

139/1958

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE

DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPEL IN STRAFSAAK.

CAPITAL

SIMON

MOLOI

Appellant.

versus/teen

THE

QUEEN

Respondent.

Appellant's Attorney
Prokureur van AppellantRespondent's Attorney
Prokureur van RespondentAppellant's Advocate
Advokaat van Appellant

P. H. Mannes

Respondent's Advocate
Advokaat van Respondent

M. S. Tucker.

(leave WLD)

Set down for hearing on:

Op die rol geplaas vir verhoor op:

1.3.5.8.10.

A

Monday 15th Sept, 1958.

9.45-12.40 - CAY

- Appiel getrandhoef, wanner besyde
groot, en maak toe verhoorhof lang-
verwys om oplossing van 'n ander
straf.

Schreiner, W. H. R. Stager

Beyers, v. Blum, + Pienaar

RRJA. S.

Kleene

Griffioen 24/9/58

IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA

(Appélafdeling)

Insake:

SIMON MALOI & ANOTHER

Appellante

and

R E G I N A

Respondent

Verhoor deur:-Schreiner, W.H.R., Steyn, Beyers, Ogilvie
Thompson R.R.A. en Price W.R.A.

Verhoordatum: 15. 9. 1958. Leweringsdatum: 24 - 9 - 1958

U I T S P R A A K

STEYN R.A. :-

Die geskilpunt in hierdie appél

is dieselfde as die wat in Henry Mazibuko v. Regina behandel

is. Ook in hierdie geval is die doodvonnis opgelê vir 'n

roof wat gepleeg is voordat die desbetreffende wet, Wet No. 9

van 1958, in werking getree het. Om die redes in genoemde

saak gemeld slaag die appél ; die straf word vernietig en

die saak word na die verhoorhof terugverwys vir oplegging

van 'n ander straf.

L. C. Steyn.

Schreiner, W.H.R.

Beyers, R.A.

Ogilvie Thompson, R.A.

Price, W.R.A.

Stem saam

Sp.1/1

On resuming at 3.30 p.m.

JUDGMENT.

JUDGMENT.

RUMPF, J.: Both accused in this matter are charged with housebreaking with intent to steal and theft and with robbery, alternatively, assault with intent to murder.

10 The evidence, very briefly, shows that Mr. and Mrs. Fischer, who live on the farm Waterpan, left their homestead on the 16th November, 1957. They locked up the two cottages which constitute their home, and three servants were left on the farm. They have told us what happened to them when they came back to their farm. They were held up at the gate by three natives, one with a mask on his face, the other two wearing dark glasses; and all three were wearing lumber jackets and berets.

20 It is not necessary for purposes of this case to go into detail as to what happened. The evidence clearly shows that the three natives were dangerous people. Mr. and Mrs. Fischer were assaulted; shots were fired; and on the evidence it is, I think, a miracle that both Mr. and Mrs. Fischer are still alive today. They were robbed of the car. The safe, which had been taken out of their house, was also taken away, with its contents.

30 The native servants have told us what happened on the farm before Mr. and Mrs. Fischer returned; and the police witnesses have told us how the accused were arrested the following night and what they found in the house of No. 1 accused, ^{also} where the car was found, the big safe and also the small safe.

The question that is before us for decision is to what extent No. 1 and No. 2 accused were involved

in.....

in these crimes. Mr. Fischer has told us that he recognised a native called Karin as one of his assailants. Karin is not before us today. Mr. Fischer says that he knows accused No. 1. He says that both No. 1 accused and Karin lived on a farm adjoining this farm; and No. 1 accused admits that he lived on an adjoining farm, but denies that he ever was on complainant's farm. The fact that accused No. 1 lived on a neighbouring farm is an indication that he has a knowledge of the area in which this farm is.

Mrs. Fischer says that Karin and No. 1 accused grew up on a portion of the farm Waterpan, adjoining them. She also stated in her evidence that in July of last year on two Saturdays running she saw Karin, No. 1 and No. 2 accused and another person on her farm. In view of the fact that this took place some time ago I do not think one should rely on this evidence of Mrs. Fischer at all, if one may be looking for corroboration of other witnesses.

