IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: A522/2010

In the appeal between:

THEMBALETHU KONDLO Appellant

and

THE STATE Respondent

JUDGMENT HANDED DOWN ON 15 FEBRUARY 2011

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1. The appellant was charged with robbery with aggravating circumstances as contemplated by section 1 of Act 51 of 1977.

2. It was alleged that the appellant, on or about 26 September 2009 and at or near Du Noon, intentionally and unlawfully assaulted Mr Monty Claassen and Ms Marissa de Nobrega and robbed them of R3 000,00 cash, one gold chain, a Samsung D900 cellphone and one wallet.

3. The appellant pleaded not guilty on 22 February 2010.

4. The appellant was convicted as charged on 7 April 2010 in the regional court, Paarl.

5. No previous convictions were proved and no further evidence was adduced at the sentence stage. The appellant was sentenced to 15 years direct imprisonment.

6. The appellant was sentenced to a term of imprisonment of 15 years.

7. The State called three witnesses: the two complainants, Mr Monty Claassen and Ms Marissa Magdalena de Nobrega, as well as the arresting officer, Constable Hein Hendricks.

8. The appellant testified as did his sister, Ms Siphokazi Kondlo.

9. The facts regarding the commission of the offence are not in dispute. In short, they are as follows:

   (a) The complainants, Mr Claassen and Ms de Nobrega, were selling chicken in Du Noon. They were robbed and Ms de Nobrega was threatened with a knife. She was robbed of her jacket and a gold chain. Though she resisted, she surrendered when she saw Mr Claassen pushed to the ground with a gun at his head.

   (b) Mr Claassen was robbed of about R3 000,00 cash, his wallet with his driver's licence and a cellphone. None of these items were recovered.

   (c) After they were robbed, the assailants left in a group in the direction of the taxi ranks. The complainants got into their vehicle and sought

the assistance of the South African Police. They found the police and on their way back to the crime scene, Mr Claassen observed the appellant along the road and pointed him out to the police. The appellant was arrested there and then.

10. The uncontested evidence was that the appellant is employed at Woolworths and that he resides approximately five to seven minutes from the taxi rank and hitchhiking pickup spot. The appellant's evidence was that he was at home until around 2 o'clock that afternoon and that he thereafter left for work. It took him a few minutes (between 5 and 8 minutes on his evidence, and 20 minutes on his sister's evidence) to walk from their home to the taxi ranks. At the taxi ranks it was too crowded and he walked to the pickup point for hitchhikers when he was confronted by Mr Claassen.

11. The central issue is the identification of the appellant by Ms De Nobrega and Mr Claassen.

12. The appellant, according to both Ms de Nobrega and Mr Claassen, was observed prior to the robbery in the vicinity of the complainants talking on his cellphone. He was there observed from about 2 o'clock until the robbery took place a while later. Ms De Nobrega identified the appellant as the person who stood with his foot on Mr Claassen's chest during the robbery.

13. The learned magistrate found that the two complainants corroborated one another in all material respects. They were both good witnesses and the

defence had so conceded. They were also corroborated by Constable Hendricks's evidence.

14. The learned magistrate, though he accepted that the State's case was not open to criticism, nonetheless, quite correctly, considered whether the appellant's version that he was on his way to work, and not involved in the robbery at all, was reasonably possibly true.

15. The learned magistrate found that he could not criticise the appellant's demeanour and he had also not contradicted himself in cross-examination.

16. The issue of the identification of the appellant is central to his conviction. The learned magistrate, again quite correctly, approached the identification of the appellant with circumspection.

17. In S v Mthetwa 1972 (3) SA 766 (A) Holmes JA held as follows at 768A-D:

"Because of the fallibility of human observation, evidence of identification is approached by the Courts 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 the 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 weighed 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) SA 488 (AD); R v Dladla and Others 1962 (1) SA 307 (A) at 310C; S v Mehlape 1963 (2) SA 29 (A).

18. On behalf of the appellant, it was submitted that the conclusion arrived at by the court *a quo*, namely that the evidence of the appellant could not be reasonably possibly true, was based on the following incorrect findings:

(a) that the testimony of the appellant's sister could not be relied upon;

(b) that the complainants identified the appellant's facial features and complexion, and not at all by the clothing that he was wearing;

(c) that the identification of the appellant took place amongst many other persons walking in the area, whilst the evidence was that the appellant was walking all by himself.

19. Mr Weeber's criticism of the magistrate's judgment was principally based on the findings that the appellant's sister's evidence was wrongly rejected, that the appellant was apprehended and arrested pursuant to an identification of him based on his clothing – and not his facial features – and that there was no evidence from either Ms de Nobrega or Mr Claassen about which facial features they relied upon in identifying the appellant. In this regard Mr Weeber argued that there was no indication why Ms de Nobrega would particularly have noted the facial features of the person present before the robbery talking on his cellphone. Mr Claassen's evidence was that he had not focussed on this person at all. It would therefore have been quite difficult

for Mr Claassen to have identified his assailant during the robbery having regard to the fact that teargas – or some similar substance – was used.

20. With regard to the evidence by the sister, the learned magistrate found that it was clear to him that she had no independent recollection of the particular day as she had no idea what the date was or which day of the week it was.

21. The learned magistrate found that Ms Kondlo got the date wrong – it was not November, but September. The fact that she did not give the correct date, in my view, does not detract one iota from her evidence. The identificatory feature is clear – it is the day upon which the appellant was arrested. It was with reference to that day that her evidence was adduced.

