188/1958

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).

188/1958

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

ERIC MSIBI
Appellant.

versus/teen

THE QUEEN
Respondent.

Appellant's Attorney _____ *Respondent's Attorney* _____
Prokureur van Appellant *Prokureur van Respondent*

Pro Deo

Appellant's Advocate SA Viers *Respondent's Advocate* K.L. Simons
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on: Monday, 10th Nov, 1958.
Op die rol geplaas vir verhoor op:

(Leave - TPD) 1.3.11.5.58. (A-D) 9.45 - 10.15 - 11 C.A.V.

Adjourned on.
for REGISTRAR
10/11/58.

Appeal dismissed.
Schreiner, A.C.J., Steyn, de Beer, Beyers, + Ogilvie Thompson, J.J.A.
Registrar 24/11/58

Record

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

ERIC MSIBI Appellant

and

R E G I N A Respondent

Coram: Schreiner A.C.J., Steyn, de Beer, Beyers et Ogilvie Thompson JJ.A.

Heard: 10th November, 1958. Delivered: 24-11-1958

J U D G M E N T

BEYERS J.A. :- The appellant appeared before STEYN J.A. and assessors in the Vereeniging Circuit Local Division on a charge of robbery. He was found guilty and, aggravating circumstances having been found to be present, was sentenced to 15 years imprisonment and a whipping of 5 strokes. The appeal comes before this Court upon leave granted by the trial judge.

The assault upon the complainant, Jack Mohapi, by two persons, and the theft of his goods, a travelling rug and a pair of trousers, is not disputed. The only question in issue is the identity of his assailants. The complainant says the appellant was one of the two. The appellant

denies/.....

denies this. The only witness called for the Crown was the complainant, and the only witness for the defence was the appellant himself. It is therefore the word of the one against that of the other..

Jack Mohapi, a man of 63 years, lived alone in a house of three rooms in Evaton Location. He describes how he was attacked by two men at about 8 p.m. on the 1st March 1958. He had been outside to attend to his horse and had just entered his kitchen when two men came up to him from behind and grabbed hold of him. There was a paraffin lamp burning on the table in the kitchen. It was a lamp which he himself had made from a jam tin. A similar home-made lamp was burning in the dining room. He identified the appellant as one of his assailants. He says he knew the appellant well, and a great deal turns upon the truth or otherwise of this statement.

His assailants seized hold of him and threw him to the ground, after which the one whom he identified as the appellant stabbed him on the side of the head. The other one then also stabbed him in the buttock. Finally the one whom I shall call the appellant struck him across the shoulder with a piece of iron, thereby smashing his collar-bone.

He/.....

He continued to hit the complainant with this weapon across his ribs and back as he lay on the ground. When he eventually desisted he remarked to his companion "He's dead. Leave him "alone." The complainant bled profusely from the wound in his head, but never completely lost consciousness throughout this ordeal.

Although the light in the kitchen was not of the best, the complainant had ample opportunity for observing his assailants: he was able to observe them at close range throughout what appears to have been quite a prolonged attack upon himself. He says "I was actually face to "face with the accused. I saw him very clearly." In these circumstances, if the appellant was well known to him, as complainant maintains he was, there would be little difficulty in his recognising him.

The appellant admits that he met the complainant on a previous occasion. The cross-examination of the complainant regarding their previous acquaintance reads as follows :

"Accused will say he met you for the first time in about January, about two months before the assault ?.....Yes, that can be so.

This was at the house of Masebuku ?.....Yes, I met him there.

He says he has not seen you since ?.....No, that is not so. He came to my place to look at the house.

How many times did you say you had seen the accused ?..... Before this incident, after I had seen him at Masebuku's, he came to my place. He was nice to me about my house.

What did he want from you or your house?.....He came there to see whether he could get a place to build.

Did you tell him he could build on your place ?.....No, I refused. He came there five times and I refused all five times that he came there.

You remember he came to you exactly five times?.....I am positive. He came there to see who was living with me.

Did you tell the police it was the accused, Eric Msibi, who had robbed you ?.....I did.

