IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

CASE NO: A63/12

DATE: 3 FEBRUARY 2014

NOT REPORTABLE

In the matter between:

BONGANI DESMOND NTULI **APPELLANT**

VS

THE STATE **RESPONDENT**

JUDGMENT

SWARTZ AJ

This is an appeal against the conviction and sentence imposed upon the appellant by the Mdutjana Regional Court.

The Appellant faced charges of attempted murder, two counts of robbery with aggravating circumstances and rape. He was convicted by the trial Court and sentenced to serve a 20 year prison sentence.

On appeal the Appellant challenges the reliability of the Respondent's witnesses who identified him on the charges of rape and robbery. On the charge of attempted murder, he alleges that he acted in self-defense.

In respect of Count 11:

Dealing with the attempted murder charge, the evidence of the appellant was that on the evening of 11 November 2005 he was at home. The complainant, Police Inspector Sepato, dressed in civilian clothing,

arrived at his place. He was accompanied by Captain Nkoko. They arrived in an unmarked police vehicle. They did not introduce themselves as police officers. Inspector Sepato kicked open the door to his house and fired a shot inside the house. He did not introduce himself as a police officer prior to firing the shot.

The appellant was armed at the time. He felt that his life was threatened and responded by shooting at Sepato. He fired only one shot. Only after shooting at Sepato did Sepato introduce himself as a police officer. Had he known Sepato and Nkoko were police officers, because of an introduction, he would not have shot at Sepato. He had dealings with Captain Nkoko before the night of this incident, who confirmed that the appellant would not shoot at him. Five rounds of ammunition were found in the appellant's gun after his arrest. Had he intended shooting at the police in an attempt to escape arrest, he could have fired more shots in order to avoid arrest.

According to Sepato, upon arriving at the appellant's house he saw him through a window. He introduced himself as a police officer and called at the Appellant three times to come out of the house before he proceeded to kick the door and retreat.

When the appellant did not respond to being called, Sepato noticed him through a gap in the door. He saw the appellant holding a firearm aiming and taking up a shooting position. A shot was fired and he was hit. He had a firearm in his right hand which he transferred to his left hand and the appellant was warned to surrender or take the risk of being killed. By then he had already fired one shot in the house.

According to Captain Nkoko, Sepato kicked the door and before the door could be opened, the appellant fired a shot that hit Sepato. Thereafter Sepato took cover. Sepato fired one shot through the door. Sepato fired a shot after the appellant had shot at him. Only thereafter the appellant surrendered and was arrested.

Counsel appearing on behalf of the Appellant submitted that the attack by Sepato was unlawful and exceeded the bounds of lawfulness and if the appellant did not act in self-defense then at least the court must find that he acted in putative self-defense.

The contradictions between the evidence of the two police witnesses are immaterial. It is not in dispute that the two police officers arrived at the appellant's residence in order to arrest him. They introduced themselves by calling at him to surrender. Inspector Sepato kicked the door open and retreated to take cover when he was shot.

The appellant does not dispute that he fired a shot but claims it was in self-defense. Despite being informed that they were police officers, the appellant fired a shot at them. The appellant advanced no reason for thinking that some people were coming to attack him. There is no reason to suggest that the trial court erred when it held that the Appellant shot at the police in order to repel arrest. When he realized that his objective

would not be achieved he surrendered. The appellant knew that Sepato and Nkcko were police officers wanting to arrest him. He was armed and dangerous and he shot at the police in an attempt to avoid arrest. He was not acting in self-defense of an unlawful attack on him.

The version of the Appellant on count 11 of attempted murder is not reasonably possible true and the appeal against the conviction dismissed.

In respect of count 4, the robbery of Zanele Mahlangu: The complainant and a friend were seated inside a vehicle when the Appellant knocked against the window of the vehicle and he was ordered, at gunpoint, to step out of the vehicle.

The incident occurred at about 19h00. The complainant was seated inside his vehicle with a friend, John Mashiane. They were parked outside on the street. A kitchen light projected sufficient light to enable the complainant to identify him. There was no evidence of how far the kitchen light was in relation to where the incident occurred, how good the lighting was and what type of light it was.

When Mahlangu saw the appellant for the first time he was already next to his closed window knocking at it with a gun. The appellant was accompanied by two assailants and it was submitted that they had distracted his attention. The complainant and his friend were ordered out of the car and the complainant was ordered to lie on his stomach. This limited his view of the appellant. The entire incident lasted about 6-7 minutes. He could not give a description of the appellant to the police. Mahlangu was shocked, scared and feared for his life. Because of his state of mind he could not properly focus on the identity of the appellant.

Apart from the evidence of the lighting projected from the house, there wg.s evidence of a bakkie which approached them from the front while the appellant tried to open the rear door. This light further illuminated the area around which they were parked.

The appellant denies having committed the offence and offered an alibi. The complainant who was cross-examined by the appellant was adamant on the identity of the appellant. The observation of the complainant was trustworthy. That he had been robbed of his vehicle at gun point was not placed in dispute. The conviction on count 4 was correct. The appellant was correctly identified and there is no reason to interfere with the Magistrate’s findings.

In respect of counts 6 and 7:

It appears that shortly after committing the robbery, on the very evening, at 20h45, the complainant, E[...] T[...], was with her fiance in a car. They stopped at the gate with the intention of opening it and entering a yard. Suddenly a white Jetta stopped behind them, two people got out of the car and wrestled with her

boyfriend. She was forced into a car. The car droye off, followed by the Jetta.

Along the way they stopped at various places. Eventually, when the other occupants of the car got out of the vehicle to buy beers, she was alone in the vehicle. He turned towards her where she was seated on the back seat. He attempted to kiss her and he raped her on the back seat of the vehicle. She was ordered out of the car and the next day she reported the incident to the police, where after she treated at Philedelphia Hospital. Some of her jewellery was taken as well and her cellular phone.

It was not disputed that she was raped and robbed of her belongings. The appellant denied that it was him and offered an alibi. He was at his parental home in Komatipoort after he had escaped from custody.

Both the complainant and her fiancé, J[...] M[...], identified the appellant at an identity parade held at a police station.

The appellant contends that his identification by the complainant is unreliable. She was only able to identify him after attending some counselling sessions. It would not have been easy for the witness to identify him because there was no light in the car, she could not identify the appellant and she must have been coached to identify him at the identification parade. The identity parade was irregular.

The trial court found that the complainant E[...] T[...] and T[...] N[...] were credible witnesses. We are equally satisfied that the complainant was in the company of the Appellant for a considerable time and she had enough opportunity to observe him in order to make a positive identification.

Despite the submission that the witnesses were couched into identifying the appellant at the identity parade, nothing on record supports this inference. There is nothing to support the allegation that the identity parade was irregular.

The appellant was correctly identified at the identity parade and the evidence of the complainant was honest, credible and reliable. There is no reason to interfere with the trial court’s findings.

The state concedes that there are some contradictions between the evidence of all these witnesses in the various counts on which they testified. The contradictions are immaterial and do not diminish the credibility of the witnesses with regards to the identification of the appellant.

The appeal on conviction on counts 4,6,7 and I are dismissed.

Regarding the sentence imposed by the trial court in respect of each of the convictions, the sentences imposed, having regard to the seriousness thereof are not disturbingly inappropriate, irregular or misdirected. All the relevant circumstances were considered and the trial court ordered correctly that some of the

sentences imposed ran concurrently.

The appeal against sentence is dismissed.

E SWARTZ

ACTING JUDGE OF THE HIGH COURT

I agree

A A LOUW

JUDGE OF THE HIGH COURT