IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
26.08.2011. [signature]
DATE SIGNATURE

CASE NO.: A810/2010
DATE: 28/11/13

In the matter between:

LEHLOHONOLO RAPOLA

APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

WEBSTER J

1. The appellant was convicted in the Regional Court, Vereeniging on count 1: robbery with aggravating circumstances; count 2: contravention of section 3 of the Firearms Control Act 60 of 2000 (unlawful possession of an unlicensed firearm); count 3: contravention of section 90 of the Firearms Control Act 60 of 2000 i.e. unlawful possession of ammunition. He was sentenced as

follows: count 1: fifteen (15) years' imprisonment; count 2: five (5) years' imprisonment; count 3: twelve (12) months' imprisonment: it was ordered that the sentences on the last two counts run concurrently: the effective sentence is therefore twenty (20) years' imprisonment.

2. The issue that was before the trial court centered primarily on identity. The State's case was that the complainant, the owner of a Jetta, had been robbed at gunpoint of his motor vehicle, with registration LDV 343 GP (the Jetta). Later that day the same vehicle was observed by a police officer sergeant Beukes at an intersection. He gave chase and had to fire shots at the vehicle hitting one of the wheels which forced the driver of the Jetta to come to a stop. Two people alighted from the Jetta: a shot was fired at Beukes. The appellant was the passenger. Both occupants of the Jetta fled. Beukes and his colleague pursued the two suspects and he ultimately caught the appellant hiding behind a shack. He conceded that he had lost sight of the person he was pursuing on more then one occasion but had identified him by the clothing he was wearing. Sergeant Beukes described the clothing as black pants and a black and white check shirt with buttons.

3. Three other witnesses testified for the State namely, Aaron Ndlovu, the owner of the Jetta, Constable Letsele and Agnes Galane. Aaron Ndlovu's evidence was that he withdrew R18 000 from a bank. He proceeded to Cashbuild and paid for building material. He thereafter drove to the Sebokeng hostel. After alighting from the vehicle he was accosted by two males. One of them drew a firearm and demanded money. A struggle ensued. When it ultimately stopped the attacker proceeded to the boot of the Jetta and tried to open it. When it did not open the two accomplices drove off in the Jetta. He described the person who had demanded money from

him as having worn tekkies, a black pants and a dark-coloured skipper.

4. Constable Letsele's evidence is identical to that of Sergeant Beukes. After the suspect vehicle came to a stop after being fired at two persons alighted and fled. He pursued them. They jumped over a fence. He followed them and found a firearm dropped by the appellant. He and Beukes followed the direction taken by the fugitives with members of the public indicating the direction taken by the fleeing persons. They ultimately found the appellant who was out of breath hiding behind a shack. He described the appellant's clothing as a black pants, a long sleeve shirt, black and white in colour and with flowers.

5. The evidence of Agnes Galane, a resident in the area where the appellant was arrested, was that she heard shots. She observed two persons jump over a fence into her yard and a firearm fall out from one of them. A policeman followed the two men and picked up the firearm that had been dropped by one of the fugitives. One of them was arrested by the police. One of the fugitives had been wearing a black trousers and a white "scotch" shirt.

6. The appellant testified. He denied having been at the Sebokeng hostel that day. He had gone to meet a friend of his by the name of Zakele in Lawley extension. Whilst there he heard shooting with lots of people moving about. The shooting was coming in his direction. He fled. As he was running people behind him ordered him to stop. He did so and lay on the ground. A black police officer arrested him for "hijacking". He was taken to a blue Jetta. He denied having been in possession of a firearm. He testified that he had been wearing a black pants and a white "skipper" with black on it. Asked to describe it in greater detail he stated that "*...dit is 'n*

"V-neck skipper" wat 'n swart pop het hier voor op die bors". He denied having worn the shirt described by the State witnesses. Asked if he had instructed his attorney on the clothing he had been wearing on that day his response was "*...'n wit 'skipper' aangehad en 'n swart broek*".

7. The appeal before us is based on the facts in the case. It is now trite that the approach in such a case is to weigh up all the evidence that points to the guilt of an accused against all the evidence that is indicative of his innocence, taking proper account of the inherent strength and weaknesses, probabilities and improbabilities in both the State and the defence versions, and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt of the accused's guilt (S v Chabalala 2003(1) SACR 134 (SCA) 140 (a-b). The trial Magistrate dealt carefully and in great detail with all the issues in this case in a 35 page judgment before convicting the appellant.

