THE SUPREME COURT OF APPEAL
**REPUBLIC OF SOUTH AFRICA**

# JUDGMENT

Case No: 567/06
NOT REPORTABLE

In the matter between:

**NORMAN DLEPU** **APPELLANT**

**and**

**THE STATE** **RESPONDENT**

Coram: Farlam, Mlambo JJA et Hancke AJA

Heard: 7 May 2007

Delivered: 1 June 2007

Summary: Criminal law – appeal against conviction and sentence – regional court contrasting accused's versions – incorrect test – appellant's version on correct test reasonably possibly true – appeal upheld.

**Neutral citation:** **This judgment may be referred to as *Dlepu v The State* [2007] SCA 81 (RSA).**

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**MLAMBO JA**

[1] The appellant was convicted with two others on one count of robbery with aggravating circumstances, one count of possession of a firearm and ammunition respectively, in contravention of the Arms and Ammunition Act no 75 of 1969, by the Port Elizabeth Regional Court on 11 February 2003. He and his co-accused were thereafter each sentenced to 15 years imprisonment on the robbery count. He was sentenced to 18 months imprisonment on the unlawful possession of a firearm count and to a fine of R1 200 or 6 months imprisonment on the unlawful possession of ammunition count. The 18 months sentence was ordered to run concurrently with the 15 year sentence.

[2] The appellant and his co-accused then lodged appeals against their convictions and sentences to the Eastern Cape Division of the High Court. The appeals were heard by the Grahamstown High Court (Jennett and Chetty JJ) on 3 February 2004 which upheld the appeals against the unlawful possession counts but dismissed the appeals against the robbery conviction and sentence of 15 years.

[3] On 10 February 2004 the Grahamstown High Court heard and dismissed the appellants' application for leave to appeal to this court against the remaining conviction and sentence. In this appeal the appellant appeals, with special leave from this court, against that conviction and sentence.

[4] The facts briefly are that in the early afternoon on 1 March 1999 Albert Henry Collin Moorcroft (Moorcroft) was robbed of his Isuzu bakkie in which was his briefcase with his identity document, a Nokia cell phone, a set of keys, letters and R40 cash, by two young men, just

after he had left the Standard Bank, at a shopping centre in Newton Park, Port Elizabeth.

[5] It is not in dispute that Inspector Vosloo and Sergeant Kruger, who were busy with crime prevention and other police duties, received the report of the robbery on their radio requesting them to be on the lookout for the bakkie. They were in private clothes and driving an unmarked Toyota Venture vehicle (Venture). They continued with their duties and at Fourth Lane in Newton Park they came across a gold Audi sedan (Audi) with a number of passengers inside and became suspicious. They followed the Audi into Bruce Street until it stopped in front of a house in that street. Vosloo and Kruger drove past and momentarily lost sight of the Audi. They made a U turn and when the Audi came into sight (it had also turned to face the opposite direction) they noticed a male person, carrying an object they could not identify, run from the house the Audi had parked in front of, and get into the back seat of the Audi.

[6] The Audi drove off and after following it for some time they pulled it off, ordered the four passengers and driver out and proceeded to search them and the Audi. At the back seat they found a briefcase and searching it they found a .38 Rossi revolver with its serial number tampered with, with three live rounds of ammunition. They also found chequebooks, letters, a Nokia cell phone and Moorcroft's identity document inside the briefcase. Vosloo and Kruger decided to arrest all the occupants of the Audi for the unlawful possession of a firearm and ammunition. They impounded the Audi for further investigation. A set of motor vehicle keys were also found on the grass next to where the Audi was standing. They called for backup and Sergeant Weyers responded and on arrival at the

scene Vosloo and Kruger gave him the vehicle keys with a request that he conduct an investigation at the house the Audi had stopped in front of.

[7] On searching the house Weyers discovered, in one of the garages, Moorcroft's Isuzu bakkie. He was also able to start it with the keys given to him by Vosloo and Kruger. When he touched the bonnet, he found that it was still warm. A robbery charge was added on the finding of the bakkie. The day after the Audi was impounded the police found a piece of paper under one of its sun visors with a number of names including Moorcroft's.

