

89/1958

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

APPELLATE

DIVISION).  
AFDELING).

APPEAL IN CRIMINAL CASE.  
APPEL IN STRAFSAAK.

(orig. record)

DAVID

MAGAO

Appellant.

versus/teen

THE

QUEEN

Respondent.

Appellant's Attorney  
Prokureur van Appellant

H. Helman

Joh'burg

Respondent's Attorney

Prokureur van Respondent

Appellant's Advocate  
Advokaat van Appellant

DM Williamson

Respondent's Advocate

Advokaat van Respondent

C du Plessis

Set down for hearing on:  
Op die rol geplaas vir verhoor op:

Thursday 4<sup>th</sup> Dec., 1958

9.45 - 12.25 CAV.

1.5.7.8.11 (A)

JUDGMENT: WEDNESDAY, 10<sup>th</sup> DECEMBER 1958

Appeal dismissed.

Coram: Souders, 4105, Beyer, van der Merwe, Sigfried Thompson & Smit Petrus  
C.A.

Souders, 4105

LEGATARI

10/12/58

89/1958

op borg

(on bail)

(leave TPD)

IN THE SUPREME COURT OF SOUTH AFRICA.

*Record*

(APPELLATE DIVISION)

In the matter between :

DAVID MAGAO

Appellant

&

R E G I N A

Respondent.

CORAM : Schreiner A.C.J., Beyers, v. Blerk, Ogilvie Thompson  
JJ.A. et Smit A.J.A.

Heard : 4th December 1958. Delivered : 10. 12. 58

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J U D G M E N T

SMIT, A.J.A. :- The appellant was convicted in the court of the Magistrate for the Regional Division of South Transvaal of the crime of robbery and sentenced to eighteen months imprisonment with compulsory labour and to receive a whipping of four strokes with a cane. An appeal to the Transvaal Provincial Division was dismissed but leave to appeal to this Court was granted. The particulars of the charge preferred against the appellant are that he wrongfully assaulted one Joseph Mashao at or near Highlands North on the 18th April, 1957, and with force or violence took from the person or possession of the said Joseph Mashao certain articles, the property of Ralph Rose.

Ralph Rose occupies house No. 38, in 8th Avenue,

Highlands North, Johannesburg. The stand on which this house is situated is at the south-western corner of 8th Avenue and Hamlin Street. The house faces north. In the yard and at the back of the house is a garage with an entrance door in its eastern wall. This wall is in line with the eastern wall of the house and these two walls are connected by a wall, twelve feet high, with a door in it. A servant's room adjoins the garage on the southern side. It has a window in the eastern wall facing Hamlin Street and a door which opens into the yard. This wall is about ten yards from a fence which encloses the stand on the Hamlin Street side. This fence is three feet six inches high and in it is a gate opposite the garage entrance door.

On the morning of the 18th April, 1957, Ralph Rose and his wife departed from their house leaving their native servant, Joseph Mashsao, in sole charge of the house and its contents. At about 11.30 a.m. the same day Joseph was working in the yard of his master's house when he heard knocking on the door in the eastern wall of the yard. He opened it and saw two native males standing outside the yard at the door. A third man, later identified by Joseph as the appellant, was standing on the north west corner of the intersection of 8th Avenue and Hamlin Street. The two natives questioned him about the whereabouts of his employer and of a man called Mac, who, they said, used to work there. After more questioning one of them asked permission to enter the yard in order to

relieve himself. When he came back <sup>said</sup> ~~he~~ ~~xxxx~~ to the other one : "Sergeant let us enter this man's room and search."

Under the impression that these two men were detectives he accompanied them to his room in the yard. One of them

closed the door in the eastern wall. In his room these ~~two~~

men made a pretence of searching it. They found nothing

and began assaulting him. One of them produced a revolver

<sup>ordered</sup> and ~~covered~~ Joseph to lie <sup>down</sup> on the floor. This he did.

<sup>were</sup> His arms ~~xxxx~~ then tied behind his back, his feet tied

and a towel bound over his mouth. The man with the revolver

threatened to kill him if he talked. This man then told

his ~~companion~~ to call the other one who was outside.

