135/59

IN THE SUPREME COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION).

REGINA v. 1. EZEKIEL MABANDLA.
2. HERBERT MABANDLA.
3. NORMAN SOLOMON.

CHARGE : (1). ROBBERY (TWO COUNTS).
(2). HOUSEBREAKING WITH INTENT TO COMMIT AN OFFENCE TO THE PROSECUTOR UNKNOWN.

VERDICT : NO. 1 Accused, guilty as Charged.
NO. 2 Accused, not guilty and discharged.
NO. 3 Accused, guilty as Charged.

RECORD AS REQUIRED FOR PURPOSE OF APPEAL.

Certified a true Copy of the Original record.

Asst. Registrar.

J U D G M E N T.

KUPER, J:

The three accused are charged on three counts. It is alleged that on or about the 15th February, 1958, they assaulted Mac Ncombu and with force and violence removed from his possession his property and they therefore committed the crime of robbery. There is a second count of robbery that on the same night and in the vicinity of the same place they assaulted Manuel Sardihna and by force took away from him the articles set out in the indictment, £2 in cash, some matches and clothing, and therefore they robbed him of these articles. The third count is a count of housebreaking with intent to commit an offence to the Prosecutor unknown. Here the allegation is that at the same time they unlawfully broke and entered the house of Louisa Sardihna, a European female, with the intent to commit an offence to the Prosecutor unknown.

Before I turn to the merits of this case I want to refer to something that happened during the course of the trial. I was told by counsel for accused Nos. 1 and 2 that one of his witnesses had been intimidated by members of the Police Force outside this Court. The allegation made, which was subsequently repeated in evidence by Izak Zulu, was that he, a detective in the Police Force, was approached by Pitout, also a detective serving at the same police station, and that Pitout said that if he (Izak) gave evidence on behalf of the accused he would be committed for perjury, and that Pitout also said that he himself would give evidence to show that on the day in question Izak Zulu

was on duty with him all day and any evidence he would give to the contrary would therefore be untrue. The allegation went further and Izak said that Sergeant Furstenburg was in uniform and he then said "Let me talk to this man", and he then told the witness that if he gave evidence on behalf of the accused he would be charged with perjury. Both these police officers gave evidence in the witness box denying these allegations, and in the circumstances of this case it is unnecessary for this Court to come to any conclusion on this point.

The fact of the matter is that Izak Zulu did give evidence in this Court and he gave the evidence which he originally intended to give. It may be desirable from the point of view of the Police authorities themselves to conduct a departmental investigation into the matter. That possibility constitutes an additional reason why I do not think it is desirable for me to say anything on the issue. There is only one matter I would like to emphasise, and that is that the suggestion that any person who is called to give evidence in a Court of Law can be subject to any threats of this kind, is a very, very serious matter from the point of view of the administration of justice in this country. Nothing that I have said must be regarded as suggesting in any way that either of the officers - those whose names I have mentioned - did anything wrong at all. It may well be that Izak Zulu's evidence is untrue. His evidence of course may be true, and I express no opinion on that matter. There was another incident in regard to Mr. Gunning, who is one of the Crown witnesses. It was suggested that he too had threatened the defence witnesses and that he had told another witness that if he would

give evidence he would injure him. Mr. Gunning has denied that and although it is a serious matter even for a civilian to threaten a witness, that matter does not assume the same gravity as the allegation against the Police Force. In so far as the witness is concerned who Mr. Gunning is supposed to have intimidated, he too gave evidence, and in this case too I am not prepared to accept that Mr. Gunning has made the threats he is alleged to have made against him.

The offence with which the Court is concerned and which led to the three charges, occurred on the night of the 14th/15th February, 1958, at a place or near a place called Little Falls in the district of Roodepoort. I propose to start the recital of the facts with the incident on the Sardihna farm.

Mr. Sardihna is a market gardener and he leaves for the market very early in the morning at about two o'clock. The only other person living in his house is his wife, and he has a brother, Manuel Sardihna, who lives on the farm in a room some little distance away from the house - some 30 to 50 yards from the house. Manuel Sardihna told the Court that he was sleeping on the night in question and at about a quarter past three in the morning he was roused. He heard somebody walking about. The door was opened and he saw four native men standing in the doorway. Mr. Sardihna had a torch and there were a couple of other torches as well. The torches were pointed into the room and he could see two revolvers held in the hands of two native males. One of the native males had a bar in his hands, and Manuel

Sardihna was terrified when he saw those natives in that condition in front of the door. They asked him for money and they threatened to kill him if he did not give them any money. It is not necessary for me to go into details of the offence committed there against Manuel Sardihna because they have not been challenged. They took money from him and some documents. They took some clothing. They tied him up and they covered his face. Mr. Sardihna said in evidence that there was one man he could recognise, the man who held the bar. He says that he saw him in the light of the torch - he saw him when he was being tied up. Three of the four men left Manuel Sardihna and one remained behind for some little while. Shortly after they left some shots were fired in the immediate vicinity.

