137/1958

137/58

G.P.-S.1568732—1956-7—9,000. S. U.D.J. 445.

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

(Appellate DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

Capital.

HENRY MAZIBUKO

Appellant.

versus/teen

THE QUEEN

Respondent.

Appellant's Attorney Kerbel + J. (JHB) Respondent's Attorney
Prokureur van Appellant Prokureur van Respondent

Appellant's Advocate J. Unterhalter Respondent's Advocate Mr E. Tucker
Advokaat van Appellant Advokaat van Respondent

(Leave W.L.D)

Set down for hearing on: Wednesday 3rd Sept, 1958.
Op die rol geplaas vir verhoor op: 9.45-

1.3.5.7.11. (4A)

Appèl gehandhaaf, vonnis tersyde gestel, en saak na verhoorhof terugverwys vir oplegging van 'n ander straf.

Schreiner W.n.H.R., Steyn, Beyers, v. Blerk, + Price (W.n.) RR/A.

[signature]
Griffier 24/9/58.

Rekord.

IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA

(Appélafdeling)

Insake:-

HENRY MAZIBUKO Appellant

en

R E G I N A Respondent

Verhoor deur:Schreiner,W.H.R.,Steyn,Beyers,van Blerk,RR.A. en Smit W.R.A.

Verhoordatum: 3. 9. 1958. Lewerингsdatum: 24 - 9 - 1958

U I T S P R A A K

STEYN R.A. :- Die appellant het voor die Plaaslike Afdeling van die Witwatersrand tereggestaan op aanklagtes dat hy hom op 18 November 1957 skuldig gemaak het aan roof en aanranding met opset om moord te pleeg. Hy is op albei aanklagtes skuldig bevind en op 14 Mei 1958 op die aanklag van roof tot die dood veroordeel. Hierdie straf is opgelê kragtens Artikel 329(1) van die Strafproseswet, 1955, soos gewysig deur Artikel 4 van Wet No. 9 van 1958. Bedoelde wysiging, wat die oplegging van die doodvonnis by 'n skuldigbevinding aan roof te magtig, is op 21 Februarie 1958 afgekondig, d.w.s. voordat die vonnis opgelê is maar nadat die misdaad gepleeg was. Die appél is teen die straf, en die vraag vir oorweging is of dit die

verhoorhof/.....

verhoorhof vrygestaan het om die doodvonnis op te lê vir 'n roof wat voor die inwerkingtreding van die Wysigingswet gepleeg is.

Die tersaaklike gedeelte van die gewysigde sub-artikel (met die ingevoegde woorde kursief weergegee) lees as volg :

"Die doodvonnis deur ophang word deur 'n hoërhof opgelê aan enigiemand wat voor of deur bedoelde hof aan moord skuldig bevind word, en die doodvonnis deur ophang kan deur 'n hoërhof aan iemand opgelê word wat voor of deur bedoelde hof weens hoogverraad of verkragting *of roof (met inbegrip van 'n poging tot roof) indien dit bevind word dat verswarende omstandighede aanwesig was,*..... skuldig bevind word."

Volgens die woordbepaling deur die Wysigingswet in die Hoofwet ingevoeg, beteken -

" 'verswarende omstandighede' met betrekking tot -

(b) roof of 'n poging tot roof, die toediening van 'n ernstige besering of 'n dreigement om iemand ernstig te beseer. "

Ten behoewe van die appellant is betoog dat die Wysigingswet 'n nuwe straf stel op bestaande misdade, dat die nuwe straf nie ten aansien van misdade voor die inwerkingtreding van die Wet gepleeg, aangewend kan word sonder om hom retrospektief toe te pas nie, en dat die bedoeling dat hy aldus toegepas moet word nie voldoende uit die

Wet/.....

Wet blyk nie. By die beoordeling van die geldigheid van hierdie betoog, is dit nodig om daarop te let dat 'n wetsbepaling betreffende die straf wat vir 'n misdaad opgelê kan word, te onderskei is van prosesregtelike bepalings wat volgens Curtis v. Johannesburg Municipality (1906 T.S. 308 op bladsy 312), normaalweg alle daaropvolgende prosesse beheers, onverskillig wanneer die betrokke aksie ontstaan het. Gudelinus (de Jure Novissimo 5, 2 bls. 215) noem die reël dat 'n wet simpliciter spreek, op toekomstige sake slaan en nie op vergange sake nie, en voeg by dat hy onder toekomstige sake (negotia) verstaan, nie toekomstige regsprosesse nie, maar kontrakte, testamente, delikte of dergelike, tensy die wet juis handel nie oor die beslissing van die twisvraag (lis) nie maar oor die ordening en vorm van die regterlike ondersoek; want net soos in die dinge wat op die voorgelegde twisvraag betrekking het gekyk moet word na die wette wat gemaak was ten tyde van die kontrak, testament of delik, so moet, in die dinge wat op die ordening van die ondersoek betrekking het, gelet word op die tyd van die geregtelike optrede. Na my mening hoort straftoemeting nie by die reëling van die regsproses tuis nie maar by die voorgelegde vrae waarop 'n antwoord deur die regsproses gevind moet word. Volgens Gudelinus sou 'n hof dus by bepaling van die toelaatbare strafmaat of strafsoort ag moet slaan op die wetsbepalings

wat/.....

wat tydens die pleeg van die misdaad van krag was. Hiervoor is bevestiging te vind in Voet, Ad Pandectas 1, 3, 17. Hy sê nl. in verband met die reël teen terugwerkendheid dat indien 'n straf opgelê moet word vir 'n ~~delik~~ misdryf wat gepleeg is voor 'n nuwe wet wat die strawwe verskerp, dan moet die dwangmiddel nie luidens die voorskrif van die nuwe daaropvolgende wet ~~xxxxxx~~ toegemeet word nie, maar luidens dié van die vroeëre wet. Glück, Pandecten 1, 1, par. 21 bls. 144, spreek in 'n dergelike verband dieselfde sienswyse uit. Die reël, sê hy, dat positiewe wette nie op reeds verrigte maar slegs op toekomstige handelinge aangewend kan word, slaan ook op strafwette. Daarom moet by die bepaling van die straf vir 'n begane oortreding daarop gelet word welke straf in die tyd toe die oortreding begaan was, in die wette bepaal was, want eintlik het die misdadiger hom slegs dié straf op die hals gehaal, en nie die straf wat eers later, al is dit dan nog voor die end van die ondersoek, deur 'n nuwe wet ingevoer is nie. Hy beroep hom o.a. op Dig. 48, 19 1 pr., waarin bepaal word dat waar dit om 'n misdaad gaan, die beskuldigde nie die straf moet ondergaan wat sy stand toelaat op die tydstip waarop die oordeel oor hom uitgespreek word nie, maar die straf wat hy sou ondergaan het as die oordeel uitgespreek was op die tydstip toe hy oortree het. Ter illustrasie word die voorbeeld

genoem/.....

genoem van 'n vrygestelde slaaf wat bereg word vir 'n misdaad wat hy begaan het terwyl hy nog 'n slaaf was. Brunneman se kommentaar daarop is dat wanneer straf toegemeet moet word, op die tydstip van die misdryf ag gegee moet word en wel seker nie op dié van die veroordeling nie, al het die stand van die oortreder intussen verander. Hierdie digestaplek het betrekking op 'n verskil in strafmaat op stand gegrond, wat by die pleeg van die misdaad reeds bestaan het, en op die uitwerking van die verskil by 'n verandering van stand. Dit handel nie direk oor die huidige vraag nie, maar dien desnietemin, soos blyk uit Brunneman se opmerking, ter beklemtoning van die onderliggende beginsel dat waar 'n verskil in straf verband hou met die onderskeie tye waarop die misdaad gepleeg en bereg word, die tydstip van die misdaad die deurslag moet gee. (Vgl. ook Nieuw Nederlands Advysboek bls. 255 par. 25 i.f.). Dit skyn in ons reg veral die geval by 'n strafverhoging te wees. By 'n strafvermindering word ander oorwegings erken wat tot 'n ander gevolgtrekking kan lei.

