135/1959

G.P.-S.1706—1950-1—6,000.

U.D.J. 445.

135/59

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

(Appellate DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN KRIMINELE SAAK.

Berman Selcman

Appellant.

versus

The Queen

Respondent.

Appellant's Attorney *Prokureur van Appellant* J. Cuson (JHB) *Respondent's Attorney* *Prokureur van Respondent*

Appellant's Advocate *Advokaat van Appellant* Z. Sutej *Respondent's Advocate* *Advokaat van Respondent* M. G. Tucker.

Set down for hearing on:— *Op die rol geplaas vir verhoor op:—* Thursday, 29th October, 1959.

AD (LLD)

(B)

Coram: Schreiner, de Beer & Ogilvie Thompson

Appeal dismissed.
(Reasons later)

[signature]
REGISTRAR

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter of:

NORMAN SOLOMON ..... Appellant

versus

REGINA ..... Respondent.

Coram: Schreiner, De Beer et Ogilvie Thompson JJ.A.

Heard: 29th October, 1959. Handed in: ~~Delivered:~~ 4th Nov., 1959.

REASONS FOR
JUDGMENT

OGILVIE THOMPSON J.A.:

This appeal was dismissed at the conclusion of counsel's argument for Appellant, it being then intimated that the Court's reasons would be handed in later. Those reasons now follow.

Appellant was convicted in the Witwatersrand Local Division, before Kuper J. sitting with assessors, of (i) robbing Manuel Sardihna, (ii) assaulting Mac Ncombu, and (iii) attempting to break into the house of Louisa Sardihna. Treating these offences as one for purposes of sentence, the learned ~~Trial~~ Trial Judge sentenced Appellant to imprisonment with compulsory labour for a period of three years and to

receive ...../2

receive a whipping of four strokes. Leave to appeal was refused by the trial Judge but was granted by this Court. Owing to the shorthand notes having been lost, only a portion of the Trial Court's judgment convicting Appellant has been transcribed. Having regard to the time which had elapsed since the trial, KUPER J. felt that he was unable, consistently with fairness to Appellant, to reproduce that portion of the Trial Court's reasons which, owing to the loss of the shorthand notes, is now missing. Consequently, it was necessary for this Court to decide the appeal without having the benefit of the Trial Court's full reasons. That course was, in this particular case, merely inconvenient; but under other circumstances the absence of a material portion of the record might well have most serious consequences. A letter has been received by the Registrar of this Court from the Registrar of the Witwatersrand Local Division explaining the circumstances whereunder the shorthand notes came to be lost and stating that steps have been taken to obviate a similar occurence in the future. It is, therefore, unnecessary to say anything more on the question beyond emphasising the necessity for appeal records to be

both ..../3

both complete and accurate and to express the hope that the precautionary steps referred to by the Registrar of the Witwatersrand Local Division will in the future prove effective.

The three crimes of which Appellant was convicted were all committed during the small hours of 15th February 1958 at a rural holding near Little Falls in the district of Roodepoort. The robbery and attempted housebreaking were committed, within a few minutes of each other, at approximately 2.30 a.m. Although Mac Ncombu said he was assaulted very much earlier, it would appear that his estimate of time was faulty and that the assault upon him must have been substantially contemporaneous with the robbery and attempted housebreaking. Manuel Sardihna was robbed in his bedroom, situate in an outbuilding, some thirty yards away from the house of Louisa Sardihna, who is his sister-in-law. Mac was assaulted in the near vicinity of Louisa Sardihna's house. It is clear that these three crimes were all committed by the same band of criminals. This was, indeed, not disputed before us. The contention on behalf of Appellant was that the Crown had failed to show beyond reasonable doubt that

Appellant was a party to the commission of these crimes, or any of them.

