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125/1958
U.D. 445

G.P.S. 1568732-1956-7-9,000. S.

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

Appellate

DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPEL IN STRAFSAAK.

SIMON MOTHLABANE

Appellant.

Ingaol.

versus/teen

THE QUEEN

Respondent.

Appellant's Attorney S. Muller
Prokureur van Appellant

Respondent's Attorney JHB
Prokureur van Respondent

Appellant's Advocate E. J. Haddad
Advokaat van Appellant

Respondent's Advocate P. E. Roux
Advokaat van Respondent

(Leave WLD) Set down for hearing on: Friday, 14th Nov, 1958.
Op die rol geplaas vir verhoor op:

2.5.9.10.11 (13) 9.45 - 10.15

Appeal dismissed. (No written judgment).

Coram: Hoexter, Beyers, Hall (Actg.), Price (Actg.) et Smit (Actg.) JJA

Alexander

L REGISTRAR
14/11/58

burdened with many cases which have been awaiting trial from last year, and the matter of a retrial would mean that some other accused would have to sit longer in gaol. The crown opposes the aspect of a retrial. The only aspect is justice has to be done and the Crown feels if the accused wants a retrial, if he requests it, it will be difficult to oppose it.

HIS LORDSHIP: I have never met such a case as this.

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MR. ROUX: I understand there is a decision a Natal Case an appeal from the Magistrate's Court in which after judgment the accused applied for Counsel to represent him in mitigation of sentence. It was refused by the Magistrate, went on appeal and the conviction was set aside.

HIS LORDSHIP: Oh yes a plea in mitigation normally comes after judgment, before verdict.

MR. ROUX: That is the only case where anything of this description has happened.

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HIS LORDSHIP: Tell the accused that I can't entertain the idea of a retrial. This request should have been made at a very much earlier stage. I shall now proceed to give judgment.

J U D G M E N T .

DOWLING, J:-

The accused in this case is charged with robbery on one count and attempted robbery on the second count. The first charge relates to an occasion on the 1st October of last year,

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when it is said that the accused and others assaulted one Thomas Mothlose and robbed him property of which he had the lawful possession and custody.

The second count relates to the 8th October of last year when it is said that the accused attempted to rob the same complainant Thomas Mothlose.

Now Thomas Mothlose was employed as a driver of a delivery van. His employers were Solarsh & Co., Ltd., Merchants. Thomas Mothlose was the driver of this van at the time. On the 1st October Thomas set out with another native also employed by Solarsh & Co., one Freddie Zungu. They set out on the afternoon of the 1st October to deliver goods to purchasers. After dark the van still had some cartons in it. The exact number and contents of these cartons have not been established, but according to the witness Freddie there were several. The van apparently drove past the Orlando Power Station where a black Chrysler motorcar passed it and stopped in front of the delivery van at the intersection of the road proceeding to Roodepoort. The van drew up behind the motorcar. After it had stopped Thomas says that four men alighted from the Chrysler car and came running in the direction of the van. He said that the van's lights were on and he was able to see clearly. One of the men he recognised as the accused, whom he knew by sight. The others whom he had not seen before he would be

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unable to recognise or identify. He said that the accused assisted by another man who had a weapon which looked like a revolver in his hand, pulled him out of the car and two men at the same time did the same thing to Freddie. The accused's attackers demanded money and the key of the van. Thomas said that he had no money but the key of the van was extracted from the pocket of his dustcoat; the van was opened and he and Freddie were thrown into the van at the back and locked up. The van was then driven off by one or other of the attackers. After it had proceeded some distance it stopped and efforts to restart the engine apparently failed. The van was opened and Thomas was ordered to start the car. He was put in the driving seat and saw what the cause of the van's non-starting was; he did not disclose this but said that these other men had broken the car and it would not start. I should mention at this stage that this delivery van had a diesel engine as it was explained by Thomas and Mr. Emmanuel Solarsh, a member of the firm, what was likely to have happened in this case. I need not go into the details. Discovering that they could not start the van, Thomas says he was put back into the van and the door was closed. Strangely enough it was not locked, so that when the Chrysler car which had followed behind the van was driven off Thomas was able to drive the van together with Freddie to the Moroka Police Station. He said he was not

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able to take the number of the Chrysler car.
I should mention that after the van had stopped, the goods which were in the van were removed and placed in the Chrysler car.