The story is then taken up by Manuel Sardihna's sister-in-law, Louisa Sardihna, who was alone in the house. She heard people coming round and she saw one of them tampering with the burglar proof and she took a gun which she had. She fired some shots and some shots were fired outside.

Again it is not necessary for me to go into details of this offence for again it is common cause that although nobody entered the house they did attempt to do so.

As a result of the commotion caused at the house and without doubt because of the fact that Louisa Sardihna was able to defend herself, the robbers left the farm of the Sardihnas. Apparently before they had come on the farm of the Sardihnas they had attacked Mac Ncombu. It

is right for the Court to say immediately that Mac gave his evidence in an unsatisfactory manner. He said that on his way back from the store at Little Falls, some little distance away, he met a number of native men who were in two motor-cars and that they tied him up and they took away from him some Horseshoe tobacco and they kept him tied up. Two men remained behind until about two o'clock in the morning. He puts the time at about two o'clock because he says he heard the tinkling of the milk cans, and that usually happens at about two o'clock in the morning. He knew that his employer, the Crown witness Mr. Gunning, who conducts a dairy in the nearby vicinity, would be on his rounds. He went and stood in the street and stopped Mr. Gunning when he came along in his lorry, and he went off with Mr. Gunning in pursuit of the cars that had stopped much earlier that evening when the men had got out and attacked him. Mr. Gunning takes up the story at that point and he says that he was in his lorry and he came up to a car which was parked off the street on the side of the road. He got out of the lorry and went to the car and found a man in the car. He had the light of his torch on this man and he kept the light of the torch on that man for approximately a minute. He asked Mac whether this is one of the men that attacked him. Mac said he was.

Mr. Gunning then said that this man should be arrested. The man got out of the motor-car. Gunning struck him. He staggered and at that moment another motor-car came cruising by. This man was able to jump into the motor-car and he was driven off. It is clear on this recital of the facts that the crime of robbery

was committed at the house of Manuel Sardihna or rather in his room, that the crime of attempted housebreaking was committed at the house of Louisa Sardihna, and that a crime was committed in regard to the witness Mac Ncombu. The Court is unable to accept the evidence of Mac that he was robbed of Horseshoe tobacco. The probabilities are overwhelming that he was attacked and he was admittedly attacked, but that he was attacked as part of the programme of the housebreaking at the Sardihna household. It follows therefore that the offence that was committed in regard to count one was not robbery but assault. Now, the question the Court has to decide is whether the Crown has proved beyond reasonable doubt that one or more or all of the accused are guilty of one or more or all of the charges. I propose to deal with that matter later. There are three main factors relied upon by the Crown in presenting the case against accused No. 1. They are that the accused was identified by Manuel Sardihna as the man who held the bar, that the accused's motor-car was found at the scene, and that the accused was not, as he should have been, at his place of employment at a time which would have made it impossible for him to have been at the scene of the robbery. No. 1 accused was identified by the witness Manuel Sardihna at the identification parade held by the police at the police station at Roodepoort. Suggestions were made in regard to this identification parade as being an improper one. There were some twelve people who stood in the line at the parade. They were of different sizes, dressed in different ways. Accused Nos. 1 and 2 are fairly tall men, accused No. 3 is a short man and it is quite clear that if three accused of three different heights are placed on the same parade

it is impossible to have the other nine men of similar build as the three accused, and where twelve people were on parade it would be sufficient if six of them were of one height and the other six of another height. There is no doubt that there were a number of people, if not quite all, of the same height as one or other of the accused, and that there were certainly some of a height similar to accused No. 1. It is also quite clear that the dress of accused No. 1 was not so different from the other persons on parade that he would stand out as an isolated example. It was suggested that Mr. Sardihna, who was the only person who identified No. 1 accused, was either outside at the lorry at the time of the parade or inside the parade office, but it is quite clear that Manuel Sardihna was never in sight of the parade after he had been brought there by a policeman called Sergeant Furstenburg.

