REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NO: A474/2011

DATE OF HEARING: 3 MAY 2012.

REPORTABLE: YES

OF INTEREST TO OTHER JUDGES: NO

REVISED: Yes

In the matter between:

JAGIBAN DHIRAN — FIRST APPELLANT

PORTHEN RONALDO — SECOND APPELLANT

and

THE STATE

J U D G M E N T

MUDAU A J:

[1] The two appellants, were convicted by the Regional Court, Alexandra, on a single count of robbery with aggravating circumstances .They were each sentenced to 15 years' of imprisonment.. The two appellants were also declared unfit to possess firearms in terms of section 103 of the Firearm Control Act 60 of 2000.

[2] The appeal is against both conviction and sentence, with the leave of the court a quo.

[3] The offence referred to above (at para 1) was admitted at the trial. The only dispute concerned the identity of the robbers. The facts of the matter are briefly these: the complainant (Van Rooyen) was at about 12:30am, and on Saturday the 5th of September 2009, at a place called "Valley Tavern" in Midrand. He had just arrived when he started to chat to a coloured man who was seated behind the wheel of what he described as a Toyota Conquest. He walked around and sat on the front passenger seat. There were two other men in the rear seat, but, he did not see their faces. He identified the man he spoke to before the trial court as the first appellant. He admitted however, that he was not hundred percent certain of his identification of the first appellant. Someone, who by accent sounded like an Indian man, closed and locked the passenger door. One of the passengers at the back grabbed him by his chin and put a gun to his head. They searched him and took his car keys, a VW Polo with registration number XJJ 838 GP. They drove to a dark part of the area but not far from where they were. He was forced into the rear passenger seat. They thereafter, drove with him for quite a while. At one stage, they stopped as some of them went to check his VW Polo for a tracking device. One of them had remained guarding him. When they returned, the driver of the Toyota Conquest drove away, and he was forced into his VW Polo which took off with rest of the robbers. Along the way, a shot was fired to threaten

him to say whether the car was fitted with a tracker. He was driven around followed by a few stops until he was dropped off somewhere in Roodeport. He eventually found his way to a police station and reported his car stolen. He was later picked up by his brother. Under cross-examination, he further testified that he had reported his car stolen, the following day, which was Sunday the 6th of September 2009.He later received a call from the police that his car had been recovered. He went and identified it by its original registration numbers (XJJ 838 GP).Complainant however, had failed to point out any of the appellants who were in the identification parade.

[4] The next witness, Pillay, was at the time, a member of the Community Policing Forum. Pillay worked with police reservists in Lenasia. It is his evidence that on Saturday the 5th of September 2009 and at about 19h00, he heard a car spinning tyres outside his house in the street. He went to investigate and recognised the driver of a white VW Polo car as the second appellant (Porthen) in this matter whom he knew well. Lighting was good. He recognised the second appellant about a meter away as he stood on the pavement. The car only had one registration number plate in front written ENRICO GP. He as a result, phoned the police and informed them of what he had observed. Police came, and the second appellant was not long thereafter traced to extension 9, Lenasia. The second appellant was found standing next to the same car with his friends. The second appellant was arrested and led police to others who were later arrested.

[5] According to the police officers who testified at the trial, at scene where the second appellant was arrested, they saw him throw away an object on the pavement. They discovered that this was the key to the VW Polo. They supported Pillay's testimony that the front registration plate was inscribed with the words ENRICO GP. From the chassis number they established that the

correct registration number was XJJ 838 GP. At that stage, the VW Polo had not been reported stolen. The police witnesses refuted a suggestion that the key was found in the car. They also denied that they had found the registration plate with the words ENRICO GP at the second appellant's house, which they later affixed to the VW Polo.

[6] Pelwan, who is the owner of SP Security Company, also testified and supported on the main, the versions regarding the circumstances leading to the arrest of the second appellant.

[7] Subban, the state's section 204 and star witness's testimony is to the following effect: On the early hours of Saturday the 5th September 2009. He and his two friends (the two appellants) went to a bar called "Far Out" in Midrand. They had travelled there by an Opel Corsa, with three doors. In the parking area, they saw the complainant whom the second appellant approached. Upon his return from the bathroom he (the witness) sat in the rear seat. He saw the complainant approach. The complainant got into their Opel Corsa and set in the front passenger seat. The second appellant then sat next to him on the same seat. The second appellant signalled to him to choke the complainant but the witness refused. The second appellant jumped to the back seat and choked the complainant .At the same time, the second appellant ordered the witness to take a gun which was underneath the seat. The witness did so, and put the gun to the complainant's head. The first appellant thereafter drove their car (the Opel Corsa) around the corner. It was there that the second appellant stripped the complainant of all his valuables that included: car keys, cellular phone and a wallet. The second appellant thereafter, drove to the complainant's car, white VW Polo to Lenasia where they later met. They drove and parked the Corsa at the second appellant's place of residence. The complainant was later dropped off at Industria. Later

the Polo car was parked away. The 3 of them slept at the second appellant's place. Later that morning, the second appellant dropped him off at his place using the VW POLO. Police later arrived and arrested him and others for this and another charge. The second appellant was already in police custody.

[8] It is common cause and as it was admitted at the trial, the first appellant's palm print was lifted from the driver's side of the stolen Polo. The print lifted was later found to match that of the first appellant.

