IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO:**A403/12**

In the matter between:

DALUXOLO DONDOLO Appellant

v

THE STATE Respondent

JUDGMENT DELIVERD THIS 29th DAY OF NOVEMBER 2012

DOLAMO, AJ

[1] The Appellant stood trial in the Regional Court Wynberg on one charge of robbery with aggravating circumstances as defined in Section 1 of Act 51 of 1977 in that on or about the 11th February 2007 and at or near Claremont he unlawfully and intentionally threatened the complainant with a fire-arm and there and then robbed him of his vehicle, a Volkswagen Gold 5 with registration number CA14162. In the alternative he was charged with a contravention of section 36 of Act 62 of 1955 for being in possession of the said vehicle, which was reasonably suspected to be stolen, and was unable to give a satisfactory account of such possession. He was

legally represented throughout the trial by an attorney and on the 16 August 2007 pleaded not guilty to the main as well as the alternative count.

[2] He was convicted and sentenced to 10(ten) years imprisonment on 15th May 2008 after a trial in which 11 witnesses testified, 9 on behalf of the State and he and a witness testifying in his defence. He filed an application for condonation for the late filing of a notice of leave to appeal and simultaneously with it an application for leave to appeal. Such condonation and leave to appeal his conviction and sentence was granted on the same day.

[3] I shall, in summarising the evidence led in this matter not follow the sequence in which the evidence was presented but adopt one which set out the chronology of events. For this reason I will start with the evidence of the complainant. He testified that on the 11th February 2007 at approximately 22h40 he returned home in Rondebosch, driving in his vehicle, a Volkswagen Golf 5 1.6 with registration number CA 14162. The vehicle was white in colour with clear untinted windows. He stopped outside his yard, got out of the car and went to open the gate. He drove into the yard and stopped in the driveway, which was lit by two ordinary bulbs which were about two metres away. Suddenly an unknown black male rushed towards him showed him a fire-arm threatened to shoot him and pulled him out of the vehicle. He was pulled so hard that he landed on his knees behind the vehicle. He had a clear look at the robber when he was pulled out of the vehicle. The robber came to him and took about 20 seconds to search him.

[4] The robber was well dressed and had piercing eyes. (He saw this at approximately a metres distance). He described the robber's face as oval shape and dark in complexion. He had nothing on his head. He had never seen the robber before. He did not see any other person with him. The robber got into the vehicle and drove away. He admitted that he was shocked when the robbery took place. He did not sustain any injuries.

[5] On the same day he went to the police station to report the robbery. He was not asked to give a full description of the robber though an identikit was compiled, but not in his presence. This identikit however, was a fair resemblance of the robber. He was given an option to make changes to the identikit but did not do so. The hair on the identikit was described as short stubbles, maybe slightly longer than stubbles, but not outgrown at all. Under cross-examination he conceded that the eyebrows on the identikit were bushier than that of the Appellant, He was further prepared to concede that the cheekbone structure of the identikit was different to that of the appellant. The Appellant was described by his legal representative as having a scar on the side of his eye, but which was not shown on the identikit. The complainant conceded that the Appellant did have a scar as stated by his legal representative.

[6] After a week and two days of the robbery the complainant was phoned by the police and told that his vehicle had been found. He went and identified the vehicle at the Rondebosch police station. There was some bodywork damage (there was a

dent on the roof and passenger side door).He was assisted by the investigating officer, Constable Marais, who booked the vehicle out of the SAP 13 39/2/2007 and completed his identification statement.

[7] On the 20th February 2007 the complainant was contacted and requested to attend an identification parade at the Rondebosch SAPS he went to the police station where he was put in a room alone until the police were ready to take him to the identification parade. Nobody spoke to him about the case before he went to the identification parade. He was given some time to make an identification. It took him about 20 seconds to identify the man who robbed him of his vehicle. This was the Appellant who was bearing a number 2 on the identification parade. He recognised him by his facial features, in particular, his cheekbone structure and eyes. Nobody spoke to him after he made the identification. He went back to the witness room and waited until he was told to leave. Appellant's legal representative challenged the procedure which was followed in conducting the identification parade, insinuating that the appellant was brought forward from the line-up so as to expose him to the complainant and thereby suggesting to the latter that he was the one to be identified. As a result Inspector Nongalaza was called to testify about the role he played in the conduct of the parade. His evidence was that he acted as an interpreter and also collected people from Langa who came to form part of the identification parade. He denied the suggestion that, prior to that, these people were brought onto the line-up after it had already been formed, implying that Appellant was exposed for easy identification. Inspector Moore who assisted with the identification parade also testified but could not take the matter any further as he was not yet involved with the parade when the alleged irregularities took place.

