**IN THE HIGH COURT OF SOUTH AFRICA**
**(EASTERN CAPE DIVISION, GRAHAMSTOWN)**

**CASE NO.: CA&R/216/2015**

In the matter between:

**RAYMOND ESKOK** **Appellant**

And

**THE STATE** **Respondent**

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**JUDGMENT**

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**BESHE J:**

[1] The appellant together with a co-accused were convicted of one count each of robbery with aggravating circumstances and kidnapping in the Regional Court, Port Elizabeth. He was sentenced to fifteen (15) years imprisonment in respect of the robbery charge and five (5) years in respect of the kidnapping charge. The sentences were ordered to run concurrently. He is now appealing against both the convictions and the sentence with leave to do so having been granted by the court *a quo*.

[2] The charges against the appellant and his co-accused arose from an incident that took place during the evening of the 10 September 2014 at or near Summerstrand, Port Elizabeth. In this regard **Mr Moses Metu** (**Metu**) testified that during the evening on the day in question, he was

sitting in his wife's motor vehicle, a silver grey VW Polo, which was parked along the beach, with a lady friend one **Ms Hlumela Ncokazi** (**Ncokazi**). As the evening progressed the cars that had been parked alongside his drove away leaving only his parked along the beach. At around midnight he observed a VW Golf from one of the security companies driving towards his motor vehicle. The driver of the golf did not talk to him, he just turned the vehicle around and drove off. After approximately five minutes, the golf approached **Metu's** vehicle once again. The driver of the golf signalled to him to wind down the window which he did. The driver of the golf who was one of four people in the car told him to park in such a way that his vehicle faces the beach. Without questioning why he should park his motor vehicle to face the sea, **Metu** merely complied. He testified that although he was not acquainted with the driver of this golf, a coloured male who was wearing a security guard uniform, he was used to seeing him. He identified him as the appellant. Ten minutes after turning the car to face the sea, **Metu** who was sitting on the back seat of the Polo motor vehicle with **Ncokazi**, heard a knock on the window. When he turned to look, he observed that somebody was knocking on the car window with a firearm demanding that he should open the door of the vehicle. He complied by pressing a button that unlocked all four doors of the motor vehicle. Two people opened the doors and demanded that **Metu** and his companion should alight from the car. Having alighted, the two men demanded that they hand over their cellular phones as well as his wallet which they did. A third man appeared from the nearby bushes. All three searched the car. They found a bank card and demanded that he provides them with the PIN code of the card. He could not as the card did not belong to him. He was manhandled by the three men. One of them told them to get inside the Polo motor vehicle (**Metu's** car). He was made to sit in the front passenger seat, two

of the men sat at the back with **Ncokazi**. The third man who appeared from the bushes drove the car. All three men continued asking him to give them the PIN code of the bank card. One of the two men in the back had a gun to his head. He observed a police vehicle approaching from the opposite direction, he held on to the steering wheel and swerved it side to side ignoring his lady friend's screams asking him to let go of the steering wheel. In the process the vehicle left the road and crashed into nearby bushes and landed on its side. **Metu** ended up on the side that was closer to the ground. The driver and the other male person who was behind him managed to get out of the vehicle and fled. As the police who had observed the car crash were approaching their car, **Metu** screamed that they were being hijacked. Police fired shots at the two who were fleeing. The third robber was trapped inside the vehicle that had crashed, underneath **Ncokazi**.

[3] It became common cause during the trial that appellant's co-accused is the person that was found by the police trapped inside **Metu's** car.

[4] Whilst the police were still busy at the scene of the crash **Metu** heard **Ncokazi** shouting that there is the golf whose driver told them to park facing the sea. The police chased the golf. It is common cause that this was the company vehicle appellant was driving that evening. He was stopped and questioned by the police after the chase.

[5] **Metu's** evidence was corroborated to a large extent by **Ncokazi**. She testified that at the time their Polo was being driven by the man who emerged from the bushes, the men who sat with him at the back were in

cell phone communication with someone else updating them about what was happening – namely that they were now driving in the car.

[6] It was common cause during the trial that at the time of this incident the appellant was employed by Odyssy Security Solutions as an armed response officer. It was also common cause that he was driving a company vehicle being a VW Golf and that he was issued with a firearm: a Vector 9mm pistol.

