser, M.C. Mare; *General Principles of Criminal Law through the Cases* (Butterworths, 3rd edition), at 685.

²⁵ De Wet and Swanepoel 187 n 86 and 201; RC Whiting (1980) 97 SALJ 199 and Snyman 273.

consequence crimes. However it is arguable that for accomplice liability only factual causation in the sense of furthering or assisting in the commission of the crime is necessary²⁶

F) In cases where assistance is provided after the crime has been committed the person who provides the assistance is guilty of being an accessory after the fact and not of being an accomplice. An accessory after the fact is a person who, after the completion of the crime, unlawfully and intentionally engages in conduct that is intended to enable the perpetrator or accomplice to evade liability for his crime, or to facilitate such a person's evasion of liability.²⁷

QUESTION SIX-THREE

a) The liability of an accomplice is accessory in nature. This means that a person can not be an accomplice to his own crime. Someone else must have committed a crime. It has however not been decided in the South African courts which degree of accessoriness is required. There are two different theories in this respect that have been identified by writers.²⁸

1) The limited accessoriness theory requires unlawful conduct by a principal offender. In this theory it is not important whether the principal offender had the required criminal capacity or *mens rea*. The accomplice can nevertheless be convicted.²⁹

2) According to the strict accessoriness theory it is necessary that a crime was committed by a principal offender that corresponded with the definitional elements of the relevant crime and was accompanied by the required culpability.³⁰

b) According to Snyman there should be no reason why a person could not be found guilty of being an accomplice to the attempted commission of a crime if the crime which the perpetrator set out to commit has not been completed.³¹

²⁶ J Burchell, Principles of Criminal Law (Juta & Co, 2005), at 601-602.

²⁷ C.R Snyman; Criminal Law (Butterworths, 4th edition) at 274.

²⁸ R.C. Whiting (1980) 97 SALJ 199, M.A. Rabie (1970) 23 THRHR 244, J Burchell, Principles of Criminal Law (Juta & Co, 2005), at 604, C.R Snyman; Criminal Law (Butterworths, 4th edition) at 269-270

²⁹ *Vanmali* 1975 1 SA 17 (N) 23.

³⁰ *Rasool* 1924 AD 44, *Parry* 1924 AD 401

³¹ C.R Snyman; Criminal Law (Butterworths, 4th edition) at 270.

c) The perpetrator does not have to be tried and convicted.³² All that is necessary is that someone else committed the crime as a perpetrator.³³

³² *Dettbarn* 1930 OPD 188 191.

³³ C.R. Snyman; *Criminal Law* (Butterworths, 4th edition) at 270.