Did you give information about him or did you actually give his name ?.....I gave his name, I even showed them where he stays. There was no looking for the accused. I pointed out his house.

How did you know where he lived ?.....He himself pointed out his house to me.

When did he do that ?.....When I met him at Masebuku's, I asked him name, he said his name was Eric Msibi; I said 'Where do you stay ?' and he pointed out his house and said 'I stay there.' "

The appellant denies that he visited the complainant at his house on five occasions. He avers that he does not know where the complainant lives. The only time they met was at the house of Masebuku. He says the complainant appeared to resent his presence at Masebuku's house, and there was a quarrel. He was sitting with his arm

around/.....

around Masebuku, whom he claims is his concubine, when the complainant arrived. The complainant remarked that he had no right to have an understanding with a woman like that, he being so young and the woman so old. He alleges that the complainant bears him malice because of this. He gathered from the complainant's behaviour towards this woman on that day that there was an understanding between them, and it is because of this woman that complainant was now falsely accusing him of robbery. Although the complainant was submitted to a lengthy cross-examination, this part of the appellant's story was not put to him.

Complainant says that that night, when he turned round and saw the appellant, he spoke to him, addressing him by his name. "I said 'Msibi' what's wrong ?'.. "I said'Msibi', where are you going to this time of the night? "I am going to bed.' " He adds "I was not frightened very "much. I thought this man was only playing. I know the man "and he knows me and I thought he was playing the fool when "he grabbed me." When the appellant struck him down he asked him "Eric, why do you kill me ? "

According to the complainant the appellant spoke on at least three separate occasions. He

uttered/.....

uttered the following words, in this order :

"Where is the money ? I want money ."

"Let's go to the box."

"He's dead. Leave him alone. "

The complainant was thus afforded an opportunity of recognising the appellant by his voice also.

There can, I think, be no doubt that the complainant was honestly convinced in his own mind that it was the appellant who attacked him. The manner in which he addressed his assailant is also of some significance. He addressed him as he would a friend, and not as somebody whom he had once casually met and quarrelled with.

The appellant admits that he was having difficulty in finding a house to live in. He had attempted, unsuccessfully, to obtain a house at Vanderbyl Park. At the time when he met the complainant he was living with a person called Nkosi. Soon after meeting the complainant he moved from Nkosi's place,owing to a shortage of water, to a room at the place of one Makula, in the Evaton Location. In view of this it is not improbable that he may have approached the complainant for permission to build on his stand, as the complainant says he did. He denies that he told the

complainant of his movements and of his intention to move from one place to another. The learned judge deals with this aspect of the case in the following words :

"In this case Mr. Christodolides, who appears for the accused, did everything possible for the accused, but conceded, and in my opinion, very properly and correctly, that the complainant's evidence regarding the history of their relationship should probably be accepted. We are satisfied that the coincidence would be far too high to reject the complainant's version of that history. We know that the accused was in difficulty in regard to housing and it would be difficult, on the accused's version, having met the complainant once only, without anything in this regard being discussed, to ascertain in what manner the complainant became aware of the fact that the accused was interested in a house. "

I should, I think, in fairness to the appellant, point out that when asked to explain how it was that the complainant knew that he wanted to move, the appellant offered the explanation that Masebuku knew of his movements and must have told the ~~appellant~~ complainant of his intentions.

Mr. Visser, who appeared on behalf of the appellant, referred to what is possibly a contradiction in the complainant's evidence. The complainant says that he lit the two lamps, which were in different rooms, when he came back from attending to his horse. At the same time he says that as he entered his room and before closing/.....

closing the door he heard a sound behind him and on looking round he saw the appellant. The suggestion is that either he lit the lamps before going to the horses, or that the lamps were not lit at all, because with the appellant so close on his heels as he entered his room, there was no time for him to have done so. The complainant, however, was not asked to explain this in cross-examination. It is possible that he did have time to light the lamps after he had entered the house and before being attacked. It is also possible that he lit them before going out and is making a mistake when he says that he did so after his return. The point does not seem to me to be important.