Uit die voorgaande wil dit blyk dat die aanwending van 'n by wet verhoogde straf ten aansien van 'n reeds gepleegde misdaad, volgens die gemene reg as 'n retrospektiewe toepassing van die wet beskou word. Na my oordeel sou dit, op die grondslag van terugwerkendheid, 'n

retrospektiewe toepassing wees in 'n meer wesenlike sin dan die oneigenlike waarin bv. prosesregtelike bepalings soms met betrekking tot 'n eis wat voor die inwerkingtreding daarvan ontstaan het, terugwerkend genoem word. Hoewel ons strafwette veelal lui dat die oortreder by skuldigbevinding binne die perke van 'n aangewese maksimum strafbaar sal wees, is dit nie die skuldigbevinding nie maar die misdryf waaruit bedoelde strafbaarheid ontstaan. Sodra die misdryf gepleeg is, is die dader aanspreeklik nie slegs vir die sivielregtelike gevolge van sy daad nie maar ook vir die strafregtelike. Hy word onmiddelik aanspreeklik vir 'n straf binne die perke van die strafsoort of strafsoorte waarmee sy daad alsdan bedreig word. Daardie aanspreeklikheid duur voort totdat die ooreenstemmende reg van vervolging ingevolge Artikel 388 van die Strafproseswet, na verloop van 'n termyn bereken met ingang vanaf die pleeg van die misdaad, verjaar het, en die aanspreeklikheid daarmee verval. Dat die hof die straf wat ondergaan moet word eers later na skuldigbevinding bepaal, doen niks daaraan af dat die aanspreeklikheid vir straf, net soos die reg van vervolging met die oog op bestraffing, tevore reeds bestaan het nie. Die totstandkoming van so'n aanspreeklikheid by die pleeg van die misdaad, word ook veronderstel in Artikel 12 (2) (d) van die Interpretasiewet, 1957, waar-

volgens/.....

-volgens die herroeping van 'n wet nie die oplegging van 'n straf uitsluit nie wat "opgeloop is ten opsigte van enige mis-"dryf" ingevolge die herroepe wet. (Vgl. Rex v. Mvagalie, 1924 T.P.D. 263 op bls. 265). Die keersy van die aanspreeklikheid is 'n meegaande vrystelling van 'n straf wat bedoelde perke te buite gaan, 'n vrystelling wat die oortreder nie deur 'n hof ontsê kan word sonder om hom 'n onreg aan te doen nie. 'n Latere wet wat genoemde aanspreeklikheid verhoog of afbreuk doen aan die daarmee verbandhoudende vrystelling, sou 'n wet wees wat na 'n handeling in die verlede teruggryp om vanaf die inwerkingtreding daarvan die reeds ingetrede regsgevolge ~~daarvan~~ die handeling te wysig. In so'n geval sou dit juister wees om nie van retrospektiwiteit te praat nie maar van 'n wysiging van die gemene reg en die verandering van 'n reeds bestaande aanspreeklikheid en vrystelling, maar ook so'n wysiging en verandering sou, net soos retrospektiwiteit, nie sonder meer vermoed kan word nie. (Petersen v. Cuthbert & Co. Ltd. 1945 A.D.420 op bls. 430; Rose's Car Hire (Pty) Ltd. v Grant, 1948(2) S.A.466 op bls. 471). Ten dele sou die toepassing van die onderhawige bepaling op misdade voor die inwerkingtreding daarvan gepleeg, ook die doel van die nuwe straf verbystreef. Vir sover dit gerig is op afskrikking van die dader self, sou dit by 'n reeds gepleegde daad van alle

gevolg/.....

gevolg ontbloot wees. Letterlik word die nuwe straf weliswaar gemagtig met verwysing na 'n toekomstige skuldigbevinding en bestraffing, maar ek kan nie daarin 'n voldoende duidelike uitdrukking vind nie óf van 'n terugwerkende bedoeling óf van 'n bedoeling om 'n bestaande aanspreeklikheid of vrystelling te tref. Met die oog op ~~reeds~~ genoemde oorwegings laat bedoelde magtiging die vraag of dit op skuldigbevinding aan en bestraffing van reeds gepleegde sowel as toekomstige misdade slaan, sonder ondubbelsinnige uitsluitsel, en moet daarom aan die vermoede teen 'n bevestigende antwoord op daardie vraag gevolg gegee word. Die uitspraak in Director of Public Prosecutions v. Lamb (1941 (2) K.P. 89), waarna in Rex v. Loots and Anor. (1951 (2) S.A.132) en Rex v. Molomo and Anor. (1952(4) S.A.748) verwys word, hou uit die aard van die saak nie rekening met die oorwegings wat uit ons gemenereg ontstaan nie en wat ten gevolg het dat die onderhawige bepaling tekortskiet in die helderheid wat noodsaaklik is om die desbetreffende vermoede te weerlê.

Namens die appellant is ook in bedenking gegee dat die Wysigingswet, ten aansien van huisbraak en roof, deur die invoeging van spesifieke misdaadsbestanddele onder die benaming "verswarende omstandighede ",

nuwe/.....

nuwe misdade skep en dat aanwending van die Wet op sulke tevore reeds gepleegde misdade, op 'n ongeregverdigde terugwerkende toepassing daarvan sou uitloop. Deur die Hof is verder die vraag geopper of ~~the~~ die woordbepaling van "verswarende omstandighede", vir sover dit op roof slaan, gesien die weglating daarin van die woorde "deur die oortreder of 'n medepligtige ", wat in die woordbepaling voorkom waar dit op huisbraak betrekking het, nie die uitwerking het nie dat die doodvonnis by roof slegs opgelê kan word indien die veroordeelde self die ernstige besering toegedien het of met so'n besering gedreig het. Die gevolgtrekking wat ek bereik het, maak dit onnodig om op hierdie vrae in te gaan.

Om bogenoemde redes is ek van oordeel dat die appél slaag. Die straf word vernietig en die saak word na die verhoorhof terugverwys vir oplegging van 'n ander straf.

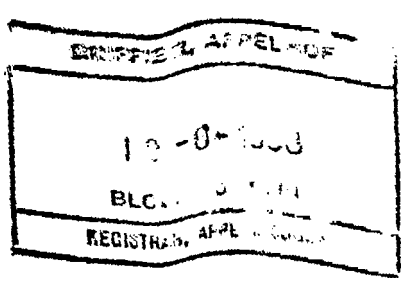
L v Stuyn.