[7] Around midnight on the night in question, the same time **Metu** and **Ncokazi** testified about, two South African Police Services members, **Constables Rhode** and **Memani** were patrolling on the beach front. They were stopped by the appellant who had been coming from the opposite direction, being Summerstrand direction. Appellant informed them that he had observed a motor vehicle that appeared to have been broken into in Kings Beach. As a result of this report, the two officers were obliged to turn back to the direction from which they were coming in order to attend to the complaint / report. Before they could negotiate a turn to go back to the Kings Beach area, and whilst still waiting for the opportune time to join the road, they observed a VW Polo vehicle driving towards Summerstrand. They also observed this Polo going off the road and coming to rest on the side of the road. They drove to the scene. As they were approaching the Polo, two males got out of the motor vehicle and ran into the nearby bushes. Inside the Polo a male person was shouting that he was being robbed. It is not in dispute that this was **Metu**. Also that the two police officers found appellant's co-accused in the Polo and arrested him. According to **Rhode**, one of the passengers in the Polo, a female, who we now know was **Ncokazi** pointed at a Golf that was

driving past the scene of the crash and remarked that appellant who was driving the golf, was also involved in the robbery. Another officer, **Constable Tyibilika** who had been contacted through the radio chased the appellant and brought him back to the scene – namely where the Polo had crashed. It was at that stage that **Rhode** observed that appellant had an empty gun holster in his waist. This prompted **Rhode** to ask where his firearm was to which appellant answered that he did not book one out.

[8] In his version, appellant's co-accused more or less confirmed what the state witnesses said. He testified that he was fetched by the appellant earlier that evening who asked him to come and keep him company during this shift so that he does not fall asleep. He also testified that appellant picked up two men at Standford Road. He handed the pistol he had to one of the men. At Marine Drive they came across the silver VW Polo (**Metu's**) car. Appellant spoke to the driver of the Polo. Thereafter they drove up and down Marine Drive until appellant stopped not far from the Polo and told them to alight. The three of them alighted – but one of them hid behind some bushes when he (accused number one) and another proceeded to the Polo. The occupants of the Polo were robbed of their belongings. One who had been hiding behind the bushes came out. All five being accused number one, his two companions, **Metu** and **Ncokazi** got back into the Polo which was then driven by one of the robbers. Along the way, **Metu** held the steering wheel causing the motor vehicle to veer off the road and land in a ditch next to the road. This attracted the attention of the policemen who were not far from where the Polo left the road. It is common cause that appellant's co-accused was then arrested.

[9] Appellant's version was as follows:

Whilst on duty on the evening in question, though he was not permitted to do so, he drove to Gelvandale where he lives because he was concerned about the safety of his wife and child because of a shooting incident that had taken place earlier in that area. It was at that stage that he met with his former co-accused **Mr Scheeper** who asked him to give him a lift to his mother's house. He agreed. **Scheeper** brought two other men with him who were not known to him. As he was driving with the three men one of them placed a gun on his head and a demand was made for his company firearm which he handed over. He was instructed by the three men to drive towards Summmerstrand. Next to First Beacon, they saw **Metu's** Polo. His co-accused instructed him to tell the owner of the Polo to park so as to face the sea. Thereafter he was instructed to reverse away from where the Polo was and then to drop the three off. He did as he was told. He then sped off towards Summerstrand. He observed a police vehicle approaching from the opposite. He stopped it and reported to the police officer what had first happened namely that he had been robbed of his service pistol. As he was speaking to the policemen he observed the Polo speeding out of the parking area, drive into the bushes and landing on its side. He denied that he reported anything about a vehicle with a broken window at Kings Beach. He denied he was party to the robbery in question.

[10] Needless to say, after a careful evaluation of all the evidence that was placed before him, the learned Magistrate in the court *a quo* rejected appellant's version. He found the evidence of the state witnesses to be credible, reliable and trustworthy. He concluded that the only inference to be drawn after considering the evidence in its totality, is that appellant

participated in the crime in furtherance of a common purpose with former accused number one and the two men who evaded arrest. This he did by transporting the robbers in the company vehicle, facilitating the commission of the robbery, by asking **Metu** to park so that the car faces the sea and by providing the robbers with a firearm. To this list can be added appellant's endeavour to decoy the police away from the place of the robbery.

