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

CASE NO.: CA&R33/2018

Date of hearing: 13 October 2021

Date delivered: 14 December 2021

In the matter between:

SIMTHEMBILE MTANGA Appellant

And

THE STATE Respondent

JUDGMENT

MAJIKI J:

[1] This is an appeal against conviction. The appellant was convicted of four counts of robbery with aggravating circumstances and four counts of kidnapping in the East London regional court. He was sentenced to thirty years imprisonment. The appeal is opposed by the respondent.

[2] The main ground for the appeal is that the court *a quo* erred in relying on the evidence the facial comparison analyst specialist about a video footage linking the appellant to the commission of offences.

[3] The appellant was charged of a string of counts of robbery and kidnapping which occurred in East London area on the following dates;
One on 1 September 2014, two on 2 September 2014 and three on 1 October 2014. He had pleaded not guilty to the charges. It later transpired, when he testified, that he was relying on alibi defence. He said he was not in East London but was in Cape Town at the time the offences were allegedly committed. The appellant in the end was convicted on four counts (robbery and kidnapping).

[4] The *modus operandi* for the perpetration of the said robberies was similar. The motor vehicles belonging British American Tobacco Company (BAT) were targeted whilst delivering tobacco to various shop customers. The representatives of BAT would be pounced on, be forced into the vehicle, it would be driven for some distance where the tobacco would be offloaded and loaded on a getaway vehicle. The BAT vehicle and the representative would be left at that spot, with the cellphone and other personal belongings being taken away by the assailants. Only one representative identified the accused through dock identification in respect of the robbery of 1 September 2014.

[5] It is common cause that the said motor vehicles were installed with CCTV camera system. The system had four channel servision digital video recorder that was recording the footage through the channels simultaneously. The footage of the robberies would be downloaded and the file would be referred to the facial comparison analyst. He would then prepare a report on the findings about the images of the suspects captured in the footage. That is the evidence that is the subject of the appeal.

[6] Mr Kasselman said he was employed by Fidelity Security Company, which was contracted by BAT. He said he had sixteen (16) years experience

in facial comparison analysis. He also attended a morphological two weeks workshop at the University of Pretoria. Initially he had enrolled in order to attend as one of the people to be trained. The co-ordinator recognised his skill and requested that he assists with leading the course. He already gave evidence in 186 cases in the courts around South Africa. The magistrate, correctly so in my view, accepted his evidence as evidence of an expert.

[7] Regarding the present case he detailed what the footage contained, right from the time the suspects approached BAT vehicle, when it was driven away to some secluded area, the speed co-ordinates used to track the vehicle right up the time the mission of offloading the stolen tobacco was accomplished. Mr Kasselman tabled a detailed analysis on the process of analysis made in respect of one count, relating to the Mdantsane CAS, for the incident of 1 September 2014. According to the evidence the process was the same and there was one suspect with regard to the three other counts. All reports were admitted as exhibits.

[8] According to Mr Kasselman, in two other incidents of the four he was convicted of, the suspect was captured wearing the same cap that he wore during the incident of 1 September 2014. Those were the incidents of the following day in Mdantsane and Buffalo flats.

[9] Mr Kasselman's evidence require some detail. Firstly, the magistrate did not sufficiently set it out so that a clear background of his analysis is apparent, especially that it relates to a relatively new field of criminal law expert evidence. Secondly, it constitutes the main ground of appeal. It was also criticised on the basis that it was not objective and the captured images he used did not have the scar that was on the control image.

[10] Mr Kasselman said the investigating officer, constable Zikade requested him to compare captured images of the suspects involved in the robbery with the control images. The control images of the suspect were taken by local criminal record centre after the arrest of the suspect. After he received the master file with the master copy of the footage, he captured images of the robbery incident and all the individuals actively involved therein. He ran the footage through a DVD compiler system which captures more than twenty thousand (20 000) images recorded at twenty five (25) frames per second. He then selected four images that were perfect and clear for the comparison. Through an intensive process of forensic facial comparison, he was able to conclude that the person who actively took part in the four cases he analysed, was the appellant depicted on the control images. The process usually takes up to three days to complete. He said he did not analyse the documents relating to the fifth count of robbery. They were not referred to him. He saw the documents relating to it in the morning of the day he gave evidence in court.

[11] He made a presentation of his report on a projector screen in court. He displayed six (6) control images, thereafter, he displayed the image showing BAT vehicle that was robbed, from the captured images. Two individuals were depicted from the captured images, he focused on the appellant who was on the control images referred to him.

[12] Mr Kasselman said he took the dimensions the basic outline and shape of the head and face on the control image. Where possible, both the control images and captured images were divided into three comparative lateral images being between;

(a) the top of the head and the bridge of nose;

(b) the bridge of the nose and the top lip; and

(c) the top lip and the bottom chin.