Schreiner, W.H.R.
Beyers, R.A.
Van Blerk, R. A.
Smit, W.R.A.

} Stem saam

IN THE SUPREME COURT OF SOUTH AFRICA.

(WITWATERSRAND LOCAL DIVISION.)



REGINA

vs.

HENRY MAZIBUKO.

Found guilty of the crime of Robbery and sentenced to Death on the 14th day of MAY, 1958 by Mr. Justice Theron, at Johannesburg.

ON RESUMING:

J U D G M E N T.

THERON, J:-

In the course of this trial the Crown sought to place before this Court the statement alleged to have been made by the accused tothe Additional Magistrate Mr. van Zyl of Johannesburg. Because of the requirements of Section 244(1) of Act 56/1955, objection was taken to the admissibility of this statement, it being contended that the statement was not made freely and voluntarily. That issue required to be dealt with in the absence of the assessors, and after hearing all the evidence on that issue I came to the conclusion that the Crown had discharged the onus resting upon it to prove that the statement was in fact made by the accused, that he was in his sound and sober senses and that it was made freely and voluntarily, without him having been unduly influenced thereto. Because of the view that I held I did not consider it advisable to give my reasons at that stage, because of the question of credibility of the accused being a matter for serious consideration.

Before now dealing with the merits of the case, it is necessary for me to state briefly the reasons for coming to the conclusion to which I have come. There is no doubt that the Crown proved that the statement was made to the Magistrate; that it was made by the accused in his sober senses, and that he made it freely and voluntarily and without having been unduly influenced thereto. That onus

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can be discharged by the Crown, by direct evidence, or by facts from which the necessary inference may be drawn. In my view the law is that if on the review of all the evidence, whether led by the Crown and, or the Defence there exists a doubt upon this issue, the statement should not be allowed in. Counsel for the accused, in argument in dealing with this aspect of the matter, submitted that unless it could be found proved beyond a reasonable doubt, that the accused was untruthful, the statement should not be allowed in as evidence. In my view that is not a correct submission in law, since I can immediately conceive of a case where upon all the evidence before a Court, it may be found for reasons perhaps not present in the instant case, that an accused person was an utterly untruthful witness, yet upon all the evidence the Court may yet conclude that notwithstanding the untruthfulness of the accused, the Crown failed to discharge the onus resting upon it in terms of this Section. In my view the untruthfulness of the accused's evidence is but one of the elements albeit an important element to be considered in the light of all the evidence to determine whether the Crown has discharged this onus.

It is common cause that the accused was detained by two members of the C.I.D. on the afternoon of the 17th November, 1957. Because in my judgment dealing with the merits of this case, I deal fully with the circumstances of his being detained and arrested, I do not propose to duplicate it by here

/ repeating ...

repeating those facts. Be it sufficient for me to say that in regard to that - in regard to the accused being detained and arrested I unreservedly accept the evidence of Sergeant Redlinghuys and constable Kruger, that they pursued the accused into the yard of the Power Station of Johannesburg, that I accept the evidence of the gateman Mr. de Beer that the accused was in possession then of a revolver, and that the accused when caught by Kruger levelled this revolver point blank into the face of Kruger, and subsequently when across the fence on a bale of cables the accused again fired this revolver at Sergeant Redlinghuys. Thereafter he discarded this revolver, it was found in the yard, and whilst Redlinghuys had possession of this revolver the accused grabbed the barrel of the revolver with both hands, and in order to break his violent grip upon the barrel the assistance of Kruger and a by-stander was required. In this scuffle the accused was severely thrown to the ground, constable Kruger struck him several blows in his face, trampled upon his hands and upon his wrist to loosen the grip that he had upon this revolver. I have no hesitation in concluding that in those circumstances the accused sustained some injuries to his wrists and face.

The accused was taken to the charge office, where he made a statement to Sergeant Myburgh. Again this statement will be read in the main judgment and I don't propose to repeat it here. During the evening of the night of 17th November, the accused was taken out of the cells and taken

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to Dube Township and Sophiatown. He there pointed out in Dube, one house, and in Sophiatown two different houses. The evidence for the Crown is that the accused made a statement which need not be repeated here, and mentioned the names of three persons. He was unable to furnish the address where these persons could be located, but offered to take the police to these addresses, and in those circumstances it was said by the Crown theaccused was taken out of the Police station on the excursion to Dube and Sophiatown.

The accused in his evidence, and I understood it too from the cross examination by his Counsel before he gave evidence, alleged that this took place late at night. The accused alleged that early in the evening round about 9 - 10 o'clock he was fetched from his cell by Sergeant Booysen, taken to an office where the following acts were performed upon him: he says he was told to undress which he did, he was handcuffed, and while not being prepared to make any statement or communicate any names, a broomstick was inserted in the crux of his knees and through his elbows, he was suspended on this broomstick between two tables; at first a red tube was tied round his face and his breathing was restricted; he refused to divulge any information, maintaining that he had nothing to disclose. He says then a gas mask was employed and at some stage the air was so restricted that he became unconscious. While he was under the gas mask he says that he heard the voice of the one Sergeant, and he then felt an

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injury to the right side of his head. Not only were those acts committed upon him but he was kicked in his back, and he thought that the injury to his head was also caused by a kick and in addition he was prodded with a loaded electric stick; he contended that under this compulsion he was prompted what to say to the Magistrate the next day when taken to the Magistrate. He has given the details of what he was prompted to tell the Magistrate the following day, and he contended that not a single word in the confession which he subsequently made came from him but was induced into his mind by the prompting and the compulsion used upon him. In his evidence he stated that there were three people present in the room while the assault was committed upon him, Sergeant Booysen and a short thickset person and later there was present a youngish person. While he was suffering this assault he says he screamed very loudly and it brought to the office Sergeant Myburgh who did nothing to stop the treatment, but only said that this person is making excessive noise. He says it was because of this treatment that he then agreed that he would go to the Magistrate and would make the statement that he was prompted to make. He further added that he overheard Sergeant Booysen saying to the cell warder that the accused was not to be taken out of that cell unless he Booysen or some person concerned with this case came to take him out. That is in very broad detail the evidence given by the accused.

A doctor was called to examine the accused

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on the 21st of November; this doctor found two injuries to the right side of the accused's head in the temporal region, he found no other injuries or bruises. The accused did not draw the doctor's attention to his back and he did not tell him of the fact that he had this kick in the back as he now alleged. On the 19th of November, the accused was brought to Sergeant Myburgh who was then equipped with all the facts upon which these various charges now before us could be formulated, and Myburgh then considered it the time to charge the accused formally, for that reason the accused was brought to his room. Sergeant Myburgh tells us that the accused was quite at east in his office, and spoke to him freely and voluntarily stating that he was not going to stand alone in this matter and he was prepared to divulge the names of the others. The accused mentioned the names of some persons, and I may say those were the same names that Booysen and the other crown witnesses testified to having been disclosed by the accused to them the previous evening before they took him out. I should also add that why the excursion took place from Dube to two places in Sophiatown was because the accused mentioned the fact that the one person Lucky, had a Plymouth motorcar, and that if the Plymouth motorcar was not to be found at Dube, it might well be found at the premises of a person Lucky frequently visited. There was criticism of the police not having entered these houses that evening and carrying out a search, I am mindful of the

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criticism but to my mind the explanation given by the police are satisfactory to dispel any right to criticise them in this regard. Because of what the accused told Myburgh on the morning of the 19th, he was asked whether he was prepared to make a similar statement to a Magistrate. The accused was taken to the Magistrate's office in the presence of Mr. van Zyl an additional Magistrate, and there he made the statement in question.