[8] It is common cause that the appellant was one of the back seat passengers in the Audi when it was stopped by Vosloo and Kruger. It is also common cause that he was not the driver nor the person seen running from the house and getting into the back seat of the Audi.

[9] The background I have sketched represents the evidence led by the State, it being common cause that Moorcroft had failed to identify any of the five accused in an identification parade.

[10] The trial proceeded against the appellant and two co-accused as the driver of the Audi, Elliot Ndlovu (accused 5) and one of the backseat passengers Jongikaya Nconco (accused 1) had skipped bail and were never rearrested. The regional court pointed out a number of differences in the versions and evidence presented by the appellant and his two co-accused. At the conclusion of the trial the regional court found that the appellant and his two co-accused had given different versions and that their credibility was for that reason in tatters ('is aan flarde'). The court

viewed these as contradictions hence the view that their credibility was in tatters.

[11] The regional court concluded on the facts proved by the State that the Audi was the 'pick up' or 'back up car', a conclusion based on the finding of Moorcroft's name in a piece of paper under one of the Audi's sun visors, as well as the fact that one of the robbers knew Moorcroft and addressed him by a name under which he was known.

[12] The regional court also concluded that in the light of all the material contradictions amongst the accused and their versions it could come to only one inference: that the passengers in the Audi were not coincidental ('toevallig') passengers; that accused no 4 (Xolani Ngcayisa) who was light complexioned was one of the robbers based on Moorcroft's evidence that one of the robbers had a light complexion; that based on its finding that everyone in the Audi were not coincidental passengers, it meant that they were all deeply involved ('kop en mus') in the robbery; that the two robbers who robbed Moorcroft were part of the five arrested by Vosloo and Kruger, although it could not be said who they were.

[13] It is clear from the regional court's reasoning that it found that the occupants of the Audi, who it had found had not taken part in the actual robbery had acted in a common purpose with the actual robbers. It is for this reason that the regional court found that the Audi was the so-called 'back up' or the 'pick up car', as also found by the court *a quo*. It is also clear that in finding that there were contradictions amongst the accused the regional court had treated them as if they had presented a unified

defence, hence the emphasis on contradictions amongst their versions and evidence.

[14] The nature of the evidence led by the State in this nature is circumstantial in its entirety, save perhaps regarding the link between Moorcroft's briefcase and accused no 2 (Ralo) who was seen by the police running from the house into the Audi carrying it. Therefore the regional court concluded that the only inference it would draw from all that evidence was that the appellant and the other accused were the 'back up' to the robbery.

[15] Indeed circumstantial evidence can be relied upon with or in the absence of direct evidence to prove the guilt of an accused person. Where circumstantial evidence is relied on one enters the realm of inferential reasoning as done by the regional court. It is settled law that where an inference is sought to be drawn all the proved facts taken together must exclude every other reasonable inference from them save the one sought to be drawn. It is not each proven fact that must exclude all other inferences but 'all the facts as a whole must do so'. *S v Reddy* 1996 (2) SACR 1 (A) at 8c-e; *R v De Villiers* 1944 AD 492 at 508.

[16] It is also settled law that in the assessment of circumstantial evidence to determine whether the only inference justified by the evidence is one of guilt, the court must, in the same assessment, consider the version presented by the accused. This is so for the simple reason that a court must be in a position to say that in the light of all the evidence the version of the accused is not reasonably possibly true hence the only inference to be drawn from all that evidence is one of guilt.

[17] The test is that an accused must be convicted if the evidence establishes his guilt beyond reasonable doubt and that he must be acquitted if it is reasonably possibly true that he might be innocent. *S v Van Aswegen* 2001 (2) SACR 97 at 101a-e. In arriving at either conclusion all the evidence must have been taken into account.