[13] He said he then marked them X, Y and Z. He said the suspect in captured images was always wearing a cap or other headgear. He marked the visible lateral areas for comparative purposes as Y, Z respectively. He said in both captured and control images the width of Y measured 1.45 which represented 54% of the aggregate of X and Y;
The same exercise carried out in respect of Z, measured 2.45 with the representation of 45%;
In both captured and control images, the measurement was the same. They showed a degree angle of exactly 33% from the tip of the nose to the corners of the eye. He also measured nasolabial folds, (the folds between each side of the nose and the corners mouth called, smile lines). It marked 17A and 18 A, left and right, the feature was prominent in both captured and control images. He then stored the analysis in a CD.

[14] He said in his field, unlike with finger prints experts who needed seven points of identification, he needed to be satisfied with only one feature in order to prove and convince the court that the analysis was positive. However, he still tried to get as many features.

[15] Mr Kasselman explained that no two people have the same features, not even twins. There was over hundred (100) calculations that could be run on the distance from the nose, ear, chin. No two people have same layout of the ear, distance, depth, helix, lobe, thickness and etc. He said he dealt with a case of identical twins, both active in the same incident. At first blush they appeared to have the same features but after comparing the morphological characteristics, they only had 13% similarity.

[16] Ms Tena, counsel for the appellant, criticised him for the statement, that, that he needed to prove and convince the court of his analysis. Ms Tena submitted that an expert was expected to present an objective opinion to assist the court to make a determination. Regardless of the said statement, in cross examination Mr Kassselman explained, in relation to questions about whether he had ever had a finding of no similarities. He said he would not push to have a suspect found guilty. The police had been cross at him in such instances because the suspect in the images looked the same but he said he found no similarities. He said he would only come to court if he was 98% sure that the suspect was the same person in both images. In my view, his statement that he needed to convince the court may have just been an issue of poor presentation. However, later, his understanding of having to give unbiased opinion is apparent, which is in line with what was stressed in **Jacobs and another v Transnet Ltd t/a Metrorail and another** 2015 (1) SA 139 (SCA) at paragraph 15. The court stressed that, since it was well established that an expert was required to assist court and not the party for who he testified, objectivity was the central prerequisite for his or her opinions.

[17] He was pressed about the absence of the prominent appellant's scar that was not visible in captured images, in cross examination. He said there were various reasons for that. Firstly, the scar was on the side of the nose, the captured image's view was flat and had no view around the corner. He said the cameras capturing the suspect were on the left side. Further, the effects of the weather and lighting were also a factor on the quality of the footage. There was bright light from behind, the photograph's primary colour was blue. The background from outside was bright and blue as well. The pictures in the captured image were darker. He also speculated about the timing of the scar as to a possibility that it was not there at the time of the robbery. He stressed that, although, it was possible to manipulate the images, he could not rotate it

in order to capture the scar. He was not allowed to do so in order to suit his comparison or present such to court.

[18] In the final analysis Mr Kasselman said he could still give certainty on the facial features he identified. He concluded that in all the four incidents, relating to the four counts, the person that took part in the robbery was the appellant on the control images.

[19] The appellant's defence was that of alibi. He said he was in Cape Town during 2014 when the offences were committed. He was arrested from his home at 784 Mabombo Street, Phillipi Brown's farm on 15 November 2014. He was advised that he was a suspect in cases in East London, having been linked through fingerprints identification. He said his scar in the nose was sustained in 2002 in an accident involving a truck.

[20] The magistrate accepted the evidence of the dock identification and that of Mr Kasselman. Before us Ms Teko submitted that the evidence of Mr Kasselman was expert evidence and such evidence was based on probabilities and not proof beyond reasonable doubt. In the light of the existence of the appellant's scar there was a probability that he was not the person on the captured videos. It was also submitted that the magistrate did not make findings on the evidence of the appellant, especially in relation to the scar.

[21] Mr Koloti, counsel for the respondent, on the other hand submitted that Mr Kasselman testified about five of the features he identified that had similarities in the images. He said the same cap that was identified on the images, on the incident of the same day, constituted corroboration of Mr Kasselman's evidence. Further, the court could convict on Mr Kasselman's

evidence only, in terms of section 208 of the Criminal Procedure Act 51 of 1977 (the Act).

[22] It is true that it is the conclusions by Mr Kasselman that tendered to link the appellant to the offences. However, he was also identified on the dock by Mr Xhonxa who said that the appellant was the driver of one of the hi-jacked vehicles during the robbery. Mr Xhonxa said, despite the fact that when he made a statement, few hours after the incident, he could not recognise the robbers, he was getting flash backs of what happened on the day of the robbery. I am not of the view that the magistrate erred by accepting such evidence, especially, when viewed in the totality of the evidence.