Upon a perusal of the statement which is a fairly lengthy document I do not believe the accused at all when he says that this was in every detail a statement that was prompted to him. The accused came into the office of Mr. van Zyl where he was warned that he was in the presence of a Magistrate, and he was asked whether he had made previous similar statements and he was then told that there was no need for him to make a statement, that if he wished to do so it would be taken down and used in evidence against him, and on being asked what his reasons are for making this statement he said he wanted to speak the truth. Then the pertinent question was put to him as to whether any person had in any way forced him, induced him or compelled him to make the statement, and the answer was in the negative. Mr. van Zyl is an experienced Magistrate, a senior Magistrate, he is aware of the seriousness of confessions made and he satisfied himself - that the accused was in his sober senses and was making the statement freely and voluntarily. Now analysing the position, the accused finds himself

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in an office of a Magistrate, he himself says that if he had believed the person to whom he was then speaking to be a Magistrate, he would have told him of the events of the previous evening, and would have told him that he was compelled to make this statement the police having prompted him. But strangely he says that he did not believe the Magistrate when he told him that he was a Magistrate. I disbelieve the accused entirely when he says that. He was in the offices of the Magistrate, he knew that it was part of the Magistrate's Court building, there the Detectives were kept aside they were not brought into this office, and he was told by the Magistrate of that fact. I disbelieve him then when he says that he did not realise that he was in the presence of a Magistrate or didn't believe that he was in the presence of a Magistrate. I understood the cross examination by his Counsel of the Magistrate to be to the effect that he knew that he was in the presence of a Magistrate but still laboured under the impression that when he left that room he may receive similar treatment if he did not make a statement. That is not what he told me. The accused's evidence is subject to very serious criticism; I have mentioned the one aspect that he mentioned that he was kicked in the back; he did not inform his doctor of that, and his doctor certainly found no injury other than the two abrasions to his temporal region. But I need no medical evidence to tell me that if the accused's description of the events om that evening did take place, he unquestionably

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would have had some visible bruises on the back of his legs and arms too, the day the doctor saw him. He says that while he was so suspended he suffered severe pain in his knees and he was swung forwards and backwards by the officer, causing him further pain. Here, in my view the accused did have the injuries that the doctor found; how he sustained those injuries, in my view on the unacceptable evidence of the accused, remains a matter to be considered in the light of the treatment he received at the time of his arrest.

He was manhandled, he was severely thrown to the ground, and there he sustained injuries without doubt. One injury was visible because his mouth on the side was bleeding and there was dry blood seen by Sergeant Myburgh when the accused was brought in. Myburgh says he did not pay particular attention to the injuries the accused then had upon him, and he did not see any noticeable injuries other than the mark on the lip on the morning of the 19th when the accused was taken to the Magistrate's Court. The Magistrate did not observe these injuries, but the accused in his evidence suggested that he disbelieved the Magistrate in his statement that he was a Magistrate, because he suggested there was this very obvious injury to his head of which the Magistrate took no notice. I disbelieve the accused that these injuries were so obvious; I conclude that he is exaggerating that portion of his evidence in order to make his allegation against the police as strong as possible. But in

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my view the most important factors on credibility against the accused is the evidence of Sergeant Myburgh. The accused told me that the Sergeant turned up at the office when he was shouting loudly, and this was after 9 o'clock in the evening. Sergeant Myburgh was cross examined about this. He has satisfied me that he left the charge office at 6 p.m. on that evening, and living 18 miles out of town did not return to that police station thereafter that night. That being so, the accused is untruthful when he says that Sergeant Myburgh came in when he was being manhandled. I find that his motive for doing that is because he now has no explanation why he did not on the 19th tell Sergeant Myburgh of this rough handling. That was the only reason he could suggest, and it was a fabricated reason. Secondly, the accused testified to the presence of a short thickset person with Booysen when he was so being dealt with. Sergeant Engelbrecht was subsequently called to testify and it was then alleged that he was that person fitting that description. I cannot for one moment believe that the accused could have made such a mistake and be bona fide. Sergeant Engelbrecht is a tall lean person, in fact he is even taller than Booysen. He had no hesitation in naming Booysen so it can't be that he gave a description of the short thickset person to Booysen by mistake. The person he had doubt about was the second one and not Booysen. But not only is the accused an untruthful witness there, he is a cunning witness and very shifty. He suggested

/ that ...

that late that evening when he was returned to the police cells, the Sergeant instructed the cell warder not to bring him out from the cell the next morning, and in his evidence in chief he followed on to say that that person then stopped him from coming out the next morning when the prisoners were paraded. In cross examination it was pointed out to him that at 6 o'clock in the morning there is a change-over of cell warders, and he came out with a remarkable statement that it is quite easy, that that person carried forward the instruction to his relieving officer and it was that person, the second one who stopped him from coming out.

I heard the evidence of Mr. de Villiers the Head Constable in charge of the Police Station and the cells, and he gives a complete lie to the accused's version that he was detained in the cell that morning and not brought out on the parade. Again it is obvious what the accused's motive is, because he knows that on the parade the persons paraded were asked whether they had any complaints. Here now is an officer who on his own evidence is unassociated with any duress compulsion or injury inflicted upon him, and he could not find any reason to explain why he should not have said to de Villiers what had taken place the previous evening. To escape that position he places himself falsely in the cell at the time when the parade was held. I have no hesitation in rejecting his evidence in that regard as entirely false with false motives. I therefore am left with all the remaining evidence

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to which I have in a summary way referred. I come to the conclusion that the accused was not in the cells at all between 9 and 10.30, and that he was taken out of the cell on the excursion to Dube and Sophiatown, and I reject his statement that he was only taken out in order that he should show the police where he lived. The police were not interested in where he lived, he could have given them his address. On the balance of probability, if I may employ that as a term for assessing quality of evidence, I accept that he did mention names of persons and took the police to where they could find these persons. There are discrepancies in the evidence of Engelbrecht and van der Merwe, and perhaps between Engelbrecht, Booysen and van der Merwe, but to my mind discrepancies that one would expect in respect of events that were a side issue and taken place some months ago. I am satisfied on the evidence of these witnesses that the accused was prompted by his desire to place facts before them, he was minimising his participation in what they were alleging against him, and he wanted the police to have the others arrested. I do not believe that there is a shred of truth in his allegation that he was assaulted, and far less do I accept that he was told what to say, memorized it so well that he could repeat it the next morning. It is true the accused is an intelligent person and he speaks English and Afrikaans well, but when the details of the statement are considered I do not believe that he could have carried that in his mind

/ unless ...

unless those were facts which he had in his mind. For those reasons I came to the conclusion that the confession was admissible.