I have to refer to the fact that No. 2 accused suggested that Sergeant Furstenburg told witnesses where accused persons were standing, and thereby helped them to identify the particular people.

The Court is satisfied that this statement by No. 2 accused is false and it is quite clear not only from what the accused persons have said, but from the evidence of the Crown witnesses, who are not concerned with the identification parade, that the Sergeant in charge of the parade was very careful to see that the proper procedure was followed. He never indicated to them when he spoke to each one of them in turn that the suspected person was on parade. He asked each person to walk up and down the line and if he saw the persons who he thought was involved

in the offence to point them out, and the Court rejects any suggestion that the Sergeant did not do his duty in conducting that parade.

Mr. Sutej suggested that it was wrong for the Sergeant in charge of the parade to see the statements made by the witnesses and that he should rely upon what the investigating officer asks him to put to them. I see no reason why that should be done. The Court has therefore come to the conclusion that Sardihna did identify accused No. 1 at this parade without any assistance from any other person.

It must be remembered, however, that when the robbery took place Manuel Sardihna was terribly afraid. He did have a torch. He did say that he saw accused No. 1 in the light of that torch before it was broken, and that he again saw accused No. 1 in the light of the other torch when he was being tied up.

The ability of a person to identify another person has always been regarded as a difficult matter by Courts of Law, and it is particularly so where a European is called upon to identify a native whom he sees for only a very short space of time, and the more so when that European is in a state of fright and nervous tension at the time. So if the only evidence against accused No. 1 had been this identification by Sardihna, the Court would not have been satisfied beyond reasonable doubt that that identification was correct. The question is whether some of the factors to which I have referred afford sufficient corroborative proof rendering that identification correct beyond reasonable doubt. The

witness Gunning, who, it was conceded, was a good witness, and who the Court is satisfied was an honest witness, has said that on the night in question when he came to the first car he made a note of its number and that when he saw the second car he made a note of its number, and he handed into Court the numbers that he wrote down. He wrote these numbers down on two sheets of paper. The numbers were written on one of the sheets at the time he came to each car, and the Court has no doubt that he wrote down the numbers of the two cars in the manner described by him. One of these cars admittedly belonged to accused No. 1, and putting it at its lowest by a very strange coincidence the other car belonged to accused No. 2, who is the brother of accused No. 1. As far as accused No. 1 is concerned he said that he left his car outside his house shortly before half past one on that morning, and that when he came back from duty after six that morning his car was there. The Court accepts as a clearly proved fact the fact that his car was at Little Falls certainly at the time when Mr. Gunning saw it at half past two. The only way then in which accused No. 1's car could have been there, on accused No. 1's story, was that somebody took his motor-car - that his car was stolen. The thief must have taken it shortly after No. 1 had gone on duty, and that this thief then returned the car to the same spot shortly before No. 1 accused came off duty. The Court believes beyond reasonable doubt that the car of accused No. 1 was at the scene of the crime, with the coincidence of accused No. 1 who was there at the same time.

Accused No. 1 set up an alibi. Again it is not

part of the duty of an accused person to establish an alibi. The onus remains on the Crown to prove beyond reasonable doubt every aspect of it's evidence, and where an alibi is raised the onus remains on the Crown to establish beyond reasonable doubt that it was the accused who committed the crime, and that the alternative must be rejected as untrue. The accused was at the time employed as a Municipal policeman at the Dube Hostel. It was his duty at the time to be on duty on the shift from 10 o'clock in the evening until six in the morning. He was the constable in charge of the night shift. On this particular night, however, it is common cause that the accused was not there at 10 o'clock, and he has told the Court a long and involved story in regard to the breaking down of his car near Kliptown and to the fact that he spent hours in that car. He says that the car broke down towards evening or the late afternoon, and after he had tinkered with the car for some time he walked home - a distance of some miles. He then walked back to the car. He tinkered again with the car. He was tired and fell asleep in the car. He woke up and he was able, after some further manoeuvres, to start the car. He brought it back home and was able to arrive at his place of employment at about half past one in the morning of the 15th February. Here again the Court does not believe his story. As for the break-down of his car, the Court tried to ascertain whether there was any possible corroborative witness of the break-down of this motor-car and the time the accused said he spent at that car, but no person emerged who could be of any assistance in such an enquiry.

(Please see letter by Mr. Justice Kuper on page 293).