IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA
REPUBLIC OF SOUTH AFRICA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

22/01/16 .....

DATE SIGNATURE

22/01/16

CASE NO: A417/14

In the matter between:

MOSES MMAKASA MOREPE APPELLANT

and

THE STATE RESPONDENT

JUDGEMENT

SEMENYA AJ

1. The appellant and his co-accused, who were legally represented at the trial, appeared before a regional magistrate on two counts of robbery with aggravating circumstances as intended in section 1 of the Criminal Procedure Act 51 of 1977 (the CPA). He was convicted as charged on both counts. His

co–accused was however acquitted. The regional magistrate, having taken both counts as one for sentence purposes, proceeded to sentence him to an effective term of ten (10) years imprisonment. The appeal is on both conviction and sentence and is with leave of the trial court.

2. On 15 May 2010 at about 15:00, one Nomaefeso Kgarebe (Kgarebe), a social worker by profession, was on duty and on her way to Stanza Bopape

   Community Hall situated in Mamelodi. She was in the company of a friend named Suzan Phiri (Phiri). Kgarebe, who was the driver of the vehicle they were travelling in, stopped along the way to ask for directions to the hall from a group of boys standing by the road.

3. A male person who was identified as the appellant approached their vehicle and gave them directions to the hall. According to Kgarebe it took her approximately ten minutes to understand what the appellant was saying due to language barrier. She was looking at the appellant's face as they were talking. Kgarebe followed the directions given to them but stopped again at Stanza Bopape clinic for further assistance. Meanwhile the two complainants noticed that the appellant and some passengers were following them in a Honda Ballade (Honda) which they have found parked at the place where they initially saw him. The appellant's co-accused was identified as one of the passengers who was occupying the back seat. The Honda stopped behind their vehicle at the clinic. The two complainants were directed to the hall which was near the clinic by a security guard at the clinic.

4. When they were about to alight at the hall, they noticed that the appellant had stopped alongside their vehicle. The appellant disembarked armed with a firearm. He used the said fire arm to knock on the window on the driver's side. The person who was occupying the front passenger seat also alighted and approached Phiri. As Kgarebe was opening the window, the appellant pointed the firearm at her head and punched her with a fist, demanding money from her at the same time. Kgarebe opened the boot of her vehicle where her bag was and appellant joined his companion on Phiri's side. The appellant's

companion pulled Phiri out of the vehicle causing her phone to fall. He picked it up and went for Kgarebe's phone which was inside the vehicle. The appellant drove away with Kgarebe's gym bag as well as her hand bag.

5. As the Honda was moving way, the two complainants realised that it had no registration numbers on its rear side. They nonetheless proceeded to the police station to report. The police accompanied Kgarebe and Phiri to the place where they initially met with the appellant but they did not find him. The appellant's co-accused took the police and the two complainants to the appellant's house. Kgarebe and Phiri identified him to the police as the driver of the Honda. The appellant and his co–accused were then arrested.

6. Although Appellant admitted that he is the person who directed the two complainants to the hall, he denied that he is the person who was driving the Honda. He also denied that he robbed the two complainants of their belongings at gun point. According to his version, he remained where he was found by the two complainants for about 30 minutes and later went home. He stayed there until the arrival of the police who arrested him. His version is, to a large extent corroborated by that of his co-accused and one Letsoalo who was a vender at the place where appellant was found by the two complainants.

7. Counsel for the appellant argued that the two complainants admitted that they were terrified and traumatised by the occurrence. He further argued that the application of caution dictates that they could not, under those circumstances, properly see their assailants and that this fact renders their evidence of identity to be unreliable. He further argued that there are discrepancies in the versions of the two state witnesses regarding the aspect as to whether the Honda was there where they first met the appellant or not.

8. It appears from the record of the proceedings of the court *a quo* that the regional magistrate was conscious of the fact that the main issue before him was the identity of the robbers and the need to approach the evidence of the two complainants with caution. It is further evident that the regional magistrate indeed diligently and meticulously applied that caution to their versions. The trial court found that the proximity of the complainants to the appellant, both at the time he was directing them to the hall and at the hall during the robbery, the time spent with them, the fact that the incident took place during broad day light and that they were able to show the co-accused to the police are factors that exclude reasonable doubt with regard to the identification of the appellant as the person who robbed them – See

   S v Mthetwa 1972 (3) SA 766 (A).

9. The regional magistrate dealt sufficiently with the discrepancies highlighted by counsel for the appellant and found that Kgarebe, as the driver of the vehicle and the person who was careful not to knock against other vehicle was in a better position to testify about the presence and position of the Honda.

10. The approach to be adopted by the appeal court faced with an appeal against conviction was stated as follows in **S v Monyane and Others 2008 (1) SACR 543 (SCA) para 15:**

    *"This court's powers to interfere on appeal with the findings of fact of a trial court are limited. It has not been suggested that the trial court misdirected itself in any respect. 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. (**S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645 e-f**). This, in my view, is certainly not a case in which a thorough reading of the record leaves me in any doubt as to the correctness of the trial court's factual findings. Bearing in*

mind the advantage the 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. (S v Francis 1991 (1) SACR 198 (A) at 204 e)".

11. I am unable to find any misdirection on the regional magistrate's part with regard to factual findings. In my view, there are no material discrepancies between the versions of the two complainants. They actually say the same thing in different ways. This is acceptable in that Kgarebe was the driver of the vehicle as correctly found by the trial court. Having said that, I find that there is no reason to interfere with the trial court findings that the identity of the appellant, as the person who committed the robbery, has been proven beyond reasonable doubt.

12. In *S v Kekana 2013 (1) SACR 101 (SCA) at 105 [11] d* it was stated that:

> "It is trite that this court will not interfere with the sentence imposed by the court a quo unless it is satisfied that the sentence has been vitiated by material misdirection or is disturbingly inappropriate".

13. No argument was presented before court with regard to appropriateness or otherwise of the sentence imposed by the regional magistrate. The trial court was alive to the fact that the offences the appellant was convicted of attract a minimum sentence of 15 years imprisonment as provided for in section 51 (2) of the Criminal Law Amendment Act 105 of 1997 in the absence of substantial and compelling circumstances that justify imposition of a lesser sentence in terms of section 51 (3) (a) of this Act.

14. It appears from the record that the regional magistrate appraised himself of mitigating and aggravating factors, more in particular the personal circumstances of the appellant and finally arrived at a conclusion that he

lesser sentence is justified. On the basis of *Kekana* (*supra*), I find no reason to interfere with these findings. I am of the view that the sentence the regional magistrate imposed on the appellant does not raise a sense of shock.

15. In the circumstances I propose the following order:

15.1 The appeal against conviction and sentence is dismissed.

M.V SEMENYA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA (ACTING)
GAUTENG DIVISION, PRETORIA

I agree,

N JANSE VAN NIEUWENHUIZEN J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

It is so ordered.

APPEARANCE ON BEHALF OF THE APPELLANT:

Advocate Phahla

APPEARANCE ON BEHALF OF THE RESPONDENT:

Advocate Roos

Date of hearing: 23 November 2015