Now dealing with the merits of the case, a witness David Sandler testified to the identity of a revolver which was issued and licensed to him. He is the Vice-Chairman of the Johannesburg Harriers Athletic Club; he used this revolver for starting races at race meetings. He kept this revolver in his car and he last saw the revolver in his car on the 14th of August, 1956. On the 16th of August, 1956, when he again required required his revolver at a race meeting, he found it was missing from his car. Having parked his car at various places in the City of Johannesburg, he did not have the remotest idea where and when this revolver could have been removed from his car. However, it has been clearly established that between the 14th and the 16th of August, the revolver was unlawfully removed from his car. This revolver is produced and it bears the number of the revolver lost by Mr. Sandler. Guided by the appearance of the revolver Ex. 1 and definitely by the number on it, he was definite that this was the revolver that was stolen from his car during August 1956.

Im the third count of this indictment the accused is charged with the theft of this revolver, but I shall deal later with the other facts upon which we are satisfied that this is not so recent a possession of this revolver which was stolen as to require the accused to give an explanation which if

/ untrue ...

untrue would necessitate his conviction. I think Mr. Tucker for the Crown acted rightly in not asking for a conviction on count 3. The accused is accordingly found not guilty of the theft of this revolver on count 3.

The further charges upon which the accused is indicted are, count 1 Robbery in that on the 18th of November, 1957 at Johannesburg, he wrongfully and unlawfully assaulted Charles Wolpe, William Hlezane and Daniel Mokgabhabe and that he did there and then and with force and violence take from their possession two leather bags containing £1773.3.5. their property and in their possession, and that he robbed them of this money.

Count 2 is that of assault with intent to commit murder, in that upon the 18th of November, at Johannesburg he wrongfully and unlawfully assaulted Abraham Jacobus Kruger and Paul Burger Redelinghuys with intent to murder them.

The fourth count relates to contravention of the Arms and Ammunitions Act, in that the accused unlawfully possessed the fire-arm without being licensed to possess it.

The accused has pleaded not guilty to all these charges. These charges are brought upon the following facts. Mr. Charles Wolpe is the Secretary Bookkeeper of various firms in Johannesburg. He prepared the bank deposits on behalf of these firms, and at about 11.30 a.m. on the 18th October, 1957, accompanied by two native employees William and Daniel, he left his office at 67 Pim Street Newtown, with an amount

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that he is uncertain of, but he says it was no less than £1700 in two bank bags. They were on their way to deposit these amounts to the credit of various firms at the nearby Barclays and Standard Banks. William carried the one bag and Daniel carried the other. The three of them walked close together. They turned from Pim Street into Becker Street and walked along the Eastern pavement on Becker street, whenapproximately 70 paces from the nearest Bank they crossed over Becker street to the Western pavement, and no sooner did they reach this pavement when Mr. Wolpe noticed a native coming up from behind them going round them and suddenly confronting them with a revolver. This native uttered something which Wolpe did not hear clearly, but which William and Daniel say was to the following effect. William saying "that you keep quiet if you speak I will shoot you." Daniel saying: "if you move I will shoot you." Immediately two other natives appeared on the scene and the two bank bags containing the money were snatched from the two carriers William and Daniel. The three persons were dumbstruck with shock and fear, Wolpe to such an extent that he has no clear recollection of what went on. As an instance can be quoted that he did not mention being held by any of the assailants while William saw two of the natives grab hold of Wolpe, and Wolpe received what was a painful injury and was unable to account how he received that, probably in the course of coming into contact with the car. However, all three these witnesses are in agreement, that the natives wore

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dark blue overalls and all three agree that the revolver they saw in the hand of the first native looked similar to the one now before Court Ex. 1. According to these Crown witnesses, after the bags of money were snatched away, Wolpe and William noticed a dark blue or black Chevrolet car in the street. Wolpe could not remember what happened to their assailants, but William testified to seeing two of them run to this car and get into it. His impression is that the native who grabbed his bag entered the car but he then carried both bags of money. Wolpe ran to the side of the car to endeavour to take out the ignition key, but when he approached the car on the one side, he received a blow on the side of his face. In this car there was a fourth native also wearing dark blue overalls, occupying the driver's seat. These witnesses noticed this Chevrolet car reversing, and there is some uncertainty as to whether only one or two revolver shots were fired either from this car, or by persons immediately next to this car. However, in reversing the car collided with a stationary delivery van, pushing it out of position and so clearing its way to move into Pim street. This car then moved into Pim street and turned the corner. To show how Wolpe was taken aback by these circumstances, he at first thought the set was a joke, but soon realised the seriousness of the hold-up, and in the anguish of the moment he shouted for help. This attracted the attention of witnesses William, Welthagen and Pottas, who rushed into the street from the premises of the Empire Fresh

/ Meat ...

Meat Supply at 62(a) Becker Street. Witness Abel was standing outside, he also had his attention attracted by the shouting. They all saw a native carrying a bag in the one hand and a revolver in the other, running towards this Chevrolet car, the description corresponded. Welthagen saw this native enter this car on the right hand side. According to him it was a 1948 model a dark blue Chevrolet car. He advanced to a position some four paces from the native who entered the car and according to him this native turned round and fired a shot in the air, obviously to scare him away.

He saw the car reverse and described the collision with the stationary van. From there the car moved off in Pim Street, turned the corner into Bree Street and then travelled East in Bree Street. He says that because of heavy traffic at the time, the car could not advance rapidly on it's way, and he was able to follow it on foot for some distance, until it disappeared from his sight in Bree Street. He noticed this car carried a T.J. registration number. He remembers that the numbers were a three a four, a five and a six, but he could not remember the sequence of these numbers. From evidence to which I shall refer later a dark blue 1948 model Chevrolet car was later found damaged and abandoned at the corner of Pritchard and Sauer streets. In particular, attention is to be drawn to the fact that the rear of this car was damaged, probably in reversing up against something. This car had on false registration numbers, T.J. 4536.

/ Witness ...

Witness Jan Pottas also saw a native carrying a bag in one hand and a revolver in the other, running to this car. He saw the native fire a shot into the air and then enter this car. According to him this native wore a dark blue overall and a dark brown balaclava cap. He like the other witnesses stated that the revolver Ex. 1 is similar to the one he saw in the hands of this native. Witness Abel described a similar scene and he testifies to two shots being fired, the one being fired at about the time the car collided with the delivery van; the sound may have been dulled by that crash. Witness Abel similarly described the native as wearing a blue overall and a brown cap. The question is was it a cap. An exhibit was produced in Court which is a brown balaclava cap, rolled as it was on the day when this case commenced, a person may easily mistake that headgear for a cap. Now as almost invariably happens in cases of this kind, with rapid movements, a short scene filled with fear and shock, the eye witnesses, not only the persons mentioned in the indictment but the others to whom I have referred could give no clear description of the assailants and at a parade held on the same afternoon some hours later, all but one witness were unable to identify and point out any person on the parade. This person pointed out two persons not concerned in this hold-up. At 11.30 on the day in question it so happened that Detective Sergeant Redelinghuys and Detective Constable Kruger were on patrol duty in a police car in Bree Street. We accept that, at the