The native girl, Elizabeth, although she says that she saw No. 1 accused before he put on the mask, failed to point him out on the identification parade on the 17th November; and I do not think her evidence should be taken into account as far as the identification of No. 1 accused is concerned.

One of the servants, Bok, says that he knew No. 1 accused and Karin well, and he is very certain that Karin and No. 1 accused were on the farm on this day of the 16th November, and that No. 1 accused was one of those who held him and who threatened him. He also says that.....

that No. 1 accused is the one who pushed the wheelbarrow with the safe on it to the gate. Bok is the man who says that when he accompanied the police to a house in Moroka Location the following night, and when there was a knock on the door by the police, he recognised the voice of No. 1.

10 Temba, the other servant who was left on the farm, also said that he knew accused No. 1 and Karin. He says that at first No. 1 did not wear the mask, but when he saw that the strangers on the farm had got hold of Bok he noticed that No. 1 was wearing a mask. He pointed out No. 1 accused on the identification parade, and in cross-examination he stated that he mentioned No. 1 accused in the statement which he made to the police that same day.

20 If there is any criticism of the evidence of Temba, generally, it is that he failed to point^{out}/No. 2 accused, who, he told this Court, was the person who took him, with another, to a place behind the dam, where he was bound up with Elizabeth.

30 The police evidence is that of Detective Head Constable Bosman, who gave evidence about the search of the house of accused No. 1 the following night and who states that a revolver was found on the wall as also a wallet containing £260, consisting of five pound notes. He also states that No. 1 accused took the police to the various houses that he mentioned, including the house of No. 2. Thereafter, he says, the person called Japie took the police to Dube, where the car was found, and to a lavatory where the big safe was found.

He.....

He says that thereafter No. 1 accused took them to another lavatory where the small safe was found.

Detective Snyman told us that in the house of No. 1, behind a piece of carton, he found two bags with money.

10 Detective Constable Schoeman told us that in the house of No. 1 he found a bunch of keys in the bedroom, the mask before the Court, a lumber jacket, a beret; and in the living room in a vase he found a pair of dark glasses. A small red purse with some Kruger coins was found in possession of ^a sister in law of accused No. 1, as she was pointed out. I may say that this small red purse has also been identified as something coming out of the safe of Mr. Fischer. Detective Constable Schoeman also told the Court that No. 1 accused showed the police where the small safe was.

20 The evidence clearly shows that the things found at the house of No. 1 accused came from the safe of Mr. Fischer, and it also shows that the type of clothing found, the lumber jacket and the beret, was similar to that worn by the assailants at the gate, and that the mask, if not the identical mask, was similar to the mask worn by one of the assailants.

30 Finally, against accused No. 1 is the evidence of accused No. 2. He incriminates accused No. 1 to the full. It is suggested that No. 2 has a grievance against No. 1 because of the fact that accused No. 1 pointed out the house of accused No. 2 to the police, and pointed him out as a person who was at the house of accused No. 1 earlier in the morning of the 16th November, with three others.....

others.

It is conceivable that accused No. 2 may feel aggrieved at what No. 1 did, but it is difficult to understand why his grievance should take him so far as to incriminate No. 1 to the extent that he does.

This evidence, ^{the} Crown evidence, and that of No. 2, constitutes an overwhelmingly strong case against No. 1. In reply to that evidence he has given evidence under oath, and he has also called his wife to give evidence under oath. His defence is that he was not on the farm at all on the 16th November. He says that on the morning of the 16th No. 2 came to him, with three other men in his car, and asked him to take over the car and to use it as a taxi for the day. No. 2 accused is, inter alia, a taxi driver. No. 1 says that with No. 2 were Karin and Japie. Karin is his own brother in law. The fourth man he did not know. He says that he refused to do the taxi driving that day because he wanted to work in his yard. He says that later on the 16th, in the afternoon, Karin came there and brought with him a bag. Karin did not explain what was in the bag or why he brought the bag there; he only said that he would call for the bag later. He also states that during the raid on his house by the police the police found this bag and that everything that was produced by the police in this Court was found in the bag; that he, accused No. 1, did not know ^{at all} what was in the bag.