[8] Prior to the vehicle being handed to the complainant, on or about the 20th February 2007 and at Rondebosch police station Constable Makhanjana had lifted a palm print from its left front passenger door. According to Makhanjana the print could have been left on the door when the person was entering the vehicle. This print was facing sideways and to the front. After lifting the print and properly marking it he handed it over to the Exhibit Room at their office. No print matching the one he lifted from the door was found inside the vehicle. He did not know what happened to the exhibit after he had handed it in but was certain that there was no mix-up.

[9] Inspector Malcolm Ricardo Lesch testified that on the 12th October 2007 he received from the Rondebosch SAPS a set of finger and palm prints marked Daluxolo Dondolo Mas 90/02/2007. He compared that print with all the prints which were found on the scene and found that the left palm print matched the one which he received from the Rondebosch SAPS and which was handed in as an exhibit. He found seven points of similarities. This was in respect of the type, direction, palm position and relation, which was sufficient for a positive identification. Before the commencement of the proceedings he took Appellant's left palm print and found it to match with the other palm print exhibits which he already had. He concluded that the prints which he received were those of the Appellant. He had also received other prints from Inspector Moore, but testified that this was merely for control purposes.

[10] Jeremy Eugene Johnson a constable in the South African Police Service testified that he was on duty together with his colleague Gregory Nico Veldsman on 19 February 2007 doing complaints and crime prevention control duties. They were patrolling in a vehicle in Hampstead Road Harfield when they noticed a white Golf 5 vehicle speeding over a stop street at the corner of Third Avenue and Hampstead Road. They followed the vehicle and pulled it off in Third Avenue. They stopped about 5 metres behind the vehicle. The window on the driver's side was open and he noticed some activity inside the car though the windows of the vehicle were slightly tinted. He approached the vehicle form the right hand side at an angle whilst his colleague approached it from the left. There were street lights in the area which also provided lighting. The blue lights, flash lights and headlights of their vehicle were on which helped with visibility. These lights momentarily fell on the face of the driver and he could see him. Under cross-examination when asked whether he came face to face with the driver he said that he went to the back of the vehicle which placed the driver at a diagonal angle to him. The driver therefore had to turn his head back, which he did, in order to look at him. He had a roundish face clean shaven and a bald head. He gained the impression that he was a shortish person as the driver's seat was moved closer to the pedals. He had 5-8 seconds to look at this person. He did not see any of the passengers. Nobody alighted from the vehicle at that time. He made a mental note of the vehicle's registration number. He found it unnecessary to have included this aspect in his written statement. He also found it unnecessary to include that he had instructed the driver to turn off the engine nor to mention that the driver's window was open, all of which he mentioned in his evidence in court. He also noticed that there were three males in the vehicle.

[11] They never got a chance to inspect the vehicle because when he was about a metre away from it, it sped off. They (him and Veldsman) immediately went back to their vehicle and pursued it. At the fork of Landsdowne and Chichester the vehicle turned into the parking area of the Christian Bookshop. The complex was protected by an electrical fence as a result of which nobody could gain access to the back of the property which is adjacent to the Christian Bookshop. As they approached the car he saw its doors open, and according to him, realised that it could be that the occupants got out of the vehicle. He however conceded under cross-examination that he did not see anyone running away from the vehicle. He only saw movement. He did not give a clothing description of any of the suspects.

[12] Veldsman in the meantime had informed other units in the area that they were chasing the suspected vehicle. As a result about 3 to 4 other police vehicles immediately arrived on the scene after they had stopped. They (i.e.himself and Veldsman) did not chase after the suspects who alighted form the vehicle and were fleeing on foot but told their colleagues that the suspects ran in the direction of Windhover Road, which was the next road in the opposite direction from where they came. They came from a southerly direction.

[13] On inspecting the vehicle he discovered that the registration numbers of the vehicle differed with that which was reflected on the disc. They tested the vehicle on their system which confirmed that the vehicle was hijacked the previous night or a couple of days before. He was shown his written statement and confirmed that the registration numbers plates which were on the vehicle was CA263173.

[14] About 30-40 minutes after they set off in chase of the vehicle he heard on the communication system of their vehicle that two men were apprehended in Windhover Road. Later when he was at the police station at Claremont, inspector Hayes of Crime Intelligence Gathering ("CIG") brought in two males, one of whom could possibly have been the driver of the vehicle which sped off. his face looked familiar. He had access to these suspects while they were processed in the police station. The suspects who were arrested by Hayes were never brought to the scene i.e. where the vehicle was found.