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time they were unaware of the events in Becker Street to which I have already referred. Redelinghuys was driving this car with Kruger as his passenger. They were driving West in Bree Street, their attention was attracted by a native in a dark blue overall, wearing a brown balaclava cap, running fast along the pavement in Bree Street, in the same direction as they were travelling. Sergeant Redelinghuys immediately noticed this native had a revolver in his right hand; this Kruger did not notice, but they both agree that they saw this native fumbling to put something into his overall pocket while he was running. Redelinghuys stated that this was the revolver which he saw in the hands of the native as he ran. While driving this car, Redelinghuys could not keep his eyes focused on this native, he had to attend to the road and keep a look-out as to where he was driving. Intermittently therefore he sighted the native, he instructed Kruger to keep him under observation. Redelinghuys is able to say that according to the direction of the running, the manner of running, the build of the person and the clothing that he wore, he was certain that the person they subsequently confronted was the person he saw from the beginning. Kruger stated that he kept this person under observation throughout and he saw him run across a car parking area along the driving lane. As they expected him to emerge at a corner of Jeppe and Gogh streets, they travelled round to that corner to waylay this native. Kruger says that he could see the native

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all the time, by his head and shoulders showing above the parked cars. The native ran through out and as they waited the native ran towards them, but when about 20 yards from them Kruger alighted to affect an arrest; this native immediately turned and ran into the main gate of the Johannesburg Municipal Power Station grounds. Kruger was in hot pursuit; Redelinghuys turned his car and followed them. At the gate there was a witness de Beer, the gate-man on duty, he is an independent witness, he took no active part in either assisting the police or securing the arrest of the accused. He saw the native enter followed by Kruger who was then rapidly gaining ground. He described the dress worn by this person in the manner that I have already referred to. According to his evidence and this is confirmed by Kruger, very soon after Kruger the native entered the yard, Kruger caught hold of him by the right shoulder and jerked him round. De Beer saw the native thrusting a revolver forwards, aimed at Kruger's face at point blank range. Kruger confirms this. He pulled his head aside and he says he heard a click as the trigger was pulled and the striker pin struck; he pulled his head aside, and no doubt in the anguish of the moment the native managed to jerk free from Kruger and ran further into the yard, still followed by Kruger who fired two shots at this native but missed him. By this time Redelinghuys was in the yard, and he followed on foot. He grabbed Kruger's revolver and pursued the native. This native the accused, was subsequently arrested. I may add that

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de Beer had no hesitation in identifying the accused, but that may well be due to the fact that he saw the accused there after the arrest. Nevertheless, in the yard the accused ran to a fence, he jumped over the fence on to rolls of cable. In the meantime Redelinghuys attempted a shot at the accused but his revolver misfired. When the accused was on the other side of the fence and on top of rolls of cable lying in this yard, he turned and at point blank range pointed this revolver at Redelinghuys and fired a shot. The percussion was heard; the sound of the bullet was however not heard. Redelinghuys stated that the gun was levelled straight at him, but strangely enough he did not hear the sound of the lead passing. The accused jumped off this roll and ran further followed by Kruger and Redelinghuys; they lost sight of him temporarily but they were directed by a witness Joas Matotse and soon they again saw the accused still running - this time running towards a stationary Pontiac motor-car; he entered the back of this motorcar and tried to conceal his presence inthe back of the car. He was however found by Redelinghuys and Kruger and was detained. According to these two witnesses the accused no longer had a cap on his head; this cap was found in the car between the two seats. Redelinghuys took out the cap and handed it to the accused; Redelinghuys says the accused immediately took off the cap and threw it back into the car. They searched the accused and found no revolver on him, but because of events before they realised there

/ must ...

must be a revolver in the vicinity, the accused was taken back to the place where he was when he fired the shot at Redelinghuys. The aid of others were called in and near the rolls of cable where the accused fired from the revolver Ex. 1 was found by Joas and handed over to Redelinghuys. According to the evidence of Redelinghuys and Kruger the accused was then held by Redelinghuys with one hand, and in the other hand he received the revolver and held it; the accused immediately grabbed this revolver by it's barrel with both his hands. A struggle ensued, Redelinghuys threw the accused violently to the ground over his leg or knee and Kruger and this strange European came to his assistance to break the accused's grip. I have already referred to the injuries that he received in his face and on his arms and hands.

The accused was taken to the Fordsburg Police Station where he was detained. When the revolver was examined by Redelinghjys in the Power Station yard, he found in the revolving Chamber one empty catridge shell and one unspent round of ammunition, with an identation in the percussion cap as though struck by a strikerpin of this revolver but that it misfired; then he found one undamaged live round of ammunition. In the barrel there was lodged a leaden portion of a spent bullet. Bearing in mind the accused's evidence with which I shall deal later I may say at this stage, wehave come to the conclusion without any hesitation that the lead of the bullet fired at Redelinghuys was the lead that lodged in this

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barrel. It is by the Grace of Providence that this happened else we feel sure that Redelinghuys would probably have been seriously injured if not killed. We also have no hesitation in finding that the misfired bullet was the one aimed at Kruger at point blank range. This then is certainly another case illustrating the brave and gallant men we have in the Police force, who in the loyal execution of their duty do not hesitate to face death. Both Sergeant Redelinghuys and Constable Kruger deserve our highest praise. As a result of radio reports received, Sergeant Booysen at the Fordsburg Police Station went to the corner of President and Sauer Streets where he found a 1948 dark blue Chevrolet car carrying false number plates to which I have referred, as T.J. 4536. The licence and Insurance discs were altered to reflect this number. This car was stolen from Mrs. Dampso between 8 and 11 p.m. on the 17th November, 1957 in Hancock street. This car was abandoned and damaged and I have already referred to some of the damage. From the description of this car given by the eye witnesses to the robbery of Wolpe and his assistance, the numbers given by Welthagen, and the nature of the damage to the back of this car, probably caused in the collision with the parked van, we have no hesitation in finding that this was the car used in the armed robbery of Wolpe and his assistants. After being detained, but before being being formally charged, the accused made a statement to Sergeant Myburgh of the Fordsburg Police Station. The accused spoke in Afrikaans, he

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is fluent in Afrikaans. There was no dispute in regard to this statement that the accused was in his sound and sober senses, and that he made the statement freely and voluntarily. The statement reads as follows: He gives his address at Dube and tells where he is working.

"Ek was verwittig daarvan dat ek in die teenwoordigheid van 'n Vredes-beampte is. Ek was meegedeel van die bewering teen my en ek is gewaarsku dat ek nie verplig is om enige verklaring af te lê nie, en antwoord daarop nie, maar dat dit my vrystaan om vrywilliglik 'n verklaring af te lê uit my eie vrye wil indien ek sulks verkies en dat my verklaring neergeskrywe sal word en in getuienis gebruik mag word. Ek verkies om 'n verklaring te maak: Op die 18/11/57 om 10 v.m. was ek nog tuis. Ek trek toe die blou oorpak aan om te verf by my huis. Toe kom 'n onbekende ou man wie in my agterplaas moes kom spit. Ek gaan toe na die stad met 'n Rooi bus, nie van my firma nie. Ek het in Wesstraat, Stad, om 10.45 v.m. afgeklim. Toe ry ek met 'n bus van P.U.T.C. tot by Kerkstraat. Daar kom 'n privaat baas na my. Hy rig 'n rewolwer op my. Ek hardloop weg. Hy skiet op my. Ek staan en hy en 'n ander blanke man vang my. Ek het in 'n motorkar gehardloop en ingeklim. Daar vang hulle my. Ek kan nie die mense vandaardie kar. Hulle soek na 'n rewolwer. Het my visenteer en niks gekry. Skielik, tussen baie mense, sê hulle hier is jou rewolwer. Ek weet niks van dit nie. Dit is nie my rewolwer nie. Ek praat Afrikaans."