There are a number of improbabilities in this story of accused No. 1. The very first improbability is the request by No. 2, according to No. 1, on the morning of the 16th. We know that No. 2 was on the farm with.....

with three others, and we know that the three others had planned an armed robbery. One then asks oneself why should, at that stage, on the morning of the 16th, No. 2 ask No. 1 to take the car for the day? This story of accused No. 1 seems to be a fabrication, in order to be able to explain why he pointed out to the police No. 2, Karin and the other man. Without such a visit he would not be able to explain to this Court why he pointed these people out to the police.

10

Secondly, there is the visit of Karin with the bag. Karin, admittedly, is a relation, but he brings the bag without saying anything about it, and he is not asked anything about the bag. There is the evidence of the police, against his evidence, that a bag was found; and we feel that the evidence of the police is to be accepted, that in fact the items that have been handed in were found in the way the police have described to us they were found.

20

Dora, the wife of accused No. 1, was not a satisfactory witness. She says that she saw the car come there on the morning of the 16th, and a person came out of the car whom she did not know. She entered the house. She went in and out, but she does not know what happened. She says that in the afternoon Karin came with a parcel and said nothing.

30

There is a small, but important, point in the evidence of both accused No. 1 and his wife which requires consideration. It is the fact that we know that Karin was a wounded man. He had received a shot which had wounded him on the head. Now, accused No. 1 says

that.....

that when Karin came to the house with the bag he had a handkerchief over his head and on top of that a hat. No. 1's wife says that he was wearing a grey beret. It seems to me that, knowing what we do, if Karin had come there that afternoon he would either have been bandaged or have worn a handkerchief or something over his head, and Dora would have noticed that.

10 There is also a conflict in their evidence in regard to a certain tomato box, and, generally, the position of the bag which Karin brought. Dora says that she never saw the bag after it was put in the house. Accused No. 1 says it was put in his bedroom somewhere behind the door next to a tomato box. Dora's evidence is also unsatisfactory to the extent that she pretends not to have seen a single thing that was found by the police. She says that she was told to go into the dining room and that she stood in the door, but she does not know what was found and where it was found. This is highly unlikely.

20 Finally, the possession by the sister, or sister in law - I don't know precisely who it is - of the little red purse is not explained.

Now, if this story of the accused, in his defence, is considered in the light of the Crown evidence it cannot be said that his story can reasonably be true. If we believe the police evidence - as we do - then the accused is lying to us about the various items found; and if he lies about that, and if those items were found as the police say they were found, then he was one of
30 the three men on the farm, and he was the man who was wearing the mask.

We.....

We accept the evidence of Temba and Bok, and of No. 2, that accused No. 1 was on the farm. We accept the police evidence, and we have no doubt whatsoever that accused No. 1 was on the farm and that he is guilty in respect of count 1, housebreaking with intent to steal and theft, and in respect of count 2, the robbery, the main count of count 2.

We have to consider the case against No. 2. The question is, knowing that he was on the farm, we must consider to what extent did he associate himself with the three others who constituted a gang. His own story - if I may start with that - is an admission that he was on the farm; that he was hired by No. 1 to take No. 1 and two others to the farm in order to get a bedstead. He fixed a price of £5 for the use of his taxi. He says that he was in a hurry to get back, because he had to take people to the races that afternoon. He says that they approached the farm, but they did not go to the gate. They passed the gate until a point where the fence stopped. There they stopped, and they walked along a footpath to the other side of the property, where they entered the eastern gate. He estimates that distance to be about 100 yards. According to Mr. Fischer it is about 1600 yards. So it may^{be}, if I consider the plan which has been handed in, about 1200 yards. On Mr. Fischer's evidence and the plan it must be at least 1200 yards.

Accused No. 2 admits that he talked to Elizabeth. He denies that he heard any threats. He says he was some distance away from the other three when they spoke to Temba and Bok, and he says that after the three disappeared.....

disappeared with Bok he went to Elizabeth, spoke to her, and she took him to where the others had disappeared and there he found Japie and a safe on the verandah. He did not see the others. He protested, he did not want to have the safe put on his car. He says he may have touched the safe, and so he tries to explain the presence of his fingerprints on the safe; and he says he went back through the eastern gate towards his car and drove off.