The next episode took place at Dube Station. On that occasion the van was again driven by Thomas, he was accompanied by Edward Mazibuko. He said that he was driving in the station premises when a Chrysler car similar to the one that he had described earlier and driven by one man drew up in such a way as to block the path of the van. Thereafter Thomas said he became aware of the accused at the window of his car on the driver's side; with the accused were four or five other natives. Thomas was unable to say from whence those natives came. He said that it was a dark place but the accused was quite close to him and he was able to see him and recognise him. He was pulled out from his seat and taken to the back of the van where money was demanded and the key of the van. He said that the accused struck him in the face with the fist and that someone who formed part of this gang of four or five natives said "no don't hit him stab him." Thomas was in fact stabbed in the buttock. This account was confirmed by Edward Mazibuko. I should mention that neither Freddie Zungu or Edward Mazibuko were able to identify any of the attackers and were unable to say whether the accused was one of them. Now according to Thomas, shortly after he had received a stab

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wound there was a cry of "arraah" which is said to mean a warning that someone, possibly the police are approaching. It was apparently a signal for members of the gang to make off, which they did, and Thomas then drove the van and made a report to the police.

On a certain date thereafter, Thomas said he was being driven along a road a Main road in Meadowlands in a car driven by a native called Alec; this was a Buick car. The witness Thomas 10 was sitting in the back. He said that there was a black Chrysler car 1948 model Chrysler car which drew up at the side of the road and by some strange coincidence it was being driven, said Thomas, by the accused. He was greeted by Alec - they apparently had a short conversation; thereafter Thomas said he asked Alec who this man was and his name and address and Alec was able to furnish these particulars, including the in- 20 formation that the accused lived in Westcliffe, a section of Moroka. That was the direct evidence of the crown.

The accused who gave evidence himself denied any participation in these crimes, said that he did not know Thomas, that he did not know the driver Alec, whom he called as a witness and who stated that he had no recollection at all and emphatically denied ever having seen Thomas or the accused.

Now evidence of identification where the 30 accused challenges the accuracy of that identification

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always needs to be scrutinized very carefully. There is always room for mistake. One looks therefore for corroboration. In the present case there is corroboration of the very strongest nature. The witness Thomas said that the car driven by - or the car he described as a 1948 Chrysler was a car with which he was familiar because he had driven one as a chauffeur for a period of about 18 months, and he named his employer and stated where she lived. The next step was a visit by the police to a brother of the accused who stated that he was the owner of two motorcars which he used as taxis. One of them was a Chrysler 1948 model and the accused's brother said that he had handed this very car over to the accused - his brother to operate as a taxi, and that the accused did drive this car during the whole of October. The number of this car is T.J. 50949. In that connection I wish to turn to the occasion when Thomas said that he saw the car in question on the road in Meadowlands. He said that on that occasion he took down the number on a piece of paper which he handed to his employer. The employer corroborated this evidence and said that after communicating this number to the police he threw the piece of paper away. There was corroborative police evidence that Mr. Solarsh had given the police the number T.J. 50949. Those facts constitute the corroboration to which I have referred. In spite of the fact that Alec who admittedly drove the Buick motorcar denied

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all recollection or knowledge of the episode in Meadowlands, I am satisfied that Thomas is speaking the truth. I have no doubt at all that the accused was one of those who in the first instance robbed Thomas on the 1st October, and attempted to rob him on the 8th October at Dube station.

I find the accused therefore guilty.

Accused admits one previous conviction.

HIS LORDSHIP:

Tell the accused I do not propose to take into account this earlier offence for purpose of sentence. Ask the accused whether he wishes to say anything about the sentence I am about to impose.

ACCUSED: My Lord I would have liked at this stage to argue the case further to show Your Lordship more discrepancies of the witnesses that gave evidence before Your Lordship.

HIS LORDSHIP: I have found you guilty I can't hear further argument.

ACCUSED: I have nothing to say on the question of sentence.

S E N T E N C E .

DOWLING, J:-

In regards to sentence, the offence of robbery is a very serious one especially in the Johannesburg and the Witwatersrand district, so much so that Parliament has passed an Act which

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