/ Then ...

Then on the 19th of November, the accused made a statement to the additional Magistrate. I shall deal with that statement later.

The accused stated in evidence that he worked for P.U.T.C.O. as a driver conductor; he came off duty at 8.50 a.m. on the morning in question the 18th November, at the Kliptown depot; he went home to Dube; he reached there at about 9.30 in the morning. He took off his work clothes and put on his overalls; then he described the coming of the elderly man whom he had asked to dig for him in the garden. In his evidence in chief he said that he had that morning determined to go to town. He testified to giving this old native the tools to work with, and stated: "I went inside and washed my soiled hands. My plan was to go to town, I was to have a party on the 28th of November, and had to have my invitation cards printed in Sophiatown. I had to get the wording from someone at the Central Depot. I had arranged with this person that I would be there between 11.30 a.m. and 12 noon to get the wording." He then testified to travelling by various buses until he reached a place on the corner of Jeppe and Gogh streets. He alighted from this last bus which he was travelling in, and ranacross the road because he said he was in a hurry to get to this person to obtain the cards and to return quickly to his home; he said he then suddenly saw a car, which he learnt subsequently was the car driven by Redelinghuys carrying two persons. He says that Kruger jumped out of this car and told him to stop. He

/ moved ...

moved back, fearing that he would be shot he turned back and ran into this yard. He denied that he was in possession of any revolver, he also denied the evidence of the Crown witnesses that he levelled the gun at Kruger, and denied that he fired at Redelinghuys. He stated that after his arrest there was some scuffle about this revolver, he says thatthe Crown witnesses are untruthful in their account that what happened was that the Sergeant levelled the gun at him and because he was frightened he merely pushed the revolver away so that it was not pointing at him. Incross examination the accused may have forgotten what he said, because he now did not seem tocome to the Central Depot to obtain the wording for his tickets but in fact to collect tickets which were already printed. The accused certainly was most unconvincing in describing to us what his reason could have been for running in the manner he ran. He admits having been dressed on that day in his ordinary clothes with the overalls now before Court over his clothes and that he was wearing this balaclava cap. He stated that was only because when the old man failed to turn up at his house to carry on with the digging. he started to do the digging for the time being while he was there; and because the bus suddenly turned up, there was no time for him to take off his overall, he then proceeded to town dressed in the overall. We have no hesitation in rejecting the accused's evidence as a tissue of lies. We find that he war in possession of this revolver Ex. 1 and we find that

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he levelled this gun at Kruger and Redelinghuys in the manner as described by them. We also accept that when the revolver was retrieved and in the hands of Sergeant Redelinghuys, the struggle took place that they testified to and that the accused was lying about the revolver being pointed at him. Significant evidence is that of Redelinghuys that when this balaclava cap was handed to the accused, he tried to throw it backinto the car. The most probable explanation for that is that the accused realised that this is the type of thing that could serve, and could assist persons in identifying him, and would be sinister because of the ease with which it could be used to conceal the features of the persons wearing it. We have no hesitation in accepting that he tried to discard this balaclava cap. We therefore come tothe conclusion that the accused was dressed in this overall, wearing the balaclava cap, and we also accept the evidence of Redelinghuys and Kruger that they saw the accused not running from a bus, but that he was running in the manner I have already described in Bree Street, and that he was at that time handling this revolver. That brings one to the conclusion irresistibly that Welthagen is correct when he says this car moved into Bree Street. Two witnesses saw aperson dressed in a blue overall and wearing a balaclava cap at the scene of the robbery. The accused has falsely denied being in possession of this revolver and in our view has given a false reason for having the overall on, on that day and also this cap. We have

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no hesitation in concluding that he was running away that day with the revolver, because of what had happened in Becker Street,and we have no hesitation in coming to the conclusion that he was one of the persons partaking in this robbery. It is clear that this car involved was stolen the night before it was used in this robbery, that the accused was a member of a gang of four persons taking part in this robbery, usingthis car in making their get away, and we have come to the conclusion that this was an armed robbery. The accused had in his possession the revolver shortly before he was detained; The Crown witnesses Mr. Wolpe and his two assistants described a person who was wearing a blue overall having that revolver and being the person who pointed that revolver at them and issuing the threats. Very close to the scene and very soon thereafter the accused was seen tallying with that description; he was running away with this revolver which he tried to conceal but was unsuccesful because of the fact of the police being on the scene.

On all the evidence therefore we have come to the conclusion without any doubt that the Crown has proved the guilt of the accused on the counts which I have recited that is on count 1 Robbery, count 2 Assault with intent to murder, and Count 4, the contravening Section 4(1) ofAct 28/1937. We have also come to the conclusion without any doubt that the accused was the person who either levelled this revolver at the persons robbed, and heissued a

/ threat ...

threat to do them grievous bodily harm should they stir or shout, and even if we err in that regard we find that the person who did confront Wolpe and the two native witnesses was armed with a revolver, and did issue such a threat. It has been contended on behalf of the accused that there is no evidence that that revolver was a loaded revolver, affording that person the opportunity of giving effect to his threat if he desired todo so. Secondly, it was contended that the accused could not in the particular circumstances of this case, if he were not that person, have had a reasonable expectation or foresee reasonably that such person would issue such threats or carry out such threats. But as I say we have come to the conclusion that he was that person armed with Ex. 1, that Ex. 1 was in fact loaded because thereafter he used it in the manner on the police towhich I have already referred. But if again we err in that regard, we have no hesitation in concluding that on all the evidence this was a premeditated attack where the participants were armed with predetermination and it is idle for a person who takes part in such a robbery to say although I knew that my colleagues were armed I could not reasonably expect that they might use threats that they would carry out those threats of inflicting serious bodily harm. That is the very purpose for which they carry the arms to instil fear in the minds of their victims, and for that purpose they arm themselves to effect their purpose as rapidly as they can, by issuing real threats to induce their

/ victims ...

victims not to resist.

We have therefore come to the conclusion that the accused is guilty on count 1 in terms of the special definition prescribed in Section 1 of Act 8/1958. There remains for me to deal with the question of the confession: We have so far disregarded the confession for the purposeof our conclusion, but if we are to have regard to the confession at all, we have unanimously come to this finding that according to this confession the accused admits to having been a party to this robbery, and this is what he stated:

"Ek is werksaam by Putco; gister om 8.50 v.m. het ek huistoe gegaan. n Ander naturel wie ek gestuur het om te spit het by die huis aangekom. Ek het my groen oorpak aangehad. Now Imust immediately say that "groen" here is incorrect, it may be due to the interpretation of the native word which has an equal meaning "groen of blou", and probably it is due to theinterpretation. "Ek het die naturel gesê om aan te gaan met spit en ek het stad toe gekom. Ek het in n vriend van my se kar gery. Ons het saam na die stad gekom. My vriend het die kar in Kerkstraat parkeer en vir my gevra om vir hom goedere te help dra. Hy het my gesê dit is tafel enstoele. Daarna het ek gesien my vriend haal n rewolwer uit die kar. Hy het aan my gesê "nou gaan ons werk." Hy het gesê as ek roer sal hy my skiet. Dit was terwyl ons op pad was na die werk. Ons het nadie Cold Storage gegaan. My vriend het gesê ek moet die witman wat saam met naturelle uitkom vasgryp. My