At the trial Appellant was charged together with two other accused, Ezekiel Mabandla and Herbert Mabandla who were, respectively, Nos. 1 and 2 Accused. No. 2 was acquitted on all counts. No. 1 - who was identified by Manuel Sardihna as having been one of his assailants - was convicted on all three charges. The Crown proved that each of the three crimes had been perpetrated by more than one man, but led no evidence directly proving Appellant to have been present at the actual commission of any of these crimes. The Crown's case against Appellant rested upon his having been found, around about the time when the crimes were committed, crouching in an Oldsmobile car, the property of No. 2 Accused and bearing the number T.J. 35491, which was parked at the side of the road at a spot some 26 yards away from the scene of the assault upon Mac Ncombu; and, further, that, when called upon to alight from this car, Appellant had run away and boarded a Dodge car T.J. 122173, the property of No. 1 Accused, which cruised slowly by and then, after Appellant had boarded it, went off at high speed.

Appellant, who gave evidence at the trial, denied that he had ever been anywhere near the scene of the crimes on the night in question and, in particular, denied that it was he who was found in, and subsequently escaped from, the ~~Dodge~~ Oldsmobile car as described above. It was argued before us that, even if Appellant's denial be rejected, his presence in, and flight from, the Oldsmobile car did not link him sufficiently closely with the perpetration of the crimes to establish beyond reasonable doubt that he was a socius therein. We were unable to accept this argument.

The witness Gunning - a European dairyman who was delivering milk - deposed that, shortly before he found Appellant in the Oldsmobile car, he had noticed that two cars were parked at that spot. When, in response to a report from Mac, he returned, accompanied by Mac, to this spot he found only the Oldsmobile car still so parked. As already remarked, No. 1 Accused was identified by Manuel Sardihna as having been among his assailants, and it was No. 1 Accused's car which picked Appellant up. All the circumstances, when considered in relation to the semi-rural locality and the hour of the night, conclusively show that these two cars

were ..../6

were used by the perpetrators of the three crimes in issue. If it was indeed Appellant who was found by Gunning and Mac in the Oldsmobile car, the conclusion - in the absence of any explanation from Appellant - irresistibly follows that Appellant was actively associated with these three crimes. (See R. v. Jackelson 1920 A.D. at p.491). Clearly recognising this, Mr. Sutej devoted the greater portion of his persuasive argument for Appellant towards submitting that Appellant was not conclusively identified as having been the man in the Oldsmobile car. I accordingly now turn to that aspect of the case.

On the afternoon of 17th February 1958 an identification parade was held at the Roodepoort Police Station. The object of this parade was to ascertain whether any of the Crown witnesses could identify either of the two Mabandlas who were already under arrest as suspected persons. It so happened that, when the identification parade was being constituted, Appellant was at the police station to which - according to his evidence - he had driven No. 1 Accused's wife in order that she might take her husband some food. When constituting the identification parade the investigating Detective Sergeant (G. Nel) asked Appellant, and another man who was sitting with Appellant, to stand on it. It was conceded at

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the trial by the Sergeant conducting the parade (Furstenburg) that when the parade commenced Appellant was not regarded as a suspect. According to Nel, he asked Appellant what he wanted at the Police Station; and, when Appellant replied that he was a friend of the Mabandlas and had come to visit them, he (Nel) then, for the first time, regarded Appellant as a "possible suspect" whom it would be advisable to include on the parade. It should here be mentioned that some of Nel's answers under cross-examination open the possibility that, in replying to Nel's enquiry, Appellant may only have mentioned No. 1 as his friend and may have made no reference to No. 2. This Court has assumed that possibility in Appellant's favour. When the identification parade was held, Appellant was identified, first by Mac Ncombu and then by Gunning, as being the man they had found in the Oldsmobile car. Mac also identified Appellant as being one of those who had previously assaulted him by placing a revolver to his head. Appellant was thereupon arrested.