A further criticism of the complainant's evidence is that he was unable to say whether the person whom he identified as the appellant was wearing a beard or a moustache. His impression was that he was clean shaven. In court the appellant was seen to have both a beard and a moustache. He says that when he met the complainant at Masebuku's house he was wearing his beard and moustache, and had in fact worn them for about five years. His beard, however, was very short and thin. The growth could not have been of a vigour which readily attracts attention. The complainant could not recall having seen it when he met the appellant at

Masebuku's house during the daytime and is supposed to have referred to his youth. And in court, when asked to face away from the appellant and to describe him, he was unable to say whether he then had a moustache. While there is undoubtedly this criticism of the complainant's evidence, we only have the word of the appellant for it that on the night in question he had this beard and moustache, and, at best, they do not seem to be of a conspicuous quality.

Mr. Visser also submitted that it is improbable that the appellant would have chosen to rob somebody who would be likely to recognise him and that, having been recognised before any blows were struck, he would proceed with the robbery. As to the first of these submissions it not infrequently happens that robbers pick on someone with whom they are acquainted and who, if given the opportunity, would recognise them. There is in this connection a feature about the present robbery which I may mention here. The complainant says that after he had been struck to the ground by the blow which broke his collar-bone, the appellant said to his companion "Let's go to the box." The box referred to as that in which the complainant kept his papers and his clothing, and was in another room of the house. The

robbers/.....

robbers went and got this box, and took it outside with them. If the complainant is telling the truth - and I can see no reason for rejecting this part of his evidence - the person whom he identifies as the appellant would appear to have been particularly well-informed regarding the internal arrangements of the complainant's house. In my opinion this feature is not without its significance. The appellant no doubt hoped that, with the assistance of his companion, he would be able to overwhelm the complainant without affording him an opportunity of seeing and recognising him.

As to the second submission, that appellant, having been recognised, could yet hope to escape prosecution for his crime by effectively silencing the complainant, that is to say, by killing him. The assault which followed upon the complainant's recognition of the appellant was certainly brutal enough to have caused his death. The degree of violence was far in excess of that which would normally be required to subdue a comparatively old man, unable to offer much resistance, whilst he was being robbed. The complainant bled profusely from the wound in his head. The appellant's remark to his companion "He's dead, leave him "alone " suggests that the appellant was satisfied that the

complainant/.....

complainant was in fact dead, and that it was, in the circumstances, safe to proceed with the robbery.

The trial court accepted the complainant's evidence without any reservation, and rejected the appellant's denials as false. It accepted the evidence of the five previous visits and was satisfied that the complainant was in a position to recognise, and did recognise, beyond any question of genuine mistake, the appellant as one of his assailants. With regard to the appellant the learned judge says :

".....the accused was a completely unsatisfactory witness and on his evidence of malice on the part of the complainant, we cannot believe him, nor do we believe him when he gives as a reason for that malice, his relationship with a concubine. We also do not believe him in regard to his allegation that complainant only saw him once. While Mr. Christodolides is correct when he says that a man may be a liar to colour his defence, in this case we find that the fact that he is a liar affords ample and sufficient corroboration of the evidence of the complainant in so far as such corroboration is necessary."

It is abundantly clear from the record that the trial court was fully alive to the necessity for caution in a case such as this where "the Crown seeks a "conviction on the evidence of a single witness.....and the "issue relates to identity, a field wherein the possibility of "error looms large " - cf. Regina v. T (1958(2)S.A.676(A)).

The/.....

The trial court was meticulously careful in ~~xxxxx~~ its investigation of the facts, and it is implicit in its judgment that it found the evidence of the complainant "clear and "satisfactory in every material respect" - cf. Rex v. Mokoena (1932 O. P. D. 79).

In my opinion the trial court arrived at a correct conclusion, and the appeal accordingly fails.

A. O. K. Bayers

~~Schreiner, A.C.J.~~

~~Steyn, J.A.~~.

de Beer, J.A.

Ogilvie Thompson, J.A. } Concur.

Mr. S.A.Visser, pro dec for the appellant.

