IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Appeal No: A468/2006
Date: 27/02/2008

UNREPORTABLE

In the matter between:

GRAY MKHIZE Appellant

And

THE STATE Respondent

JUDGMENT

VILAKAZI AJ:

1. The appellant was charged with two others in the regional court on one count of robbery (with aggravating circumstances)' two counts of attempted murder and unlawful possession of firearm.

2. The appellant and his co-accused were all legally represented and at the conclusion of the trial they were all convicted as charged and sentenced as follows:

    Count 1: Fifteen years

    Count 2: Five years

    Count 3: Five years

    Count 4: Five years

    The court ordered that two years of the sentences in counts 2, 3 and 4 run concurrent with the sentence in count 1.

3. With leave of the court a *quo,* appellant lodged an appeal against both conviction and sentence.

4. The conviction of the appellant was a sequel to events which occurred on or about the 25th May 2004 at Grootvlei, Modimolle, during which Hendrick Van der Merwe and his son, Henk were robbed of two bunches of keys; a remote control unit and thereafter shot at by accused 1 and 2.

5. It is not worthy that at the time of commission of crimes on counts 1, 2 and 3 the appellant was not present at the scene of crime. From the evidence on record the following can be said to the common cause: (a) Accused 1 and 2 were the only persons present on the property of first complainant. (b) They attacked and robbed the complainants of items mentioned in the charge sheet. (c) After the robbery accused 1 and 2 assaulted and shot at the complainants. (d) At all material time hereto accused 1 and 2 acted in pursuance of a common purpose. (e) The appellant transported accused 1 and 2 to a point at Grootvlei. (f) The appellant was later arrested at a roadblock; an empty holster was found underneath the driver's seat of the car. The appellant was the license holder in respect of a .38 firearm used in the commission of the crime.

6. It is not necessary to deal in detail with the evidence in counts 1, 2 and 3 as the appellant was not present at the scene at the time of the commission of the crimes. However, to the extent that the judicial

officer relied on this evidence in the conviction of appellant the Court will make reference to certain aspects thereof. It is not disputed that the appellant transported accused 1 and 2 to a point in Grootvlei and left them there. The complainants as well as the accuseds admit that accused 3 was not present at the scene and did not participate in the commission of the crimes referred to in the charge sheet.

7. For the court to convict the appellant on common purpose there must be evidence that the appellant either participated in the commission of the crimes or associated himself with the conduct of the other accuseds either in the planning of the crimes, aided or advanced their cause in the commission of the crimes. In the absence of direct or physical evidence of appellant's participation, his guilt can be deduced from other proved facts. The *onus* rested on the State to prove that there was a nexus between the conduct of the accuseds and the actions or conduct of the appellant.

8. In his judgment, the magistrate relied on the following facts to justify a deduction that the appellant acted in common purpose with the accuseds: the fact that appellant transported the accuseds, secondly that his firearm was used in the commission of the crimes; thirdly that when the appellant was arrested in the roadblock, only the holster was found underneath the driver's seat of his vehicle. The presiding officer also placed heavy reliance on the evidence of Ndlovu as well as that of Nel to which I will turn later.

9. The State case turned around of common purpose between the appellant and his co-accuseds in the court a quo. To arrive at the conclusion of common purpose the court had to reason by way of inferences. The doctrine of common purpose applies to attribute criminal liability to a person or persons who undertake a joint venture with another or others in the commission of a crime. In S v Thebus and Another 2003 (2) SACR 319 (CC) at 335 Moseneke J sets out the following requirements:

> *"19. The liability requirements* of a *joint criminal enterprise fall into two categories. The first where there is* a *prior agreement, expressed or implied, to commit* a *common offence. In the second category, no such prior agreement exists or is proved. The liability arises from an active association and participation in* a *common criminal design with the requisite blameworthy state* of *mind."*

See S v Mgedezi and Others 1989 (1) SA 687 (A)

10. In order to bring the appellant within the ambit or definition of common purpose the State had to prove: (i) a causal nexus between the action of the appellant and the crimes for which he had been convicted. (ii) It ought to have been established that the appellant had actively associated himself with the unlawful conduct of the perpetrators of the crimes in counts 1, 2 and 3. (iii) Appellant must have been aware or had subjective foresight of the commission of the crimes by his

co-accuseds. In the absence of proof of the necessary nexus the guilt of his co-accused could not be attributed to the appellant.