It was suggested by counsel that the identifying witnesses might possibly have observed the parade through a window of the charge office wherein they were waiting. The record fails to reveal any real support for this suggestion and it may be dismissed from further consideration. The record is silent as to whether or not Appellant was aware that

the parade upon which he was requested by Nel to stand would also contain Accused Nos. 1 and 2. However that may be, Appellant raised no objection to standing on the parade. Conceivably he may have considered it unwise to raise any objection. It is no doubt very unfortunate for Appellant that he happened to be at the Roodepoort Police Station just at that particular time, but I need say no more on that aspect of the matter since it was not suggested in argument before us that Appellant had been included in the parade either illegally or in any way against his will. Counsel's main criticism of the parade was that it was improperly constituted in that no arrangements had been made for the attendance thereon of persons similar to Appellant in general appearance. In view of the fact that the two suspects - later Accused Nos. 1 and 2 - were on the parade, and having regard to the circumstances, indicated above, of Appellant's inclusion in the parade, it is readily understandable that the arrangements referred to by counsel were not specially made. The substance of counsel's criticism was that Appellant is a shortish man with a relatively pale complexion for a native and that, as counsel submitted, no similar men were

included ...../9

included on the parade. Gunning and Mac - so the argument continued - had described the occupant of the Oldsmobile car as being short and thick set; and had therefore, probably selected Appellant as being the only man on the identification parade who answered that description. Furstenburg, however, deposed that the parade included two men, one of whom was a little shorter than Appellant, who were "gelerig in die gesig min of meer soos beskuldigde No. 3". According to No. 1 Accused, the parade contained others more or less of Appellant's stature though not of his complexion. Not initially regarding Appellant as a suspect, Furstenburg did not at the beginning invite Appellant to choose his position on the parade; but, after Mac had identified him, Furstenburg invited Appellant to change his position. This Appellant elected not to do. The extant position of the Trial Court's reasons inter alia "rejects any suggestion that the Sergeant did not do his duty in conducting that parade". Without pursuing all the details, it is sufficient to say that, after considering all counsel's submissions, this Court was satisfied that the identification parade was properly conducted and that Appellant can not in law be said

to ..../10

to have been in any way prejudiced by the manner in which the parade was conducted. In particular, this Court was satisfied that the record reveals no collusion of any kind between Gunning and Mac in their separate identification of Appellant on the parade.

Gunning was found by the Trial Court to be an honest and reliable witness. It was, however, submitted by Mr. Sutej that Gunning might be honestly mistaken in believing Appellant to have been the man in the Oldsmobile car. In support of this submission, counsel urged that Gunning's opportunity for observing the man in the car was of limited duration and occurred at night-time under conditions of excitement. In addition to pointing out that the Trial Court had remarked that Mac "gave his evidence in an unsatisfactory manner" and had declined to accept Mac's allegation that he had been robbed as well as assaulted, counsel drew attention to various discrepancies in the respective accounts of Gunning and Mac as to the happenings at the Oldsmobile car. The existence of these discrepancies - so the argument continued - serves to emphasise the unreliability of the observations of these two witnesses.

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The possibility that a witness - however honest and positive he may be in identifying an accused person - may conceivably have made a mistake in such identification is one that must constantly be borne in mind. In the present case, however, it is to be observed at the outset that Gunning shone his torch upon the face of the man crouched inside the Oldsmobile car for quite an appreciable time before the man endeavoured to cover his face. Gunning thus had quite a good opportunity to observe the man's features. Moreover Appellant was identified as having been the man in the Oldsmobile not only by Gunning, but by Mac as well. Upon discovering the man in the car Mac at once recognised him as being one of those who had assaulted him earlier; and, as pointed out above, no reason exists for doubting the genuineness of Mac's subsequent identification of Appellant at the identification parade. The Trial Court's strictures upon Mac's evidence were not directed to the identification issue: but, giving due weight to the Trial Court's above-cited remark that Mac did not give his evidence in a satisfactory manner, the important fact remains that Gunning's identification of Appellant does not stand alone. Nor does

the Crown's case against Appellant end there for, as I shall now show, there exists an additional - albeit circumstantial - factor linking Appellant with No. 1 Accused and the crimes under consideration.

As already remarked, Sgt. G. Nel deposed that at the Roodepoort Police Station Appellant told him that No. 1 was his friend whom he had come to visit, bringing No. 1's wife with him. Among the very few questions put by Appellant's then counsel to No. 1 Accused in the witness box were the following:

> " Did you know the accused No. 3 before this case commenced? --- Yes I knew him.
> Where you friends or merely acquaintances? --- He was just a mere acquaintance being a neighbour, but we are not friends.
> Accused No. 3 will say that in fact your wife and his wife are great friends? --- Well I have no knowledge about the relationship between our wives."