[23] Mr Kasselman, even if he were to be viewed as a single witness, when one follows the magistrate's reasoning, it is not difficult to determine whether he erred in any way. The magistrate recorded that Mr Kasselman 'has compiled separate court exhibits and he explained and set out the inherent similarities of the facial features of the robber on the captured photo and the control photo of the accused before court. His explanation for his ultimate conclusion, that it was the face of the accused before court, who appeared on all four of the different video footage recordings, was clear to the court to understand and makes good sense.' He went on to comment about his own observation of the similarities especially with the control photo 9. Then the magistrate concluded, 'This is clearly a further indication that the court is dealing with the same offender or robber.' Later on he found that the evidence of Mr Kasselman in each of the four robberies was extremely damning towards the appellant and clearly showed him behind the steering wheel of the for vehicles.

[24] In my view, the manner in which the magistrate framed the statement that Mr Kasselman's evidence placed the appellant behind the steering wheel of the vehicles, does not warrant that it be faulted. He had clearly analysed Mr Kasselman's evidence and set out why he accepted Mr Kasselman's conclusions.

[25] I am of the view that Mr Kasselman's evidence passed the test provided for in section 208 of the Act.

Section 208 provides:

'An accused may be convicted of any offense on the single evidence of any competent witness.'

In **S v Leve** 2011 (D) SACR 87 (ECG) [8] Jones J stated that, if a trial Judge did not misdirect himself on the facts or the law in relation to the application a cautionary rule, but, instead, demonstrably subjected the evidence to careful scrutiny, a court of appeal would not readily depart from his conclusions.

[26] I do not agree with the submission of Ms Tena that Mr Kasselman's evidence did not constitute proof of the state case beyond reasonable doubt. In **Michael and Another v Linksfield Park Clinic (Pty) Ltd** 2001 (3) SA 1188 (SCA) at [37] the court held that what is required in the evaluation of expert evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning. The magistrate correctly found it to have made good sense and that he could easily follow. In my view, Mr Kasselman's evidence was clear and satisfactory. He also explained why the appellant's scar was not visible in the captured image. He also withstood extensive cross examination.

[27] With regard to identification Holmes JA in **S v Mthethwa** 1972 (3) SA 766 (A) at 768 A-C, stated:

'It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested.'

The witness said he had an opportunity to see the appellant's face, it was not covered when the appellant interacted with the witness. He said even when he attended counselling the flashbacks came back. Nonetheless, his identification on its own is of less probative value.

[28] As regards the alibi defence, the magistrate found that it was a bare denial. This was consistent with his finding that the evidence against the appellant was damning.

P J Schwkkad and SE Van De Merwe's Principles of evidence fourth edition, at page 592 refers to Strydom J in **S v Malefo** en andere 1998 (1) SACR 129 (W) at 1J8 a-e and says the following five principles were identified as the correct approach in assessing an alibi defence raised by an accused:

'(a) There is no burden of proof on the accused to prove his alibi. (b) If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt. (c) An alibi "moet aan die hand van die totaliteit van getuienis en die hof se indrukke van die getuies beoordeel word'. (d) If there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable "betroubaar"). (e) The ultimate test is whether the prosecution has furnished proof beyond a reasonable doubt and for this purpose a court may take into account the fact that the accused had raised a false alibi.'

[29] In **S v Liebenberg** 2005 (2) SACR 355 SCA at paragraph 14 the Court stated:

'The acceptance of the prosecution's evidence could not, by itself, be a sufficient basis for rejecting the alibi evidence. Something more was required. The evidence must have been, when considered in its totality, of the nature that proved the alibi evidence to be false.'

[30] In **S v Thebus and another** 2003 (2) SACR 319 (CC) at paragraph 68 regarding whether an adverse inference might be drawn from failure to disclose an alibi prior to trial, the court stated:

'The failure to disclose an alibi timeously is therefore not a neutral factor. It may have consequences and can legitimately be taken into account in evaluating the evidence as a whole. In deciding what, if any, those consequences are, it is relevant to have regard to the evidence of the accused, taken together with any explanation offered by her or him for failing to disclose the alibi timeously within the factual context of the evidence as a whole'.

[31] Despite the fact that the court *a quo* did not expatiate in its finding that the appellant's defence was a bare denial, I find no basis to find fault in the said finding. When the evidence is viewed in its totality, the evidence tendered by the state regarding the appellant's participation in the robberies, is such that the appellant's alibi cannot reasonably be possible true.

[32] In the circumstances, I am of the view that the appellant was correctly convicted for the offences.

In the result,

1. The appeal is hereby dismissed.

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B MAJIKI

JUDGE OF THE HIGH COURT

I agree,

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S. K. Gough

ACTING JUDGE OF THE HIGH COURT

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