[18] The issue before us therefore is whether the evidence led before the trial court justified a rejection of the appellant's version and the conclusion that the only inference was that the appellant was part of the 'back up' to the robbery as such and was therefore equally guilty. In considering this issue it is prudent to consider the version presented by the appellant.

[19] The appellant's version was that he was in the Audi for an innocent reason and was not involved in anyway in and knew nothing about the robbery. His version was that he ran a shebeen business and a café from his house. On the day in question Ndlovu, accused no 5, came to his house driving the Audi at about 10 in the morning accompanied by Ngcayisa (accused no 4). Ndlovu was known to him but not Ngcayisa whom he was meeting for the first time. He requested permission to use Ndlovu's Audi to buy stock for his café and shebeen businesses something which he had done in the past. Ndlovu agreed that he could use the Audi after 14h00 when he reported for duty.

[20] The two stayed in his house for some time until the early afternoon when all three left as Ndlovu said he wanted to go past a place called Kabega before going to work at 14h00. The appellant stated that he went along in order to take the Audi from Ndlovu at his place of employment. At Kabega, Ndlovu left them in the Audi and went into the premises and

returned after some time, saying he had gone there to make some payment. Thereafter, they drove off and Ndlovu received a call on his cell phone after which he told them that there were people he had to pick up at Newton Park. Ndlovu also made some calls to some unknown persons. They then proceeded to a house in Newton Park where Nconco (accused no 1) and Ralo (accused no 2) got into the Audi. Ralo had come from the house they had parked in front of and had a briefcase with him and Nconco had come from a neighbouring yard. He did not know them either. They drove away and were stopped by the police in a white Venture vehicle, which he had seen before they picked up Nconco and Ralo.

[21] The trial court reasoned that it was very (‘uiters’) strange that Ndlovu, the owner of the Audi, would go with complete strangers to pick up his co-conspirators, ie the actual robbers. On this reasoning the regional court concluded that all the accused were involved in the robbery. Regarding no 3’s version of having agreed with Ndlovu to use the Audi, the trial court found that he had contradicted himself on whether he was going to use the Audi or had hired another car and whether Ndlovu took R150 from him to put petrol in the Audi or not.

[22] It is clear that the reasoning of the regional court was first that the appellant’s version and those of his co-accused were so contradictory and therefore improbable that he was justified in rejecting them and secondly that it was improbable for Ndlovu to take innocent passengers when he went to pick up the robbers after they deposited the bakkie in Newton Park.

[23] The regional court viewed the appellant's version and those of the other accused as being one, and concluded that these versions differed, that all the accused had contradicted each other, hence his finding that their credibility was in tatters. The regional court thereafter found that the appellant's version was improbable, ie he was not in the Audi for an innocent reason but was part of the robbery enterprise, so to speak. This was in my view a clear misdirection. The appellant, though charged with others, presented an individual version. The regional court erred when it took the appellant's version and contrasted it with the versions of the other accused. The regional court was required to view the appellant's version on its own and to investigate whether in the light of all the evidence, it was reasonably possibly true. The regional court did not do this.

[24] Having found that the regional court applied the incorrect test we are enjoined to conduct the investigation, applying the correct test of course. This is by no means an easy task as we, on appeal, are called upon to do, on paper, what a trial court should have done with the benefit of observing and hearing witnesses at first hand. *R v Dhlumayo* 1948 (2) SA 677 (A) at 696. Because we lack the advantages a trial court possesses in doing this we are limited in the extent to which we can conduct the investigation successfully. Nevertheless I proceed to do so as constrained as I am.

[25] The appellant's version is that he only knew Ndlovu amongst all the accused. He also testified that he was in the Audi because he was going to use it after Ndlovu had reported for work and that he had used the Audi in the past for purchasing stock for his businesses. This evidence was not contradicted by the State witnesses nor by the other accused. He

testified that Ndlovu made a number of calls on his cell phone and also received a call whereafter he (Ndlovu) stated that there were people he had to collect. It is this evidence that bolstered the regional magistrate's reasoning that that the Audi was the 'pick up' car.