11. The conviction of the appellant was based mainly on circumstantial evidence. Where there is no direct evidence implicating an accused in the commission of a crime, his guilt may be deduced or determined on the basis of inferences made from proved facts. Inferences can only be made on proved facts and not on mere speculation or conjecture. In *Bewysreg,* Schmidt at 101 citing Lord Wright in Caswell vs Powell Duffryn Associated Collieries Ltd 1940 AC 152 169, 1939 All ER 722 733 where the following was emphasized:

> *"There can be no inference unless there are objective facts from which to infer the other facts which is sough to establish... But if there are no positive proved facts from which the inference can be made, the method* of *inference fails and what is left is mere speculation or conjecture."*

12. Circumstantial evidence presents its own difficulties and peculiarities and may be linked to an unruly horse. If it is not approached and assessed with great circumspection may lead to the drawing of incorrect conclusions or inferences or results in either possible inferences being overlooked. The evidential force of circumstantial evidence rest upon the facts which are proved by direct evidence. The court must always be vigilant against drawing incorrect or wrong inferences or overlooking other possible inferences which mat be

drawn from the facts.

13. Circumstantial evidence rests on the principle commonly known as "two cardinal rules of logic" propounded by Watermeyer JA in R v Blom 1939 AD 988 at 202-203, namely:

> *"1. The inference sought to be drawn must be consistent with all proved facts. If it is not, then the inference cannot be draw.*
>
> 2. *The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable, then there must be* a *doubt whether the inference to be drawn is correct."*

14. ln R v De Villiers 1944 AD 493 at 508 the court cautioned thus:

> *"The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt* as *to the inference to be drawn from each one* so *taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done* so *that the accused is entitled to the benefit of any reasonable doubt which it may have* as *to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in other way; the crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence* as a *whole is beyond reasonable doubt inconsistent with such innocence."*

15. In S v Mcasa and Another 2005 (1) SACR 388(SCA)) at 392 Mthiyane J referring to the approach to be adopted in assessing circumstantial evidence quoted the following from S v Reddy and Others 1996 (2) SACR 1 (A) at 8c-h:

> *"In assessing circumstantial evidence one needs to be careful not to approach such evidence upon* a *piece-meal basis and to subject each individual piece of evidence to* a *consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted dictum in R v Blom* 1939 *AD* 188 *at 202* - 3, *where reference is made to two cardinal rules* of *logic which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all the proved facts and, secondly, the proved facts should be such "that they exclude every reasonable inference from them save the one sought to be drawn.*
>
> *Best on Evidence 10th ed.* § 297 *at* 261 *puts the matter thus:*
>
> *"The elements, or links, which compose* a *chain* of *presumptive proof, are certain moral and physical coincidences, which individually indicate the principal fact; and the probative force* of *the whole depends on the number, weight, independence, and consistency* of *those elementary circumstances.""*

16. The Reference in S v Zuma 2006 (2) SACR 191 0N) by Van Der Merwe J at 210a-j - 211a, to a summary in the head note of the judgment in S v Radebe 1991 (2) SACR 166 (T) at 167j - 168h is not only "an extremely helpful summary" but is also highly instructive in the approach to circumstantial evidence with reference to *onus* of proof. The following snippets from the summary are pertinent:

> *"A criminal court does not judge an accused's version in vacuum* as *if only* a *charge-sheet has been presented. The State case, taking account of its strengths and weaknesses, must be put into the scale together with the defence case and its strengths and weaknesses. ... Taking into account the State case, once again it must be established whether the defence case first does not establish* a *reasonable alternative hypothesis. That alternative hypothesis does not have to be the strongest* of *the various possibilities (that is, the most probable)* as *that would amount to ignoring the degree and content of the State's onus. The State's case must also not be weighed up* as *an independent entity against the defence case* as *that is not how facts are to be evaluated. Merely because the State presents its case first does not mean that* a *criminal court has two separates cases which must be weighed up against one another on opposite sides* of *the scale …*
>
> *The correct approach is that the criminal court must not be*

blinded by where the various components come from but rather attempt to arrange the facts, properly evaluated, particularly with regard to the burden of *proof, in* a *mosaic in order to determine whether it falls short and thus falls within the area of* a *reasonable doubt or hypothesis. In* so *doing, the criminal court does not weigh one "case" against another but strives for* a *conclusion (whether the guilt of the accused has been proved beyond reasonable doubt) during which process it is obliged, depending on the circumstances, to determine at the end of the case: (1) where the defence has not presented a prima facie case which supports conclusively the State's proffered conclusions; (2) where the defence has presented evidence, whether the totality of the evidentiary material, taking into account the onus, supports the State's proffered conclusion. Where there is* a *direct dispute in respect of the facts essential for* a *conclusion* of *guilt it must not be approached:* (a) *by finding that the State's version is acceptable and that therefore the defence version must be rejected; (b) by weighing up the State case against the defence case* as *independent masses of evidence; or (c) by ignoring the State case and looking at the defence case in isolation'"*