While Joseph was still being guarded in his room/ <sup>by</sup> the man

with the revolver he heard the other one calling the third

person and the two of them <sup>ing</sup> ~~ent~~ entering the yard. He heard them

talking and heard one say "We have got him". After that he

heard noises <sup>inside</sup> ~~outside~~ the house : noises of metal striking

against wood. Then Joseph heard Sampson, who works next

door to him, calling him by name. The man who was guarding

Joseph opened the door and went outside. He told Sampson

that Joseph was still busy whereupon Sampson left. Later,

however, Sampson returned and called Joseph as before. The

guard again went outside but this time walked a distance of

about fifteen paces to meet Sampson whom he told that Joseph had gone to a shop. By this time, however, Joseph had managed to free his hands. He pulled his gag down, got on his bed and jumped through the window in the eastern wall facing Hamlin Street. When he got outside he started screaming. He was then in that space about ten yards wide, between the eastern wall of his room and the fence. His feet were still tied. While he was screaming he saw appellant jump over the fence into Hamlin Street. Joseph hobbled along with his feet still tied and also jumped over this fence by placing his hands on the top of the fence, pressing on it and swinging over. In Hamlin Street he met a grocer's boy who untied his feet. By this time he had seen the two confederates of appellant run down 8th Avenue in a westerly direction while appellant was running ~~down~~ <sup>in</sup> Hamlin Street in a northerly direction towards 9th Avenue, followed by Jack, a native who works in the house opposite that of Ralph Rose in Hamlin Street. When Joseph was free he ran after the two men whom he had seen running down 8th Avenue. He, however, soon abandoned this pursuit as hopeless and followed Jack and the appellant. He caught up with them and threatened to throw a brick at appellant who, he says, was "running and fighting at the same time", but the other people present dissuaded him.

They surrounded appellant and caught him. Joseph had no doubt at all that the man they caught there - the appellant - was the man who had jumped over the fence after he had screamed.

Appellant did not question the correctness of what took place at the house of Ralph Rose as related by the Crown witnesses nor that he was caught in 9th Avenue a short distance from where his car was parked. He, however, denied that he was at the house of Ralph Rose that day and that he was the man who was seen jumping over the fence. He explained that he was in 9th Avenue that morning for the purpose of tracing the whereabouts of a native girl, named Dolly, whom he had taken out on a previous occasion. He parked his car in 9th Avenue, apparently near the house where he knew Dolly had lived. He inquired at the house where Dolly was and was told that she was now working lower down in 9th Avenue. He walked down there but could not find her. On his way back to his car and while crossing the intersection of Hamlin Street and 9th Avenue, he noticed many boys standing around the corner of 8th Avenue and Hamlin Street. They were speaking loudly and he heard a voice saying "one of them, there he comes at the corner". Then they came running towards him.

When they got near to him <sup>he</sup> ~~en~~ also started to run because he got scared when he saw the ~~whole~~ mob coming towards him.

He stated that when he saw them coming towards him he noticed that there was nobody in front of them nor did he see anyone running down 9th Avenue.

The identification of the appellant as the person who was seen jumping over the fence at Ralph Rose 's place depends mainly on the evidence of Joseph and Sampson. Sampson stated that he went to see Joseph that morning to tell him that he had already knocked off work. He then left Joseph in the yard where he was working and went across Hamlin Street to the house where the native Jack works. There he stood on the pavement talking to Jack who was busy in the kitchen. While he was standing there he saw appellant and another native entering Joseph's yard. Afterwards he saw the appellant come out again and stand under a tree on the premises where Joseph works. Sampson then went back to his place of employment and stood against the fence. From there he shouted to Joseph, but a native who was in front of Joseph's room, told him that Joseph was very busy. Sampson then went and locked his employer's house and went through their premises into Joseph's yard. There this native, who had spoken to him previously, told him that Joseph had gone

to a shop and had said that Sampson was not to wait for him. Sampson then walked out of the yard through the door in the wall of the yard. When he got into Hamlin Street he turned around and saw Joseph skipping with his legs tied up and heard him screaming that people were breaking into the Europeans' house. Sampson ~~then~~<sup>ran</sup> to report to David Flink, who lives opposite them in 8th Avenue. He saw two people jumping a brick wall into 8th Avenue and running down the street towards the west. He saw the appellant running along Hamlin Street. He states that David Flink followed the appellant in his car and he followed the car into 9th Avenue. There he found David Flink with the appellant, also Jack and many others, including Joseph. He also had no doubt that the appellant was ~~the man~~<sup>the man</sup> he saw enter Joseph's yard.