[9] The first appellant disputes the version by Subban. He denied that he was involved in the robbery of the complainant's car. It is the first appellant's version that on the night of his arrest, he was at the second appellant's house to spend the night, when their friend Subban, arrived. The second appellant had "wanted a lift with his wife". It was at that point that he (the first appellant) went on the driver's side of the VW Polo to give the second appellant the house keys. He was afraid the second appellant might found him asleep upon his return and he did not want to be disturbed in his sleep. This explains why his palm print was found on the driver's door. Under cross examination, he testified that he knew that Subban had no car. According to the first appellant, the second appellant had told him he was going to see his wife.

[10] The second appellant in his testimony denies that he was involved in the robbery as well. It is his version that it was Subban (the section 204 witness) whom he phoned earlier, who drove him in the hijacked Polo, to see his wife. When they arrived there, they found a group of about 20 to 25 men. His friends were there. He was speaking to his friends when the police arrived. They were all ordered to lie on the ground and were searched. One of the police reservists called Liaakit accused him that he was the one who brought

the Polo. In the mean time, police found keys to the Polo after a search of the ground. Despite his protestations that it was Subban who brought him there in the Polo, he was arrested for the robbery.

[11] The versions by the two appellants were rejected as false by the magistrate. It is the magistrate's credibility findings that are now assailed by the appellants.

[12] In **S v HADEBE AND OTHERS 1998 (1) SACR 422 (SCA)** it was held that the credibility findings and findings of fact of the trial Court cannot be disturbed unless the recorded evidence shows them to be clearly wrong *(. In assessing whether or not such is the case, the approach which commended itself in Moshephi and Others v R (1980-1984) LAC 57 at 59F - H seems appropriate in the particular circumstances of the matter:*

> *'The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. 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 a broad 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.'

[13] As indicated above, robbery is not in issue in this case. At stake is whether the two appellants also participated in the robbery as Subban, who is the section 204 witness. The probative value of the complainant's version seen in isolation, is tremendously poor with regard to the identification of the two appellants as the robbers. However, the circumstances under which the robbery occurred save for minor details {e.g. the description of the robbers' car}, is consistent with the account by Subban. In my view, Pillay is the critical witness in the case for the state who provided at it were, an independent eye witness' account regarding the circumstances leading to the appellants 's arrest. Pillay, was the first to see the stolen car driven by the second appellant next to his house in a well lit area. He knew the second appellant. This led to the search and eventual arrest of the second appellant where the V W Polo car with falsified plates was found. Pillay had no personal interest in the matter. Had it not been for Pillay, the complainant's motor car would not have been recovered within hours after the robbery. It is trite that the evidence of a self-confessed accomplice should be treated with caution' in this case and as the trial court correctly found, Subban's account is on the main consistent with the state's version on material facts.

[14] The arresting officers corroborated each other materially with regard to how the second appellant tried to dispose of the key to the Polo.

[15] The first appellant was not only linked to the crime, by the testimony of his friend Subban, but by his print found on the driver's door. It is extremely odd that for someone who claimed he went to the flats to see his wife, but, when the police arrived, he was socialising with his friends. His wife was no longer a priority.

[16] It is highly improbable in my view, that the first appellant would have been to the driver's side as his only concern was to give the second appellant keys to the house who, would have been seated on the left as a passenger. This suggests the house would have remained unlocked until the first appellant returned whilst the second appellant was in bed. This seems highly improbable and defeats the purpose why the second appellant was given keys in the first place, which is to secure the house whilst the occupants were away or asleep. According to the first appellant, he had to get outside to give the second appellant keys to the house. Common sense dictates he would not have locked himself outside the house as he was there to spend the night. The suggestion that, the police picked up false plates at the second appellant's house which they affixed on the stolen car, is highly improbable.

[17] In my view, the versions by the two appellants were correctly rejected. The respondent established the guilt of the two appellants beyond a reasonable doubt. The appellants were properly convicted.

[18] I now turn to deal with the question of sentence. It is trite that the imposition of sentence is pre-eminently a matter for the trial court to exercise its discretion. An appeal court will only interfere with the sentence imposed by the trial court if the latter exercised its discretion in an inappropriate manner. The appellants were convicted of an offence referred to in section 51 (2) Act 105 of 1997 which calls for a mandatory minimum sentence of 15 years imprisonment unless the court were to find substantial and compelling circumstances that justified the imposition of a lesser sentence.

[19] The appellants were 23 and 24 years respectively at the time of sentence. The first appellant although not married, is a father to a minor child. His new girlfriend was expecting his second child. The first appellant was employed and had a steady income. The second appellant is married and a father to a

minor child. He too had a fixed job and had a steady income. Both are first offenders.

[20] The seriousness of the offences committed and in particular the prevalence of robbery of motor vehicles in which, firearms are involved pestering our country, warrant a long term of imprisonment. In my view, the court *a quo* took into account all relevant facts regarding the imposition of a proper sentence. I could find no misdirection entitling this court to interfere with the discretion exercised by that court. The sentences also do not evoke a sense of shock. For these reasons the appeal against the sentences cannot succeed.

[21] I propose to make the following order:

The appeal against both conviction and sentence in respect of each appellant is dismissed.

T. P. MUDAU
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

B. SPILG
JUDGE OF THE HIGH COURT

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