[26] It is common cause that appellant was not the driver/owner of the Audi when the police followed it and stopped it. He was also not the person who had Moorcroft's briefcase and was seen running from the house where the bakkie was located. Clearly the 'pick up' of Ralo in particular fits in with the appellant's version that Ndlovu received a call to pick up certain people. The evidence about a call to pick up some people and his evidence that the briefcase was not in the Audi before Ralo was picked up supports the State's case about the Audi being a 'pick up' car, it was clearly incriminating, but he gave it. More than anything this was a powerful demonstration that he was unaware what Ndlovu was up to.

[27] The evidence regarding the finding of a piece of paper with Moorcroft's name amongst others, was a strong indication that the Audi was used for a criminal purpose. However, appellant was not the driver nor the owner of the Audi, from whom an explanation was called for. That fact on its own cannot be relied on as showing the appellant's complicity.

[28] Counsel for the State, Mr Robinson, submitted that the appeal had to fail also on two grounds ie that the appellant was in the company of Ndlovu and another co-accused for the better part of the day. This, it was submitted proved that the appellant was part of the planning of the robbery. The second basis was submitted to be the appellant's evidence of

stating that he did not see where the briefcase was in the backseat when the police stopped them. It was submitted that by testifying in this manner the appellant had supported the case of the other accused against the State. It was submitted that this showed the appellant's complicity in the robbery.

[29] This argument is misguided. In the first place it seeks the acceptance of only those two facts as proving the appellant's guilt. The law as I have stated earlier does not countenance a piecemeal approach to evidence. All the evidence taken as a whole shows in my view that whilst the regional court might have been correct that the Audi was the 'pick up' car, this does not necessarily mean that the appellant was involved. That finding was more appropriate against whoever was in charge of the Audi and Ralo and Nconco who were implicated by direct evidence as being the persons who ran out of the house where the bakkie was found with Moorcroft's briefcase. On the record I am of the view that this finding cannot be made against the appellant.

[30] Evidence was necessary direct and/or circumstantial to find that the appellant was involved in the robbery plot based on the common purpose doctrine, which the regional court also relied on. No such evidence was led, the only evidence being that he was a passenger. If he was, as the regional court found, acting in common purpose with the robbers, the regional court had no evidence to make this finding. The law is clear that certain requirements are necessary before a finding of common purpose can be made. In this regard no evidence was led to show how the appellant was causally connected to the robbery, there was no evidence that he was present at the scene of the robbery, that he was aware of the robbery, that he showed a common purpose with the robbers. Without

this evidence there is no basis for the finding that he was connected to the robbery. *S v Mgedezi* 1989 (1) SA 687 (A) at 705I-706B and *S v Thebus* 2003 (6) SA 505 (CC) at 521D-E.

[31] It is clear from the above that on the record before us and on a proper analysis of all the evidence, particularly the proved facts, that the appellant's version that he was innocently in the Audi was reasonably possibly true and should have been accepted as such by the regional magistrate. The fact that he may have contradicted himself in one or two respects cannot in itself found a basis to say he was also involved. In the final analysis I am persuaded that taking the totality of the evidence into account and considering the probabilities and improbabilities on the State's and on the appellant's side that the balance weighs heavily in favour of the appellant that his version is reasonably possibly true and he should have been acquitted. In *S v Shackwell* 2001 (2) SACR 185 (SCA) this court cautioned against the rejection of an accused's version simply because it is improbable. There Brand AJA said at 194g-i:

'It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.'

See also *S v M* 2006 (1) SACR 135 (SCA) at 183h-l.

[32] Based on the aforegoing I would uphold the appeal. The following order is made:

1. The appeal succeeds.
2. The order of the court *a quo* is set aside and replaced by the following:

‘(i) The appeal succeeds.

(ii) The conviction and sentence of the appellant are set aside and replaced by the following:

Accused no 3 is found not guilty and discharged.’

**D MLAMBO**

**JUDGE OF APPEAL**

**CONCUR:**

**FARLAM JA**
**HANCKE AJA**