HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

High Court Case No: A187/16

THEMBA MPILO **APPELLANT**

And

THE STATE **RESPONDENT**

Coram: Binns-Ward & Rogers JJ

Scheduled hearing: 19 June 2020

Delivered: 30 June 2020 (by email to the parties' counsel and release to SAFLII)

JUDGMENT

Rogers J (Binns-Ward J concurring):

[1] In the light of the risks posed by the Covid-19 pandemic, counsel agreed that we could dispose of this appeal on the papers. Both sides' heads of argument were full, for which we are grateful.

[2] With the leave of the court *a quo*, the appellant appeals against his conviction for robbery with aggravating circumstances and his sentence of 12 years' imprisonment. The appellant was the first accused in the court *a quo*. The second accused was discharged at the end of the State's case. The third accused, like the appellant, was convicted and received the same sentence. According to the State's heads of argument, the third accused appealed his conviction and sentence but the appeal was dismissed.

[3] The conviction of the third accused was based on evidence that his fingerprints were found on the inside panel of the front left door of the car stolen in the armed robbery. The conviction of the present appellant, by contrast, rests on eyewitness identification.

[4] It is not in dispute that an armed robbery took place at the home of the complainant in Claremont at around lunchtime on 17 January 2008. There were three perpetrators, one of whom was armed with a firearm. After taking various valuables from inside the house and the jewellery off her person, the robbers forced the complainant to hand over the keys to her Mercedes-Benz and to open the garage door. The robbers left the scene in her car.

[5] Because the complainant's housekeeper was able to escape from the house and get the neighbours to raise the alarm, the police arrived just as the robbers were reversing out of the garage. Sgt Thiart was one of the officers. He testified that he saw the driver. The driver was wearing a yellow shirt. He was not sure whether there were two or three occupants in the car. He noticed that one of the other occupants was wearing a black jacket.

[6] A few minutes later the Mercedes was involved in a collision on the Claremont Main Road. The Main Road carries two lanes of traffic in each direction. The traffic was standing still. The driver of the Mercedes approached

at high speed from the south and tried to take a gap between a car in the right lane and a truck (slightly ahead of the car) in the left lane but the Mercedes struck the truck and came to a halt. It so happened that an off-duty police officer, W/O Benjamin, was the driver of the car in the right lane. He testified that a man dressed in a yellow T-shirt and brown pants got out of the Mercedes on the driver's side and fled in the direction of Claremont station.

[7] Benjamin, who was taking his wife to an appointment in Claremont, dropped her off and returned to the scene of the accident. By this time the scene had been cordoned off. Not long afterwards, Thiart, who was not known to Benjamin, came back to the accident scene with the appellant, whom Thiart had arrested at the taxi rank outside Claremont station. Benjamin testified that he had immediately recognised this person as the man who had got out of the Mercedes and that he had told Thiart so there and then. Thiart confirmed this in his evidence.

[8] Thiart testified that when the robbers fled from the complainant's house, he radioed for assistance. He arranged for colleagues to monitor the Main Road (which is above the railway line, ie to the west) while he (Thiart) drove to Palmyra Road (which is below the railway line, ie to the east, and linked to the Main Road by the Stanhope Road Bridge). In this vicinity he apprehended a man in a black jacket who seemed out of breath and whom he suspected of being one of the robbers. (This was the second accused who was discharged at the end of the State's case.)

[9] Thiart then made his way to the taxi rank just above Claremont station. He saw a man (the appellant) 'pretending' to make a telephone call from a pay booth. This man was wearing a yellow shirt and brown pants. He recognised him as the driver of the Mercedes. After questioning him, he arrested the

appellant and walked with him to the Main Road, which is where he encountered Benjamin.

[10] The complainant did not point out the appellant at the identity parade. In her testimony, she said that the appellant looked like one of the perpetrators but she was not sure. The court *a quo* did not attach any weight to this as evidence of identification.

[11] The appellant's counsel in his written submissions dealt at some length with the danger of confident and honest but mistaken identification. These dangers are no doubt real but the court *a quo* warned itself against them and nevertheless accepted the State evidence.

[12] The attack on the identificatory evidence is not that the two police officers did not give honest evidence but that their honest conviction as to the correctness of their identification was not a substitute for reliability. The main thrust of the argument for the appellant is that the two officers were led into a confident identification because of the appellant's clothing rather than his face. The appellant's counsel did not argue that one of the perpetrators, in particular the driver of the Mercedes, was not wearing a yellow top and brown pants. His argument was that the mere fact that the appellant was similarly clothed did not mean that he was the man who had been driving the Mercedes.

[13] In regard to Thiart's evidence, the appellant's counsel submitted that Thiart saw the driver from the rear of the Mercedes. When Thiart tapped the boot of the car to attract the driver's attention, he did not yet know that the driver was not the complainant. When the vehicle reversed in his direction, he would, so counsel submitted, have needed to take evasive action. Moreover, so the argument went, the driver, assuming the standard reversing posture, would have been looking over his left shoulder, ie 'away from Thiart'. He would not

have had much time to look at the driver's face. One also did not know the angle of observation or how much of the driver's face Thiart would have been able to see.