/ vriend ...

vriend het gesê hullesal geld by hulle dra. Die witman het uitgekom. My vriend het na die witman gegaan met die rewolwer en dit op die witman gerig. My vriend het aan my gesê "vang hom". Ek het die witman gegryp. Daar was ander saam met ons. Hulle het die geld afgeneem van die witman en weggehardloop. Ek het die witman gelos en ook weggehardloop. Terwyl ons weghardloop het my vriend die rewolwer aan my oorhandig. Ek het dit geneem en dan gehardloop. Ek het gehardloop tot by "Market Square". Ek het 'n witman na my sien kom met 'n rewolwer. Hy het geskiet. Ek het weerbegin hardloop en in die lug geskiet. Ek het die witman skrik gemaak dat hy mynie moet skiet nie. Ek het in 'n kar gespring. 'n Naturel was die bestuurder. Ek het niks aan die naturel gesê nie en op die agterste sitplek gaan lê. Op hierdie stadium het ek aldie rewolwer weggegooi. Ek het die naturel gesê om aan te ry. Hy het gevra waarheen. Hy het gestop waar die Polisie my arresteer het. Die polisie het my teruggeneem in die rigting wat ek gekom het en die rewolwer opgetel."

As I say if we have to have regard to that statement, we are compelled to the view that the accused was present at this robbery and took part therein. But in the light of all the evidence, we feel that he has here made a statement to minimise his participation as far as possible and to cast the blame as far as possible upon the others. On the evidence as I have said before, we have come to the conclusion that he participated in this crime and that he is

/ guilty ...

guilty as Ihave stated before.

DEFENCE COUNSEL ADDRESSES THE COURT IN MITIGATION/

HIS LORDSHIP: I shall pass sentence tomorrow.

- COURT ADJOURNS -

ON RESUMING on 14th MAY, 1958 at 10 a.m.

JUDGMENT ON EXTENUATING CIRCUMSTANCES.

THERON, J:-

Henry Mazibuko, you have been found guilty of most serious crimes. In determining what I assess as the proper penalties I have entirely disregarded the previous convictions proved against you. Without any fear of contradiction I confess the most difficult task of a Judicial Officer is the imposition of a sentence upon a convicted person. There is no thumb rule to determine what is aproper sentence in a case.

You Counsel has most eloquently addressed me in mitigation. He has argued that the crime of robbery of which you have been convicted was committed before the passing of Act 9/1958 which now empowers a Court upon a verdict such as the one returned against you of imposing the extreme penalty. Your Counsel conceded, right in law, that the sentence is to be determined in terms of the law as at the time of conviction. He nevertheless pressed me to hold that by the effect of this Act a new offence was created/...

created which was not such an offence when the present crimes were committed by you. Secondly, and perhaps more correctly alternatively, he contended that the new penalties now provided for the crime you are convicted of should not be made to have retrospect effect. Your Counsel has contended that although in the Act reference is made to a threat to committing grievous bodily harm the extreme penalty should only be imposed in cases where grievous bodily harm was committed.

I have given most earnest and serious thought to what your Counsel has urged upon me. I am compelled in assessing the penalty, again to view the facts which have been found to have been proved in your case, and according to these facts to impose what I consider a proper sentence. The sentence is imposed within the limits of the jurisdiction of the Court according to the law as it is upon this date. In my view the provision of the Act 9/1958 donot create new crimes but prescribe as from the date of the promulgation of the Act the penalties it is competent for a Court of Law to impose. In my view there is nothing retrospect about it at all. Penalties are provided as fitting tocrimes not because a criminal meditates what he would receive; if that were so there would be no capital crimes in these Courts. A penalty is provided as fitting to cases, not because of your motives but to protect the citizens and their rights. Where serious crimes are perpetrated with such regular pattern thatit deserves the capital punishment, I do not think

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the Court should shirk it's duty. Crimes of this kind are far too prevelant in Johannesburg, they are a daily occurrence. Upon the proved facts as accepted by this Court, a car was stolen on the night before the crime was committed and then several hours thereafter this car was used only for the purpose of this robbery, no doubt after what your associates considered to have been a succesful robbery, the car was left in a damaged condition. This is one feature of proof of the very early stage at which this crime was designed. You were armed with a lethal weapon, a revolver loaded with at least three rounds. One misfired when you pulled the trigger in the face of Kruger but this fortunately misfired. The second you fired at Redelinghuys at point blank range and this again fortunately lodged in the barrel of the gun. The third live catridge was found in the magazine and according to the evidence - we have made reservation in accepting that at least one if not two shots were fired in Becker Street where the robbery was committed, which leads me to the conclusion that at least one if not more of your associates was armed with a loaded gun, and that that was the gun used at the scene of the robbery because no further empty shells were found in the breach of your gun. I have been asked to divorce my mind as faras humanly possible from the events that took place in the Power Station yard where you fired these shots at the police, and I have been asked to do that in assessing the proper sentence to be imposed upon the

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count of robbery. Here again I regret I am unable to accede to this submission because in my view the conduct of a person prior and subsequent to his criminal conduct is most relevant in determining his intentions and his state of mind at the time of committing the crime. I have no hesitation on the facts in concluding that you were in this preconceived robbery from the very outset. You dressed yourself in a fashion like your confederates namely a blue overall such as to your knowledge is commonly worn by native labourers where the crime was committed. That will make your identificaion by persons assaulted more difficult; but to make your identification even more difficult you wore a balaclava cap which you tried to discard when arrested. You carried a loaded weapon which has on it's appearance been identified by the Crown witnesses as being in the hand of the native who confronted them when the threat was issued. In fleeing from the scene of your robbery, and very close thereto you were confronted byKruger and Redelinghuys and it seems an irresistible conclusion based on probability that what operated in your mind at the time was that you were now being confronted by persons arresting you for what you had done. With that realisation you did not hesitate to use your weapon in the circumstances to which I have already referred. That compels me to the view that if Wolpe or one of his assistants or all three of them had struggled when you or anyone of you were robbing them you and also your associates would not have hesitated

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to use your revolver loaded as it was to kill or at least incapacitate those attempting to frustrate your plans.

Your statement in your confession that you were drawn into this carefully planned robbery under a threat is a fantastic story as is the whole of your evidence and indeed your evidence about collecting the printed cards for the celebration. Daily warnings are issued by these Courts and very severe penalties imposed for robberies, yet daily this type ofcrime some less some more serious, are tried in these Courts. Whether it is because of the faulty identification by eye witnesses of the culprits and consequent acquittals, Idо not know. In my view in a case such as this where the perpetrator is identified and a carefully prepared plan executed with serious threats issued by the person holding a loaded fire-arm, I should not shirk in my clear duty. Taking all the facts into most careful consideration I feel I shall be failing in my duty if I do not impose the supreme penalty in your case.

- SILENCE IS CALLED FOR -

REGISTRAR: HENRY MAZIBUKO you have been duly convicted of the crime of Robbery, know you or have you anything to say why sentence of death shall not now be passed upon you according to law?

ACCUSED: The Court has found me guilty and I ask the Court for mercy. Have mercy on my children.

/ My ...