The magistrate found Joseph and Sampson to be satisfactory and credible witnesses and had no hesitation in accepting their evidence. Mr. Williamson, who appeared on behalf of appellant, did not quarrel with the magistrate's finding that these two witnesses were truthful. He contended, however, that their opportunities for observing the man, who they say is the appellant, at Ralph Rose's place were so limited that the Trial Court should necessarily have had a doubt



whether that man was the appellant. Joseph, he <sup>argued</sup> ~~pointed out~~, saw the man only when he jumped over the fence. His subsequent identification of him in 9th Avenue was, he said, influenced by the fact that he happened to be the man who had been caught. But there is much more to the evidence of Joseph than that. He testified that he had seen appellant the day before at the corner of Hamlin Street and 7th Avenue. He was on his way to a shop when he noticed appellant sitting on the corner and when he came back to saw him again. This was denied by appellant whose defence on this point was that he was on that day in the Benoni Location, where he had gone to fetch his motor car which he had lent to Matthews Ngani the previous day. He stated that when he lent his car to Matthews Ngani it was arranged between them that he would fetch it at the latter's house in Benoni Location on the 17th April, but that the hour for picking up the car had not been agreed upon. Matthews Ngani, who testified for the defence, stated that when he borrowed appellant's car on the 16th April he told appellant that he would not return home until the afternoon of the 17th April. The magistrate correctly took into consideration the improbability of appellant's proceeding to Matthew Ngani's house at 9 a.m. that day when

he could only get possession of his car in the afternoon. Against this improbable story there is the evidence of Joseph that he saw appellant ~~once~~<sup>twice</sup> that day and that he had ample opportunity of seeing what he looked like. The magistrate saw both these witnesses and found Joseph to be reliable, whereas appellant "did not impress the Court as a credible witness." In the light of these findings it cannot be said that the magistrate was wrong in rejecting appellant's denial that he was on the corner of Hamlin Street and 7th Avenue on the 17th April. It is not correct, moreover, that Joseph only saw the appellant on the 18th as he jumped over the fence. As already indicated he stated that when he opened the door in the wall and stood talking to the two men who knocked, he saw appellant standing at the corner of Hamlin Street and 8th Avenue. This fits in with the evidence of Sampson who said that he saw the appellant and another enter Joseph's yard by the door in the wall. This could only have been after Joseph had been tied up and after one of his attackers had been told, in Joseph's hearing, to fetch the other one who was still outside and which he heard him do. Joseph said that he saw quite clearly the face of the man who jumped over the fence because when he screamed the man looked towards him. He stated further that he saw this man running up Hamlin Street followed by Jack. Although the magistrate rejected Jack's

evidence because "he drew on his imagination while testifying", there can be no reason for rejecting that part of his evidence which is confirmed by Joseph or Sampson whom the Court believed. Sampson said that he, as well as Joseph ran after the fleeing man and that when they got to the appellant in 9th Avenue Jack was already there. This evidence confirms Jack's evidence that he did run after the man who had jumped over the fence and that he followed him into 9th Avenue. The evidence of all three of these witnesses therefore is that the man who was eventually caught in 9th Avenue was the person they had seen running away up Hamlin Street from Ralph Rose's place and whom they followed. Appellant himself admitted that there was no other man running in Hamlin Street between him and the people he saw standing at the intersection of 8th Avenue and Hamlin Street at the time they started to chase him. This evidence together with that of the Crown witnesses referred to rules out any possibility that <sup>the pursuers</sup> ~~they~~ lost track of the real fugitive and caught appellant by mistake. Another factor which assists in the identification of appellant as the culprit is the fact testified to by both Joseph and Sampson that <sup>the man</sup> ~~they~~ who ran out of Ralph Rose's property had his jacket in his hand. When appellant was caught in 9th Avenue he had his jacket in his hand. The