When Appellant himself went into the box, however, he deposed that he had seen No. 1 Accused only once before the Roodepoort Police Station visit and that a long time ago: he added that he had also only seen No. 1's wife once before the occasion he drove her in his car to Roodepoort Police Station. In chief, Appellant testified that he first heard of the

crimes in issue on the Sunday morning when he received a message from No. 1 Accused's wife that she wanted him to drive her in his car to Roodepoort Police Station. Appellant complied with this request but No. 1's wife was, she said, not that day allowed to see her husband. The following day Appellant again, at No. 1 Accused's wife's request, drove her to the Roodepoort Police Station. It was while Appellant was there that the identification parade was held whereat Appellant was, in the circumstances outlined above, identified by Mac and Gunning. Cross-examined by counsel for the Crown as to why he was so generous to this woman whom he hardly knew, Appellant said that she had promised to pay him for the use of his car. His evidence under further cross-examination then proceeded:

> " How much did she promise to pay? --- The amount had not been fixed, and on our return on Sunday from Roodepoort there was no talk between us.
> BY HIS LORDSHIP: Did she tell you why she had come to you? --- She did not.
> Does she live there in the immediate vicinity of your house? About 300 paces away from my house.
> CROSS-EXAMINATION CONTINUED: You now want the Court to believe that you were quite prepared to lose your Sunday and Monday earnings just to help this woman along for an unknown fee? ---

" No, it is not so.
Well, what is it then? --- I was in need of money and I wanted the money that she would pay me to put petrol in my car so that I would be able to work during that week.
Did she give you money for petrol? --- She gave me a few shillings on our return journey from Roodepoort on Sunday, and she also wanted to pay me for the trip.
BY HIS LORDSHIP: I thought you said just now that there was no talk when you got back on Sunday? --- By that I mean that there was no discussion between us as to what amount she had to pay me for taking her to Roodepoort.
What did she say when she wanted to pay you? --- She handed a £1 note to me and said "Here,, put some petrol in your car". I only took a few shillings of this £1 and I gave the change back to her.
Was this when you went to Roodepoort or when you came back? --- It was on Sunday when I dropped her near her house.
Did she not give you the £1 as payment for the trip? --- I think that was what she intended the £1 for.
Where you satisfied with the £1? --- I wanted to have the money.
Why did you not keep the £1? --- I wanted her to give me more money the next day.
Did you tell her that? --- I knew that I had to do some work the next day.
Did you tell her that she had to pay you on the next day? --- Well, she knew that she had to pay me."

The concluding sentences of Appellant's wife's evidence-in-chief and the opening sentences of her cross-examination read as follows:

" Do you know the wife of accused No. 1? --- Yes.

Did ..../15

" Did you get any money from her after this case started? --- Yes.
What was the use of the money? --- She just gave the money.
How much was it? --- £5.
Did she not give you any reason why she gave you the money? --- She never spoke to me.
CROSS-EXAMINED BY MR. TUCKER (for Crown):
Have you known the wife of accused No. 1 before this night? --- No.
Did you see her for the first time when she gave you the £5? --- Yes."

The above-cited passages are so eloquent as to render further comment unnecessary. It suffices to say that in the opinion of this Court it is plain that a close association existed between Appellant and No. 1 Accused and that the circumstances of Appellant's visits to the police station are very suggestive of that association having embraced the particular crimes in ~~question~~ issue.

The position thus is that Gunning's positive identification of Appellant is not only corroborated by Mac but is also further supported by the circumstantial factors of the fortuitous arrival on the scene of No. 1 Accused's Dodge car and of Appellant's subsequent solicitude for No. 1 Accused and his wife. The cumulative effect of the various features I have mentioned is such as, in the opinion of this

~~Court,~~ Court, .../16

Court, to establish the guilt of Appellant beyond reasonable doubt. The appeal was, accordingly, dismissed.

(Signed) N. OGILVIE-THOMPSON.