10 Mr. Fischer has given evidence, and was recalled to give further evidence, in regard to the gates. He has handed in a plan, and he is very certain that the east gate was locked, is generally locked; and he says that he had a look at that gate on the afternoon of the 16th after the events occurred, and he found that it was still locked. There is nothing to suggest that the gate may have been opened on the morning of the 16th and closed again by somebody else. It is a gate which is never used, and if we accept Mr. Fischer's
20 evidence that the gate was locked then No. 2 accused is telling us a lie. He is lying to us as to how they entered the farm. And this is important, because if he had to creep through the fence, then it is very unlikely that he was an innocent driver to these three people.

 I have indicated that Mrs. Fischer told us that she saw No. 2 in July on the farm. In arriving at a decision in regard to No. 2 I think it is best not to rely on this evidence as Mrs. Fischer may possibly be
30 mistaken.

 Mr. Fischer and Mrs. Fischer say that when they approached.....

approached their farm in their car they saw the strange car at their gate - the western gate. Mr. Fischer says that when he first saw the car it was standing at the gate. Mrs. Fischer says that she saw the car reverse at the gate; and if their evidence is correct there can be no doubt that shortly before they passed the accused, as they did, he was with his car at the gate.

His story is that he went back to his car at the south-western corner, got into his car and went home. He passed the gate. He did not turn towards the gate. If Mr. and Mrs. Fischer are correct then accused No. 2 is lying. There is no possibility of a mistake on the part of Mr. and Mrs. Fischer, because the road is quite open there, and the gate is some 60 yards away from the dirt road on which they were travelling. If they are speaking the truth the accused has not explained to us his presence at the gate at a time when, clearly, on the inside of the gate there was a wheelbarrow with the safe. If their evidence is the truth then a reasonable inference is that accused No. 2 did stop some distance away from the gate, but that he returned to his car and took the car up to the gate to load, or to try to get the safe through the fence and into the car. In any event, their evidence is wholly inconsistent with his story.

Then we have against No. 2 the evidence of Elizabeth. She described to the Court how No. 2 came towards her, and how he said to her if she wanted to live she must not be frightened. She was then taken by No. 2 to the room in the cottage, and thereafter she.....

she says that accused No. 2 and one of the others took Temba and herself to a point beyond the dam, where they were tied up with a sheet and a curtain.

10 We were impressed by the evidence of Elizabeth. She gave her evidence well and fairly. She pointed out accused No. 2 at the identification parade the next day. She explained that he was the only man with an uncovered face, as far as she was concerned. She explained that he was not wearing a lumber jacket and a
10 beret. And when I said that she gave her evidence fairly I said it because she does not say that he was armed in any way. She did say before this Court that she was positive that No. 1 was there too, and if there is any criticism of her evidence it is that she failed to point out No. 1 at the identification parade. However, on the evidence as a whole, one has the impression that she was not much in the presence of accused No. 1 on that particular day. We know that she was approached by No. 2. He admitted that. He
20 talked to her, and we know that she had ample opportunity to see him clearly. Either she is making a mistake as to No. 2 being one of the two who tied her up or she is wilfully implicating him to a greater extent than he really was implicated. We neither think that she made a mistake nor do we think that she is wilfully telling a lie.

30 Bok gave evidence and said that he saw No. 2. He has not got much against No. 2. There is one point in his evidence that came out in cross-examination. He said under cross-examination that No. 2 was present
when.....

when he was threatened by the others. His evidence is in a certain way somewhat unsatisfactory. In regard to the car that drove away - presumably No. 2's car - he said, at one stage, "Hy het nie tot by die hek gekom nie, hy het teruggedraai voordat hy by die hek was". At some other stage he said that when he saw the car the car was moving, and he was then standing in front of the door where the safe was. Later he said that "they", meaning himself and the three assailants, were
10 already at the gate when the car drove off. He was not very satisfactory in regard to the details, and apart from what I have mentioned he does not implicate No. 2.