[11] The appeal against the convictions is premised on the ground that the Magistrate erred in finding that the state had discharged its onus of proving the guilt of the appellant beyond reasonable doubt. It was submitted that the inference that appellant was involved in the robbery was not the only inference that can be drawn from the proven facts. It was submitted that one such reasonable inference is, as appellant alleges, that he was robbed of his service pistol and coerced into participating in the robbery in the manner alleged. The Magistrate's decision is assailed on the basis that he approached the evidence on a piecemeal basis.

[12] I do not think there is merit in this submission. On the contrary the Magistrate could only find appellant's version to be reasonably possibly true if he had viewed it in isolation. The Magistrate does not seem to have paid lip service to considering the evidence in its totality.

[13] How could appellant's version be found to be reasonably true in view of the following:
He misled the police about a vehicle that appeared to have been broken into, clearly in a bid to keep them away from the robbery; he lied about not having booked out a firearm when asked about the empty holster and

as the Magistrate observed did not report that he had been robbed of his service firearm even though the people he alleges had robbed and coerced him to tell the driver of the Polo to turn the vehicle around were not present when he was speaking to the police. It was only after it emerged from his supervisor that he had been issued with a firearm that he alleged he was robbed of a firearm. Appellant was clearly untruthful about how he happened to be in his co-accused's company. According to accused number one, his girlfriend and his mother it is the appellant who prevailed on accused number one to come with him even calling his girlfriend when accused number one did not take his calls. As stated by *Nugent J*, as he then was in ***S v Van Den Meyden***[1], "It is difficult to see how a defence can possibly be true if at the same time the state's case with which it is irreconcilable is "completely acceptable and unshaken"".

[14] In my view the state succeeded in establishing the guilt of the appellant beyond reasonable doubt. The Magistrate's conclusion that the appellant acted in furtherance of a common purpose with his companions to rob **Metu** and his lady friend cannot be faulted. Evidence suggests that the appellant was in fact the instigator of the crimes. The appeal against the convictions must fail.

[15] The robbery in respect of which the appellant was convicted attracts a minimum sentence of fifteen (15) years imprisonment. A lesser sentence could only be imposed in the event of the court *a quo* having found the existence of substantial and compelling circumstances.[2] None were found to exist by the court *a quo*. For kidnapping, a minimum

[1] 1999 (1) SACR 447 at 449 (g).
[2] Section 51 (2) of Criminal Law Amendment Act 105 of 1997.

sentence of five (5) years imprisonment is prescribed. The complaint against the sentences in the court *a quo* is that the court did not accord proper weight to appellant's personal circumstances, *vis-a-vis* the seriousness of the crime and thereby committed a misdirection.

[16] The principles that should guide our courts when considering an appeal against sentence were once again stated by *Scott JA* in ***S v Kgosimore***[3] as follows:

"It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a Court of appeal may interfere. These include whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the Court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing; viz whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true inquiry."

[17] ***S v Malgas***[4] sets out the approach to be adopted by a court when faced with the question whether there are substantial and compelling circumstances warranting the imposition of a lesser sentence. In this matter the court cautions against a departure from the prescribed sentence lightly and for flimsy reasons.

[18] At the time of sentencing, the appellant was 30 years old, was married, had two minor children and a first offender. The appellant was convicted of very serious offences. As I indicated earlier, indications are

[3] 1999 (2) SACR 238 SCA at 241 [10]
[4] 2001 (1) SACR 469 SCA.

that he was the instigator of the crimes. In the process he abused his position as security guard and pretended as if he was acting in the interest of **Metu** and his lady friend advising him to park in such a way as to face the sea. He handed his service firearm to a co-conspirator to commit a crime. The same firearm he was meant to use to protect property and limb. He has not shown any remorse. He may have been a first offender with a young family but in my view his personal circumstances pale into insignificance when compared with the seriousness of the offences and the aggravating factors mentioned above. In my view the sentences imposed by the court *a quo* are proportionate to the offences appellant was convicted of, his personal circumstances and the interest of the society. The Magistrate exercised the sentencing discretion bestowed upon properly.

**[19] In the result the order that I propose is that the appeal against both the convictions and the sentences be dismissed.**

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**NG BESHE**
**JUDGE OF THE HIGH COURT**

**ROBERSON J**

**I agree, it is so ordered.**

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**JM ROBERSON**
**JUDGE OF THE HIGH COURT**

**APPEARANCES**

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| Date Heard | : | 18 November 2015 |
| Date Reserved | : | 18 November 2015 |
| Date Delivered | : | 5 May 2016 |