See also S v Mtsweni 1985 (1) SA 590 (A) at 593e-i; S v Reddy and Other 1996 (2) SACR 1 (A); S v M 1999 (2) SACR 548 (SCA); S v Mashiane en Andere 1998 (2) SASV 664 (NK); S v Mseleku 2006 (2) SACR574 (N) at 581i

17. According to the magistrate the evidence which links the appellant to the commission of the crimes is that of Ndlovu and Nel. Ndlovu's testimony is to the effect that on his way to the scene of crime he coincidentally noted a red Opel Kadett parked under a bridge. He noticed an occupant in the vehicle but did not pay much attention to the person neither did he record the registration numbers of the vehicle except that he noticed that the last letters were GP. Later when he was shown the vehicle on the photograph he identified it as a vehicle that he had seen under the bridge. It is not clear from the record on what facts Ndlovu makes a correlation between the vehicle shown in the photo and the one he had seen under the bridge. Apparently, the correlation is based merely on the make of the vehicle and its color which in his evidence said was maroon. In my view, this piece of evidence by Ndlovu does not link the appellant to the commission of the crimes. Consequently, his evidence does not take the State case any further nor can it serve as a basis for drawing an inference of the appellant's association and his 2 co-accused in the court a *quo.*

18. The danger of reasoning by inferences was further discussed in S v Pepenene 1974 (1) SA 215 (A) where at 219 A-F reference was made to Hoffmann, South African Law of evidence 2nd ed. p. 423 as well as the case of R v Hogges (1838) where the following was said:

> *"All circumstantial evidence depends ultimately upon facts which are proven by direct evidence, but its use involves an additional*

source of *potential error, because the court may be mistaken in its reasoning. The inference which it draws may be* a *non sequitur, or it may overlook the possibility* of *other inferences which are equally probable or at least reasonably possible."*

"It sometimes happens that the trier or fact is so *pleased at having thought* of a *theory to explain the fact that he may tend to overlook inconsistent circumstances or assume the existence* of *facts which have not been proved and cannot legitimately be inferred."*

19. The magistrate correctly pointed out that evidence should not be evaluated in compartments but must be assessed in his totality. However, in my view, the magistrate misdirected himself in placing more emphasis and reliance on Ndlovu's evidence. It must be borne in mind that Ndlovu had never stated in his evidence that the vehicle he had seen parked under the bridge was that of or belonged to the appellant and emphasized that he could not identify the occupant.

20. As regards Nel's evidence which is to the effect that the appellant gave different answers when he was asked whether he knew the accuseds as well as the explanation of how he lost his firearm. The magistrate relied on these contradictions in drawing the inference that appellant had lied and concluded that he associated himself in the commission of the crimes. In S v Mtsweni (supra) at page 5931-594A-D where the court cautioned against drawing conclusions and determination of guilt

on the basis of an accused untruthful evidence or denials:

> *"The conclusion that, because an accused is untruthful, he therefore is probably guilty must especially be guarded against. Untruthful evidence or* a *false statement does not always justify the most extreme conclusion. The weight to be attached thereto must be related to circumstances of each case."*

The court continued to set out factors that should be taken into account in considering false statements of an accused.

1. Notwithstanding the contradictions in the evidence of the appellant as disclosed by Nel's evidence, it cannot be argued conclusively that because of such contradictions and given the fact that a vehicle similar to that of appellant was seen parked under a bridge by Ndlovu is the only reasonable inference which can be drawn from the proved facts that appellant associated himself with the commission of the crimes. This conclusion is not justified by the facts nor does it meet the requirements for drawing such an inference.

2. In his judgment the magistrate says that he is not "convinced" that the appellant's explanation is reasonably possibly true. Suffice it to refer to the head notes in S v Thebus and Another 2003 (3) SACR 319 at 319-320:

"Principal objective of doctrine of common purpose to criminalize collective criminal conduct and thus to satisfy social need to control crime committed in course join enterprises"

And in R v Difford 1937 AD 370 at 373 the court stated that:

"...no onus rests on the accused to convince the Court of *the truth* of *any explanation he gives. If he gives an explanation, even if that explanation be improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility* of *his explanation being true, then he is entitled to this acquittal..."*

Applying the approach in the Difford case, the Supreme Court of Appeals in S v Mbuli 2003 (1) SACR 97 (SCA), Nugent AJA at 110d-e made the following pertinent propositions:

"It is trite that the State bears the onus of *establishing the guilt* of *the appellant beyond reasonable doubt, and the converse is that he is entitled to be acquitted if there is* a *reasonable possibility that he might be innocent... (I)n whichever form the test is applied it must be satisfied upon* a *consideration* of *all the evidence. Just* as a *court*

does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt, so *too does not look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true.*

Doubts about one aspect of *the evidence led in* a *trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that abroad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for* a *detailed and critical examination* of *each and every component in* a *body* of *evidence. But once, that has been done, it is necessary to step back* a *pace and consider the mosaic* as a *whole. If that is not done, one may fail to see the wood for the trees."*

3. One of the questions which the Court has to answer is whether the inference that the appellant associated himself in the commission of the crime is the only reasonable inference which can be drawn from the proved facts? Given the backgrounds to the commission of the crimes, it is clear that the appellant merely transported accused 1 and 2 to Grootvlei and on his way back he was stopped at a roadblock.