Mr.K. L. Simons, Attorney General's Office, Pretoria, for the respondent.

Record

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

ERIC MSIBI Appellant

and

R E G I NA Respondent

Coram: Schreiner, A.C.J., Steyn, de Beer, Beyers et Ogilvie Thompson JJ.A.

Heard: 10th November, 1958. Delivered: 24-11-1958

J U D G M E N T

SCHREINER ~~Schreiner~~ A.C.J. :- The facts in this appeal appear from the judgment of BEYERS J.A. For the reasons that follow I have reached a different conclusion.

It was of course very important to know how well the complainant and the appellant were acquainted. According to the appellant they had met once before, some two months previously, while the complainant said that the appellant had been to his house five times after their first meeting, ostensibly in order to obtain a place to build a house, though possibly, the complainant suspected, in order to verify that he lived alone and unprotected. In dealing with this question the trial judge says :-

"If/.....

"If we accept that the accused did see him" (the complainant) "five times after having met him at Masebuku's, we have to ask ourselves why the accused denied the fact, and the reason which suggested itself is that the complainant is right when he said that the accused did come five times to see if he, the complainant, was living alone, something which compelled the accused to deny that he did go there ~~xxxx~~ five times, because he knows, having gone there five times to prepare for a crime, it would be better for him to deny that he had done so. If this was an innocent case of wanting some information with regard to a place to build, we cannot understand why the accused should not have admitted that fact. It seems to me more reasonable to accept that he did not admit that because he was afraid of the ~~xxxxxxxxxxxx~~ incriminating nature of such an admission - which could be incriminating only if he went there with a guilty purpose. "

I have set this part of the judgment out in full because it seems to me that the reasoning is open to criticism and because the trial court attached considerable importance to the fact that the complainant knew the appellant "fairly well". It was of course much less likely that he would make a mistake if he had seen and talked to the appellant again and again during the previous couple of months than if this had only happened once. The difficulty I have with the reasoning is that no good ground is given for accepting the complainant's version of the visits to his house in preference to the appellant's denial of them. In fact the court seems to have concluded that the complainant was right in

saying/.....

saying that the appellant did visit him because if he did visit him the appellant would have a good reason for falsely denying the fact. It might as well be reasoned that if the complainant had falsely stated that the appellant visited him five times his reason for doing so might well be that he felt that his evidence of identification required bolstering up.

That evidence is subject to the criticism, which seems to me to be important, that the complainant said (a) that the appellant approached him first after he, the complainant, had come back from leaving his horse and as he entered the door of his room, before he had closed it, and (b) that he lit the two lamps, one in each room, when he came back from "the horses". It seems that there was here a conflict which would perhaps have proved by itself decisive had it been followed up. But even without any proper cross-examination on the point it remains a difficulty which must be taken into account.

Then there was the small mark on the appellant's face which the complainant mentioned at the preparatory examination as a ground for identifying the appellant, although the complainant immediately admitted that he only saw it afterwards at court. This was not a serious ground for criticising the complainant's evidence but it suggests

that/.....

that he might not be above trying to support his evidence dishonestly.

The learned judge was impressed by the complainant's certainty that the appellant was one of his assailants. Naturally if an indentifying witness is confident that he is making no mistake, his evidence will seem more trustworthy than that of a witness who is hesitant. And up to a point it may actually be more trustworthy. But one has to be careful not to pass the responsibility for identification to the witness deciding upon the correctness of ~~the witness~~. Some witnesses, though mistaken, are confident, others are naturally cautious. It is the trial court's function to decide on the objective correctness of the identification, not indeed disregarding the factor of apparent confidence or uncertainty, but not simply accepting a witness's identification because he claims to be positive that he is right.

Another factor which seems to me to be of slight importance but which must nevertheless be borne in mind is the complainant's uncertainty as to whether the assailant whom he identified as the appellant had a beard or a moustache.

Of more importance is the statement by the complainant "They did not want to look at me, the -

"one/.....