[15] Gregory Veldsman confirmed that he was with Johnson when they pulled off the Golf vehicle at the corner of Hampstead and Third Avenue. They stopped about 10 metres behind the vehicle. After that they approached the vehicle in such a way ("*skuins*") that the occupants could not see them. But where he stood he could see that there were about 3 occupants in the vehicle. The vehicle had tinted windows and had also stopped between two street lights were it was a bit dark. The lights of their vehicle did not help with visibility. At no stage did he or Johnson speak to the occupants of the vehicle. He was not yet at the vehicle when it pulled off. He was however not sure of Johnson's position. They momentarily lost sight of the vehicle after it had pulled off as they had to run back to their vehicle. When they eventually got to the vehicle where it came to a stop he saw one person running away from it. He was wearing beige pants and a blue jersey. He gave that information about the said suspect to Wienand. This was the only person he saw running away. He was across the street and about 7 metres away when this person started to run away in the direction from which they came. He did not chase after this person because they

had back up people who went after the suspects. He was certain that 3 suspects were later brought to the police station.

[16] Inspector John Hayes, with 20 years' experience in the South African Police Service, testified that on the night of 19 February 2007 at about 21h15 he was on duty together with Superintendent Baker following up on crime information. They were in civilian clothes and driving in an unmarked vehicle. They received information over the police radio from the uniformed members that they were trying to pull off a white Golf vehicle with two occupants in it. This vehicle was said to be driving recklessly and when these members put on a siren the vehicle sped off. The information was further that they were chasing this vehicle and heading in the Landsdowne Road direction. The vehicle looked like it was going to turn into Belvedere Road. They rushed to the area and found in Belvedere Road, opposite the Engen Garage, an abandoned white Golf motor vehicle. The uniformed members explained to them that they gave chase and two unknown black males had jumped out of the vehicle and had proceeded on foot into the neighbouring residential area. He and Baker proceeded on foot into the neighbouring residential area. Just off Milne Road he spotted two males who actually matched the description that was given by the uniform officers, as far as the clothing was concerned. The suspects were walking fast. The suspects were approximately 100 meters away from the abandoned vehicle and obviously making their way to Landsdowne Road which ran parallel to Milne Road. They approached the suspects identified themselves and ordered them to lie on the ground. Though they were nervous no weapons were found in their possession. He then called for back-up. One of the vans came to where they were. The suspects were arrested and placed in that van and were taken

back to what he called the scene of the crime. While on the scene the appellant never came into contact with the vehicle. The constable who initially gave the suspect's description came to the van and confirmed that these were the two people who jumped out of the Golf vehicle. He identified the Appellant as one of the suspects. He took down the registration number of the vehicle which was CA263173. He was asked by the Claremont Operational Commander to take the vehicle to Rondebosch and book it in. He did so under SAP13 13/2007.

[17] After the close of the State's case the Appellant testified. His evidence was that he was arrested on the 19th February 2007 whilst in the company of one Jabu. They were on their wat to a taxi rank walking in Landsdowne road when they were confronted by policemen who were driving in a white vehicle. These policemen pointed them with fire-arms ordered them to lie down and eventually arrested them. He denied any involvement in the robbery of the complainant and alleged that on the day of the robbery he had followed his family's Sundays routine or tradition, which was to attend church service during the day and be confined to their home for the rest of the day. He confirmed that he has a scar under his right eye dating back to 2001 or 2002. He did not know how his palm print got onto the complainant's vehicle. He also testified about the alleged irregularities before the identification parade. He alleged that he and Jabu were called and their photographs taken before the parade was formed.

[18] Appellant's sister came to testify on his behalf confirming that he was home on the day of the robbery and that he went to bed at 22h00. This was after they had watched television.

[19] Adopting a cautionary approach to the evidence of identification as required as well as the fact that the complainant was able to identify the Appellant two weeks after the robbery, the Magistrate was satisfied that the Appellant was reliably identified as the robber. The Appellant's version, on the other hand, was rejected as not reasonably possibly true and therefore false. He was accordingly convicted as charged.

[20] The question in this appeal is whether the Appellant was sufficiently identified as the robber.

[21] While admitting that Appellant was linked to the robbery through his palm print which was found on the complainant's vehicle and that he was identified at the identification parade by the complaint, Ms Mahlasela who appeared on his behalf, submitted that he was nevertheless entitled to his acquittal if his version was reasonably possibly true; that a court was not entitled to convict unless it was satisfied not only that the explanation is improbable but that beyond doubt was false. She submitted further that the robber was completely unknown to the complainant, that the complainant was shocked or terrified during the robbery which could have negatively affected his ability to reliably identify the robber. Furthermore that the

complainant had a very short time period to look at the robber's face, as to be able to later make a positive identification.