Temba gave evidence and said that he did not know No. 2. He knew No. 1 and Karin. He says that No. 2 and another native took him and Elizabeth and tied them up; but as he failed to point out No. 2 at the identification parade I do not think his evidence should be relied upon at all in regard to the identification of No. 2, in so far as his association with the other
20 native is concerned in the tying up.

as a whole.
We have considered the evidence. We find that against the strong evidence of Elizabeth and the irresistible evidence of Mr. and Mrs. Fischer in regard to the position of the car at the gate, his own story is not strong enough to bring about a doubt. If he had presented us with a story - a reasonable story - not containing the improbabilities which it does, the position might have been different.

His own story is that he was asked to take these
30 three people quite a distance away to fetch a bed, and his fee would be £5. He admits that that is a very
strange.....

strange thing; it is a very high price for a bed, of one counts this money together with the price. It is unlikely that people would pay £5 to go and fetch a bed miles out of town. They stopped at a certain corner of the farm and they walked for at least 1200 yards. Is it likely that they would do that if they are in search of a bed? He estimates the distance much shorter, but be that as it may, there is another matter which I have already mentioned, and that is the matter of the east gate. If that was closed, would he creep through the fence in an innocent search for a bed? There is his evidence about the presence of his fingerprints on the safe. He had great difficulty in explaining the fingerprints. Even in his evidence-in-chief his evidence was, "It must have happened during the argument". Is it likely that he would have touched the safe, knowing at the time that it was a stolen object and that he was asked to take that safe away? If he had become greatly agitated, almost to the extent of losing all control of himself, it might perhaps have happened; but I cannot imagine an experienced taxi driver in Johannesburg, being suddenly confronted with a safe that he knows is being stolen, touching this safe by way of protest. Not one of the Crown witnesses, as far as I can recollect, was really asked about this argument which accused No. 2 says he had with Japie. Of course, he says that the others were not there; but it seems highly unlikely that they were so far away that they would not have heard this argument. And then there is this story, that he calmly walked away, after he had refused to take the safe, back again through the east gate for

a.....

Sp.1/14

a distance of 1200 yards. It is impossible to conceive that the others would not have prevented him from leaving in the way he did, if he is speaking the truth; that he must have realised that he was leaving them in the lurch. There they were, their only way of get-away being removed by accused No. 2.

Well, these are improbabilities that I have referred to, and, after carefully considering all the evidence, we have come to the conclusion that the Crown
10 has proved beyond a reasonable doubt that accused No. 2 not only was on the farm but that he associated himself with the others, and that in fact he was one of the two who took Temba and Elizabeth and tied them up.

We find that he is guilty on count 1. The Crown has argued, but not very strongly, that this Court should also find accused No. 2 guilty on count 2, the robbery count. Briefly, there are two principles involved in regard to count 2. Generally, when there
20 is a common purpose in the minds of a number of persons to execute an unlawful scheme, each one is responsible for the acts of the other, if the act is one which comes within the contemplation of the persons concerned. Generally speaking, if after the attainment of the unlawful purpose further unlawful acts are individually committed, the responsibility is individual and not collective.

In this case No. 2, in our view, is guilty of housebreaking. On the evidence we assume that as he was about to assist in the loading of this safe; he
30 took fright when he saw the complainants' car. He may have come to some other arrangement with the other three.

That.....

That is possible. But it is equally possible that he may have taken fright. And we assume that he decided to run away and to leave his friends in the lurch. As far as his mental state is concerned at that stage, he may have thought that his friends might hold up the driver of this car. He may have thought that they might rob the driver of this car. But we do not know what he actually thought. He may not have given it a thought at all; and to that extent the Crown has failed to
10 convince us that accused No. 2 in fact did contemplate that the others would rob the driver of the car and use the car to remove the safe.

On this count, therefore, accused No. 2 must be given the benefit of the doubt, and he is found not guilty on count 2 and the alternative thereto.

Defence counsel address the Court on the question of sentence.

HIS LORDSHIP: I will consider the sentence which I should impose, and the Court will impose sentence
20 tomorrow morning.

(Court adjourned until tomorrow)