"one especially." He gave this as a reason for not seeing the small scar on the appellant's face, but it would serve also as a reason for his not being in a position to identify by other features or by the expression. I cannot agree with the trial judge that the complainant "had ample opportunity of "observation." He had some opportunity but it ~~xxxxx~~ ~~slight~~ was limited rather than ample.

The trial court found that the appellant had given false evidence when he suggested that the complainant might have borne him malice because of his association with the woman at Masebuku's whom he referred to as his concubine. The court found that "the fact that he is a liar, "affords ample and sufficient corroboration of the evidence "of the complainant in so far as such corroboration is neces- "sary." There is no great plausibility about the appellant's story of his mild quarrel with the complainant over the woman, but if anything at all like that happened it would not be a good reason for branding him as a liar that he, wrongly one assumes, attributed the complainant's identification of him to malice so occasioned. If he was in fact innocent and ~~were~~ was searching for a reason for the complainant's wrongly identifying him he might well, in addition to relying on the possibility

of/.....

of mistake, honestly think that the complainant's evidence was coloured by what had previously passed between them.

Some argument was addressed to us on the question whether the appellant would have taken the risk of robbing a person who knew him and who lived in the neighbourhood. No doubt such things may happen, though it was clearly an additional risk factor that could easily have been countered by the wearing of a mask. The trial court found a sufficient answer to the point in the evidence that at some stage when the complainant was being assaulted one of the robbers said to the other, "He's dead, leave him alone." The court considered that this removed the element of risk that the complainant would identify the appellant. But the answer is not wholly satisfactory. If the intention was to kill the complainant, so that he could tell no tales, that would have been done at once in a manner that would leave no possibility of his survival. Although the complainant was grievously hurt the injuries were not like those that would be inflicted with the express purpose of killing him.

An important piece of evidence given by the complainant is that he used the appellant's name. His first mention of it, in chief , was in the form "Eric

"why/.....

"why do you kill me ? " - after he had been savagely assaulted. In cross-examonation he said that at the very beginning when he was seized he said "Msibi, what's wrong ?" At that stage he thought that the man, whom he identified as the appellant, was playing the fool, and he asked "Msibi, where are you "going to this time of night ?" It is possible that the complainant meant that he used the appellant's first name once and his second name twice. But the questions he put are not readily reconcilable. The third one apparently corresponds to what he said in chief when he was asked whether he said anything when the man approached him. His answer was, "I said "where are you going to ? What is the trouble ? " He did not at that stage say that he mentioned the appellant's name.

It was argued for the appellant, and there is force in the argument, that if it was the appellant and he knew he was identified when his name was used he would have desisted or else made sure that the complainant was killed, while if it was someone other than the appellant he would feel the safer in going on with the robbery and in leaving the complainant alive because the latter had obviously mixed him up with someone else.

The final point in the appellant's

favour/.....

favour is the fact that 10 days elapsed between the robbery and his arrest. The complainant said that he told the police who his assailant was and where he lived. No police evidence was called, but after the Crown evidence there is a note in the record which reads - "At the commencement of the trial the "Prosecutor seeks the court's permission to read the evidence "of Native Detective Constable Ambrose who made the arrest, "because he is seriously ill in bed and is not available. It "is just as regards the question that the arrest was made on "the 11th March and nothing belonging to the complainant was "found in his possession. That evidence is admitted by the "Defence. "

Now it seems to me that it was very important in this case to ascertain when the complainant first informed the police. He was in hospital for a time but it does not appear for how long. It appears from the record that the appellant has a very bad criminal record and there is the danger that the complainant might have come to identify him as his assailant after hearing of that record. The complainant said in answer to the trial judge that he gave the name of the appellant to the police and pointed out his house. "There was," he said "no looking for the accused." In view of that evidence it would apparently have been important to know when the name was given and the house pointed out - whether soon after

the robbery or some days later. The interval of 10 days required explanation and there was none.

The case is a difficult one but in my view the trial court should not have held that the Crown's case was proved beyond reasonable doubt. I think that the appeal should be allowed and the conviction and sentence set aside.

O. W. Schreiner
22.11.58

Sleigh J.A. Concurs