[22] Mr Pelesa who appeared for the Respondent argued that the evidence of identification which was assessed by the court *a quo* was sufficiently reliable for a conviction. He found support for his submission in the leading case on the assessment of the evidence of identification, in *S v Mthetwa* 1973 (3) SA 766 (AD).

[23] In *S v Mthetwa supra* at 768a-cHolmes JA outlined the approach to the evidence of identification in the following terms:

> *"Because of the fallibility of human observation, evidence of identification is approached by the Court with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation, the extent of his prior knowledge of the accused; the mobility of the scene, corroboration, suggestibility, the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of he accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighted one against the other, in the light of the totality of the evidence, and the probabilities; see cases such as R v Masemang, 1950 (2) S.A. 444 (A.D); R v Dladla and Others, 1962 (1) A.A.307 (A.D.) at p.310C; S v Mehlape, 1963 (2) S.A. 29 (A.D.)"* (own emphasis)

[24] It is my view that *in casu* emphasis must be placed on the underlined portion of the above passage, namely, that the factors which find application in this matter must be weighed one against the other in the light of the totality of the evidence and the probabilities. All the factors relating the identification or otherwise of the Appellant as the robber must be weighed in the light of the totality of the evidence and the probabilities.

[25] It is correct, as submitted on behalf of the Appellant that the circumstances under which the complainant had identified the Appellant as the robber were not ideal. The danger of a wrong identification, however, is completely excluded in the present case when the whole of the evidence is taken into consideration. Not only did the complainant give a good description of the Appellant to the police but was able to identify him at an identification parade. While this on its own would not have been sufficient the Appellant's palm print was found on the complainant's vehicle and he was unable to give an acceptable explanation of how it came about that it should be found on the vehicle. Also heavily weighing against him is that he was arrested in the immediate vicinity of the complainant's vehicle in circumstances where the only reasonable inference which can be drawn from the proven facts was that he was one of the occupants of the vehicle who alighted therefrom and ran away. The clothing which he wore when he was arrested matched those which were described by Veldsman. That there were discrepancies in the evidence given by the State witnesses does not detract from the reliability created by the totality of the evidence.

[26] I am unable to find fault with the court *a quo's* evaluation and acceptance of the identification evidence and the rest of the evidence which implicate the Appellant as the robber. In my view the Appellant was correctly convicted.

[27] As regards sentence it was submitted that although the court *a quo* found substantial and compelling circumstances to deviate from the minimum prescribed sentence it erred in over-emphasising the element of retribution and under-emphasised his personal circumstances, including his chance of rehabilitation. In particular it was submitted that though the Appellant was convicted of a serious offence it was not one of the worst robberies as the complainant did not suffer any physical harm. In the circumstances it was argued that the sentence was shockingly inappropriate and ought to be set aside and substituted with an appropriate one.

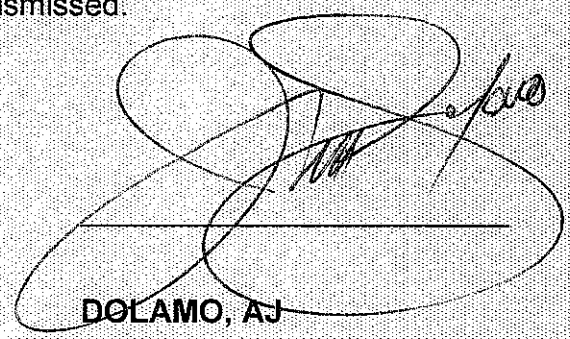
[28] It is trite law that sentence is entirely a matter for the discretion of the trial court and a court on appeal cannot, in the absence of a material misdirection interfere with the sentence imposed in preference of its own. Other than to submit that the trial court over-emphasises the seriousness of the offence at the expense of the Appellant's personal circumstances nothing substantial was pointed out as indicative of misdirection and neither could I find any fault with the Magistrate's reasons.

[29] The Appellant's personal circumstances were properly taken into consideration and weighed up against the aggravating circumstances and the trial

court arrived at the conclusion that there were substantial and compelling circumstances to depart form the minimum prescribed sentence. In my view there is no misdirection justifying an interference by this court. The appeal on sentence ought to be dismissed as well.

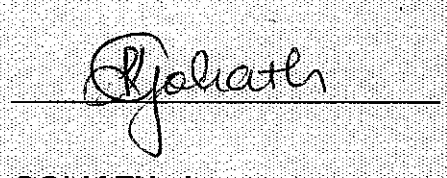
[30] The order I propose is the following:

The appeal against conviction and sentence is dismissed.



DOLAMO, AJ

I agree – it is so ordered



GOLIATH, J