[14] Thiart testified that the Mercedes did not pull out of the garage confidently and fast. It appeared to him that the driver was struggling to control the Mercedes. He could see that the driver 'didn't know how to drive it because he reversed into dustbins'; the driver 'came out slowly and then a bit faster then slowly and then he reversed into the dustbins also'. Although the matter was not explored as fully as one might have wished, on this evidence the driver would almost certainly have been looking sometimes to his right and sometimes to his left as he tried to navigate out of the driveway in a vehicle with which he was not familiar. Thiart testified that he was standing on the driver's side of the vehicle, with his firearm drawn.

[15] I accept that Thiart would not have had a long time to see the driver. His estimate of a minute does not sound realistic. On the other hand, the vehicle was not moving fast. Furthermore, there is no evidence that Thiart had to take evasive action nor was such a thing put to him. He was a trained police officer with about seven years' service at the time of the incident. Although the yellow shirt obviously made a striking impression, he testified that he saw the driver's face. When it was put to him that the appellant would say that he was not in the Mercedes, Thiart replied that he was absolutely sure that it was the appellant. There was no cross-examination designed to elicit information to cast doubt on Thiart's evidence that he saw the appellant's face.

[16] Thiart testified, furthermore, that he recognised this person as the driver when he saw him at the taxi rank, which would only have been about 10 to 15 minutes later. And the appellant, he testified, seemed out of breath. The

appellant's evidence was that there was another person also in a yellow top in the vicinity at the time, which goes to support Thiart's evidence that it was not only by the colour of his clothing that the appellant was recognised.

[17] Benjamin was seated in a stationary car when the driver of the Mercedes got out and fled. The collision had occurred just in front of Benjamin, and his eyes would naturally have been on the Mercedes. Because the Mercedes had been trying to take a gap, it was angled to the right when it came to a halt. The driver would thus have been opening the door more or less in Benjamin's direction. Benjamin testified in this regard as follows under cross-examination:

'He knocked into the back of [the truck], his vehicle was standing at an angle facing in a south eastern [he clearly meant north eastern, with the driver's side facing to the south east] direction Your Worship. As he got out he was obviously – his door was facing me Your Worship because he was nearer to me from the right-hand side Your Worship; I clearly saw accused 1 getting out of the vehicle Your Worship. I could clearly see his clothing Your Worship and if you look at the accused he is physically imposing Your Worship it was quite distinguishing.'

[18] He was asked exactly when he had seen the driver's face. He replied that he 'saw the accused as he was getting out of the vehicle'; he 'could not understand how a person could knock into a stationary truck that is in front of you'. It was put to him that he was mistaken but he replied that he was positive and absolutely sure of what he saw.

[19] It was put to him that a person in the position of the driver would have left fingerprints on the car. Benjamin said he was unable to assist on that question (he was not involved in the investigation), but added:

'[A]ll that I am saying is that I saw accused 1 getting out of the vehicle and as I pointed out to the court the vehicle was standing like this Your Worship and he was facing me from the right-hand side and I could clearly see looking at him as he got out of the vehicle on the right-hand side in front of me from the drivers side … [H]e did not look at me. When he got

out of his vehicle I was sitting in my vehicle looking at what is the driver going to do of this vehicle, this Mercedes Benz who had just knocked into this truck. He got out of this vehicle I looked at him Your Worship I had a good look at him and I saw him running off Your Worship. I clearly saw his face I clearly saw his clothing Your Worship. He had a bright yellow T-shirt on and a brown pants Your Worship.'

[20] Benjamin was an officer of some 15 years' standing at the time of the incident. He closely observed the immediate aftermath of the collision. He displayed diligence in returning to the scene of the accident about 10 minutes later. It is not in dispute that the weather was fine. Events unfolded in full sunshine.

[21] What is particularly significant is that Benjamin immediately recognised the appellant as the driver of the Mercedes when Thiart arrived at the accident scene with the appellant in tow. Thiart and Benjamin were not faced with the difficulty of trying to recall a visual impression left on their minds from an incident which had occurred weeks or months previously. Each of them, operating independently, identified the appellant as a perpetrator within a space of 10 to 15 minutes of having first seen him – in Thiart's case outside the complainant's house, in Benjamin's case immediately after the collision on the Main Road.

[22] This last point disposes of one of the appellant's counsel's other submissions, namely that Thiart and Benjamin were testifying some years after the event. That is true, but their identification of the appellant as the driver of the Mercedes was something which took place on the very day of the incident, indeed within 10 to 15 minutes of the respective occurrences which they observed.