22. The appellant's sister's evidence that she identified the particular day with reference to the fact that that was the day upon which the appellant was arrested, was never challenged. She was never tested on her understanding of which month it was, and if she was mistaken in that regard, nothing can possibly turn on that. It is in my view clear that the magistrate had erred in rejecting the evidence of the appellant's sister in the manner that she did.

23. I am not certain that the evidence of the sister is of any assistance to the appellant, as neither his evidence, nor her evidence, disrupt the timeline of the events as given by the State witnesses.

24. On the appellant's own version, he left home at 2pm – that, approximately, equates with the evidence of the complainants that they first observed the appellant around 2 o'clock.

25. The learned magistrate, in evaluating the identification evidence, in the first instance, pointed out that the appellant was identified shortly after the complainants were robbed. Moreover, he found that the appellant had been on the scene prior to the actual robbery and both complainants had testified that they had observed him in the vicinity of the crime scene prior to the robbery taking place. It was in broad daylight and he was quite close (a metre and a half, so it was testified) to the complainants.

26. In all the circumstances the court *a quo* was satisfied that the appellant's version was not reasonably possibly true, and was to be rejected insofar as it was at odds with the State's case.

27. Mr Weeber submitted that the initial identification of the appellant was made on the clothing he was wearing. He was identified by both the complaintants as he was walking along the road, in the same direction that the complainants were travelling, away from the taxi – ranks (and therefore in the opposite direction that the assailants had followed in leaving the scene of the robbery). Ms de Nobrega who identified him walking along the road. Mr Claassen also identified him. He states that the appellant had white tackies on with thin stripes, blue jeans, a white shirt with stripes running through it, a beanie with four different colours and a black leather jacket.

28. It was furthermore suggested that the appellant was identified based on his clothing being similar to that of the assailant. It is therefor possible that another person, the real assailant, was wearing similar clothing to that of the appellant and that the appellant was mistakenly identified and arrested.

29. The State, in turn relied on the positive identification made by the complainants. Mr Weeber challenged this evidence. He contended that the there was no reason for Ms de Nobrega to have remembered the person with the cell-phone observed in the vicinity before the robbery as he had done nothing suspicious. Mr Claassen was, on his own evidence, not focussed on this person.

30. Ms de Nobrega, in her evidence, identified the appellant as one of the assailants standing over Mr Claassen. Ms de Nobrega, unequivocally, testified that she *"remembers his face"*. Mr Claassen, in turn, was unequivocal in his evidence in identifying the appellant as the person who stood with his foot on his chest. Mr Claassen, as Mr Weeber had pointed out, had by then already been sprayed with something similar to teargas, which, no doubt would have impacted on his powers to make accurate observations.

31. Mr Weeber submitted that there was no evidence as to what facial features were important in making the identification of the appellant. Absent such evidence, he submitted that it was probable that the identification of the

appellant was made on his clothing only and that very little reliance could be placed on the identification based on facial features.

32. It is correct, as was submitted by Mr Weeber that Mr Claassen recognised the appellant's clothing and then pointed him out to the police.

33. Mr Claassen's evidence that the appellant did not deny being part of the robbery, and sneered at him, has not been seriously contested by the appellant (even though he denied it). Mr Claassen, in his evidence, however, also confirmed that the appellant told the arresting officer that he was on his way to work. I pause to point out that Constable Hendricks contradicted this when he testified that the appellant did not say anything at all. I would have thought that Constable Hendricks could hardly have forgotten such an important statement.

34. There was criticism levelled at the various differences between the evidence of Ms de Nobrega and Mr Claassen, in particular:

(a) the differing times they testified the appellant spent talking on his cellphone;

(b) the differing evidence on how many people (one or two) asked them for a price when the sale of the last chickens took place;

(c) the fact that Ms de Nobrega did not testify about any search of the vehicle, whereas Mr Claassen testified that the appellant (suspect) went through the vehicle;

(d) the fact that Mr Claassen testified that the appellant placed a shoe on his chest, whilst Ms de Nobrega testified that the appellant was one of the persons who stood over Mr Claassen.

35. None of these criticisms, to my mind, are material. They are to be expected of witnesses who testify regarding stressful events under stressful circumstances.

36. There are, however, other factors which, objectively have a bearing on the probability of the appellant's explanation. Though both complainants testified that the appellant had been talking on his cellphone prior to the robbery, no cellphone was found upon him when he was arrested. He was also not in a group, but walking alone, despite the fact that the assailants had departed from the crime scene in a group. On the evidence of Ms de Nobrega, the assailants ran off towards the taxi rank. Subsequently the appellant was apprehended, walking away from the taxi rank, on his own. He was walking in the opposite direction of the direction taken by the group of assailants. He was found empty-handed.

37. Individually none of these factors may be of any moment, however, taken together, they do raise some doubt in my mind as to the complicity of the appellant in the robbery.

38. Absent any evidence of the facial features upon which the appellant was identified one is left with the impression that his clothing did indeed play a more central role than the learned magistrate accepted. It is reasonably

possible that it was his identification based on his clothing which resulted in his arrest and which both complainants then linked to their identification on facial features of the appellant.

39. In the premises and even though the State had presented a strong case for the conviction of the appellant, sufficient doubt as to his identification has been raised in my mind. It is, in my view, reasonably possibly true that he was on his way to work and was not involved in the robbery at all.

In the premises I would uphold the appeal and set aside the conviction and sentence.

Sven Olivier, AJ

I agree and it is so ordered.

S. Desai ,J