There is no evidence that there was any arrangement between

the accuseds and the appellant that his vehicle could be used for gateway purposes after the commission of the crime. Indeed accused 1 and 2 confirmed that appellant was not involved in the commission of the crimes and that he was not part of the planning of the crimes. There is no evidence of the appellant's conduct besides the transportation of the accuseds of any conduct prior to, during and after the commission of the crimes by which appellant could be said to have identified himself with the conduct of the accuseds.

24. The second question which the Court must answer and on which the first question ultimately turns is whether on the totality of the evidence can it be said that the state has proved its case beyond reasonable doubt against the appellant in respect of counts 1, 2 and 3. It is trite law that in criminal cases the *onus* rests on the State to prove its case against the accused beyond reasonable doubt. In S v Van der Meyden 1999 (1) SACR 447 0N) at 448F-H Nugent J puts the test as follows:

> *"The onus of proof in* a *criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see for example, R v Difford 1937 AD 370 at 373 AND 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish*

the guilt of the accused beyond reasonable doubt, which will be so *only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might bet true. The two are inseparable, each being the logical corollary* of *the other."*

See S v Van Tellingin 1992 (2) SACR 104 (C); S v Liebenberg 2005 (2) SACR 355 (SCA) at 358-359

25. The correct approach of assessing evidence was set out in S v Chabalala 2003 (1) SACR 134 (SCA) as follows:

"The correct approach is to weigh up all *the elements which point towards the guilt* of *the accused against* all *those which are indicative* of *his innocence, taking proper account* of *inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs* so *heavily in favour* of *the State* as *to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap* of *evidence or one defect in the case for either party (such* as *the failure to call* a *material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and* a *trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context* of *the full picture presented in evidence. Once that approach is applied to*

the evidence in the present matter the solution becomes clear."

See also S v Sithole and Others 1999 (1) SACR 585 (W) at 590g-l; S v Ntsele 1988 (2) SACR 178 (SCA) at 182b-h.

26. Applying the principles I have discussed above and having assessed the evidence as a whole, It is clear that the probabilities do not favour the State evidence against the appellant. The conspectus of evidence does not justify the inference drawn by the presiding officer, namely that the appellant acted in common purpose with the accuseds in the commission of the crimes of which they had been convicted. Furthermore I am of the view that the magistrate misdirected himself in casting a reverse onus on the appellant prove his innocence. Accordingly the State has not proved its case against the appellant beyond reasonable doubt and the appeal against conviction on counts 1,2 and 3 must be upheld.

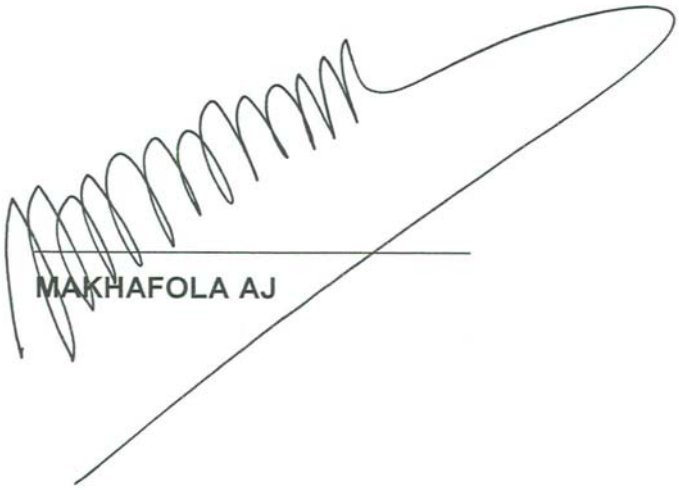
27. With regards count 4, the conviction of the appellant is rather queer. The appellant as holder of a licence in respect of the firearm used in the commission of the crimes cannot at the same time be found of being in unlawful possession of his own firearm even though it was found in the possession of his co-accuseds. At most, the appellant could have been convicted of the contravention of the provisions of the relevant provisions of the Arms and Ammunitions Control Act. Similarly the conviction in respect of this count cannot stand. On the evidence on record, I am inclined to accept the appellant's version as being

reasonably possibly true. Consequently, I propose to make the following order:

1. The appeal against conviction and sentence is upheld;
2. The conviction and sentence of the appellant are set aside.

VILAKAZI AJ.

I concur



MAKHAFOLA AJ