[23] The appellant's counsel criticised the identificatory evidence because the witnesses had not mentioned the features of the driver's face which had caused them to identify him with the appellant. Now I know that points of this kind are often raised in criminal trials but I am not much impressed by them. It is not often that a face presents itself with one, let alone two or more, remarkable features. Nevertheless, human beings are highly adept at recognising faces and voices. A constellation of multiple minor variations in standard facial features combine to make up a facial appearance which in its own way is as unique as a fingerprint. The laborious process followed by identikit artists in teasing out from a witness the facial features of a perpetrator shows that people can readily match a face to a perpetrator without being able to verbalise a description.

[24] It was argued for the appellant that it was reasonable to assume that the police conducted a proper forensic examination of the Mercedes and that fingerprints would have been of particular interest. There was evidence from a police officer, Van Rensburg, who seems to have succeeded W/O Schaffer as the investigating officer, that the fingerprint expert who lifted fingerprints from the vehicle was deceased. W/O Swanepoel subsequently testified, linking the third accused's prints to a fingerprint found on the passenger side of the Mercedes.

[25] I think one may safely assume that if the appellant's fingerprints had been found on or in the Mercedes, evidence to this effect would have been adduced. However, the fact that there was no such evidence does not mean that the appellant was not in the Mercedes; it means only that no prints from his hands, suitable for forensic comparison, were lifted. Even in the case of the third accused, who had undoubtedly been in the Mercedes, the only print seemingly fit for forensic comparison was a single print of his left little finger.

[26] It was not put to Swanepoel that a person holding a steering wheel or operating a gear lever or opening a driver's door would necessarily leave prints of sufficient quality to be suitable for forensic comparison. It is not self-evident to me that such actions by a driver would inevitably leave usable fingerprints.

[27] The appellant's counsel argued that the magistrate misdirected himself because in his judgment he analysed and 'accepted' the evidence of both police officers, before proceeding to consider the evidence of the accused. I do not accept this criticism. The magistrate acknowledged that 'acceptance' of the State's evidence was not a sufficient reason to reject the defence's evidence; the court still needed to look at the evidence as a whole to see whether the defence version might reasonably possibly be true. In context, the magistrate's 'acceptance' of the State's evidence was a finding that the witnesses were truthful and reliable, ie evidence on which a conviction might safely be based in the absence of controverting evidence raising a reasonable doubt. A State witness might be assessed as truthful and reliable, and yet controverting evidence by an accused might be assessed as having sufficient credibility to raise a reasonable doubt as to whether the State evidence is correct beyond reasonable doubt.

[28] The appellant's version was that he was a taxi driver, that his taxi was parked in the taxi rank and that he was waiting for the taxi to fill up before departing for Khayelitsha. There was a conflict between Thiart, who said that there was nobody in the taxi pointed out by the appellant as being his vehicle, and the appellant, who alleged that there were already three passengers in the taxi. There was also conflicting evidence as to the whereabouts of the taxi's keys. According to Thiart, there were keys in the ignition of the taxi pointed out by the appellant. The latter testified, however, that the keys were on his person as he was trying to make the telephone call.

[29] Thiart testified that when he took the telephone from the appellant, there was nobody at the other end, hence his evidence that the appellant was 'pretending' to make a call. Thiart also said that the appellant was out of breath, which would be consistent with his having fled from the Main Road.

[30] The appellant's defence was not really an alibi, because there was no evidence (apart from the appellant's denial) that he was not and could not have been at the crime scene. As the court *a quo* observed, even if the appellant was a taxi driver and even if his taxi was parked at the station, he could have parked it there and returned to the station after participating in the robbery. Another possibility is that an accomplice drove the perpetrators to the complainant's house in the appellant's taxi and returned to the station. In the appellant's presence, Thiart asked the taxi's guard how long the taxi had been standing there; the guard replied at least an hour or two. The fact that this report was made by 'his' taxi guard was not challenged in Thiart's cross examination.

[31] The fact that the driver of the stolen Mercedes should have been in the vicinity of the taxi rank is consistent with Benjamin's evidence that the driver fled in that direction. That Thiart noticed the appellant to be out of breath also ties in with this evidence.

[32] The court *a quo* considered that it was faced with the 'overwhelming evidence' of the two officers who had independently identified the appellant as the driver of the Mercedes. I think that the court *a quo* was entitled to find that the evidence of the State was sufficiently cogent to rule out, as a reasonable possibility, that the appellant's denial of complicity was true. There was no material misdirection which entitles us, without the benefit of having seen and observed the witnesses, to interfere with the trial court's factual conclusion.

[33] It follows that the appeal against conviction must fail. Although the appellant's counsel did not abandon the appeal against sentence, he wisely made no submissions in support of it. I thus need say no more than that the appellant may count himself lucky that the court *a quo*, seemingly on very flimsy grounds, found there to be substantial and compelling circumstances to deviate from the prescribed minimum sentence of 15 years' imprisonment.

[34] The appeal against conviction and sentence is therefore dismissed.

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O.L. Rogers

Judge of the High Court

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A.G. Binns-Ward

Judge of the High Court

APPEARANCES

For appellant	John van der Berg
For respondent	D Y Els Office of the Director of Public Prosecutions Western Cape