8. In the written heads of argument it was submitted that the question to be answered in this appeal "*...is whether the State proved the appellant's guilt beyond reasonable doubt and whether his version could be reasonably possibly true...*" particularly on the issue of identity. In oral argument this submission was pursued with great vigour.

9. It has been held that "*...in the absence of factual error or a material misdirection the trial court's findings are presumed correct*" (R v Dhlumayo and Others 1948(2) SA 677 (AD) at 705 – 706). In S v Hadebe and Others 1997(2) SACR 641 (SCA) at 645 e – f the court held "...In the absence of demonstrable and material misdirection by the trial court its findings of fact are presumed to be correct and

will only be disregarded if the recorded evidence shows them to be clearly wrong". In S v Monyane and Others 2008(1) SACR 543 (SCA) at 548 (b) (para [15]), the court held as follows: "*Bearing in mind the advantage that a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this court will be entitled to interfere with a trial court's evaluation of oral testimony*".

10. It is clear from the evidence in its totality that after the complainant was robbed of his motor vehicle it was spotted by Beukes and his crew at an intersection. It was pursued, fired at and came to a stand-still. Two persons got out, fled and were pursued. They went out of sight of the pursuers from time to time but contact made again with the aid and participation of the public. There was firing that took place, resulting in the injury of an innocent bystander. In such circumstances the assistance in indicating the direction of flight of the fugitives was a natural and instinctive one, in my view. The pursuers had a clear view of the fugitives from the time they got out of the Jetta – in broad daylight, and followed the appellant, his clothing clearly distinguishing him as he fled. Ultimately, the fact that he was apprehended hiding outside clearly dispels any doubt regarding the identity of the person who the police pursued.

11. Apart from the above observations, I can find no error in the trial court's evaluation of the evidence. There is, to my mind, no misdirection or error, let alone "*...a demonstrable and material...*" one. In my view, the conviction should be confirmed.

12. With regards to sentence, it is now trite that a court of appeal will only interfere if it is satisfied that the trial court misdirected itself – the imposition of sentence being pre-eminently a matter for the

trial court. It appears that the confrontation between the complainant and the appellant and his companion was no co-incidence. He, the appellant, must have been seen at either the bank or the hardware shop. Those who observed him were aware that he was in possession of a large sum of money: the conduct of his assailants confirms this. The attackers were armed. They did not hesitate to fire at the police when accosted. A member of the public was shot and injured.

13. It was argued on the appellant's behalf that the effective sentence of twenty (20) years' imprisonment does not "*necessarily best 'serve the public interest' ... or that the deterrent effect of a prison sentence is always proportionate to its length*". It was submitted that the trial "*...Magistrate had misdirected himself in overemphasizing:*

5.3.1 The seriousness of the offence

5.3.2 The interest of society

5.3.3 The prevalence of the offence in the Court's area of jurisdiction

5.3.4 The deterrent effect of the sentence

5.3.5 *The retributive element of sentencing*"

and "*...not taking sufficient cognizance of overlooking the appellants personal circumstances and not giving more weight to all the mitigating factors and thereby imposing a sentence that is shockingly inappropriate and furthermore not tempering the effect of the terms of imprisonment*". I have considered the "*...substantial and compelling circumstances...*" listed by appellant's counsel in his heads of argument and confirmed in argument. They all merely refer to the appellant's personal circumstances. There is nothing unusual or out of the ordinary from the average man in the street. Viewed against the aggravating circumstances of the case, considered objectively, they recede and fade into insignificance.

The manner in which the robbery was executed, the total disregard of innocent bystanders, let alone members of the South African Police Services, are the very reason that prompted the legislature to enact Act 105 of 1997. What appellant's counsel in effect attempted to do, was to appeal to maudlin pity for the appellant and his family: that the court may not do.

14. The trial Magistrate was alive to the severity of the sentence he was imposing hence the order that part of the sentence run concurrently. I can think of no reason why appellant's counsel can believe that the sentence is not appropriate let alone excessive.

15. **Having regard to all the facts in this matter, I propose that the appeal on the merits and sentence be dismissed and the judgment on conviction and sentence of the court *a quo* be confirmed.**

G. WEBSTER
JUDGE IN THE HIGH COURT

I agree.

H.J. DE VOS
JUDGE IN THE HIGH COURT

It is so ordered.