contention by Mr. Williamson that Joseph could not have been following the appellant closely nor been present when he was caught is refuted and Joseph's evidence confirmed, by the appellant's own admission that Joseph threw a stone at him when the people who were chasing him, caught up with him. This is strong evidence of identification. Against it there is the improbable story by appellant that he was innocently abroad when he was chased and caught. He brought witnesses to prove that he was in Benoni Location the previous day but no attempt was made to <sup>produce</sup> ~~produce~~ any witness from whom he had inquired after the whereabouts of Dolly on the day in question although, according to him, he had made inquiries at at least two houses. The production of such evidence would necessarily have created a doubt as to the reliability of the identification of him as the man seen jumping the fence of Ralph Rose's property. Taking all this into consideration and not forgetting the unfavourable impression appellant made on the Magistrate as a witness, I am unable to say that the ~~t~~rial Court was wrong in coming to the conclusion that the appellant was the man who assisted the other two in their nefarious activities at the house of Ralph Rose on the 18th April.

According to the evidence of Ralph Rose goods to the value of £200 were stolen from his house that day. It was contended, however, that the crime which was perpetrated by the appellant and his friends <sup>was not</sup> ~~did not constitute~~ robbery because the goods were not taken in the presence of the person assaulted. For this contention reliance is placed on the definition of robbery given in Gardiner and Lansdown (6th ed., at p. 1706) namely :-

" Robbery is theft, from the person/ of another, or in his presence, if the property stolen is under his immediate care and protection, accompanied by actual violence or threats of violence, to such person or his property or reputation intentionally used to obtain the property stolen or to prevent or overcome resistance to its being stolen. "

It was not disputed that the goods stolen were in Joseph's immediate care and protection but it was contended that because he was assaulted and locked up in the servant's room, which was a little distance away from the house where the theft took place, the theft was not committed in his presence.

We were not referred to any South African cases on this point. English practice in the matter also <sup>requires</sup> ~~defines~~ that the theft should have taken place in the presence of the victims. Russell on Crime (11th ed. at p. 964) quotes, inter alia, the following examples :-

" So if the thief having first assaulted A takes away his horse standing by him, or having put him in fear, / drives his cattle, in his presence, out of his pasture, he may be properly said to take such property from the person of A, for he takes it openly and before A's face while under his immediate and personal care and protection. "

American law is the same (Bishop's New Criminal Law - Vol 2 Section 1177 and 1178). In American practice this requirement that the property stolen should have been taken from the person of the victim or in his presence has been considered sufficiently elastic to include the case where the property was taken in the immediate neighbourhood of the victim. In State v Calhoun, 20 American State Reports at p. 252 it was held that where a party binds a person in one room and by violence exports from him information of the place where his property is in another room, which he then enters and from which he takes the property, while his victim remains bound in the adjoining room, that is a sufficient taking from the person of the victim to constitute the crime of robbery. In Clements v State, 20 American State Reports at p. 385 it was stated that it was not necessary in a case of robbery to prove that the property was actually taken from the person of the owner, but ~~it~~ was sufficient ~~if~~ taken in his presence. And it was

held to be robbery where the property of a person was taken from his dwelling-house while he was confined in his smoke-house, fifteen steps from the dwelling and where he was prevented by threats and intimidation from leaving the smoke-house and returning to the dwelling while the robbery was being perpetrated.

In the present case it is quite clear that appellant and his friends went to the house of Ralph Rose with the intention of stealing. That it was their intention to overpower Joseph and render him helpless can be inferred from what Joseph heard the man who went to call appellant say to him, namely : "we have got him". Their plan for the theft was put into execution when they knocked at the side door of the yard and inveigled Joseph into the servant's room where he was assaulted and tied up. What they did to Joseph was a necessary incident in order to "obtain the property stolen or to prevent..... resistance to its being stolen." With Joseph in the yard and at large it is obvious that they would not have been able to break into the house with impunity *under his immediate care and protection.* and to steal the goods. Joseph was on the premises all the time and could hear the noise being made by the thieves in the house where they were removing the goods. In these circumstances I am of opinion that ~~it can be said that there~~

the taking of the goods is covered by the definition of robbery  
 - which is of course not a statutory one - and that the facts  
 proved constitutes the crime of robbery.

The appeal is dismissed.

*ATm.*

Schreiner A.C.J.

Beyers J.A.

~~v. Bick J.A.~~

Ogilvie Thompson J.A.

} *concur.*