120/59

120/1959

G.P.-S.4706—1950-1—6,000. U.D.J. 445.

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

(Appellate DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN KRIMINELE SAAK.

1. DANIEL NGWENYA,
2. M. NTOMBELA

Appellants

versus

THE QUEEN.

Respondent.

Appellant's Attorney / *Prokureur van Appellant*: J J F HEFER
Respondent's Attorney / *Prokureur van Respondent*:

Appellant's Advocate / *Advokaat van Appellant*:
Respondent's Advocate / *Advokaat van Respondent*: H.C.J FLEMMING

(Leave D.C.J.) *Set down for hearing on* / *Op die rol geplaas vir verhoor op*:— Monday, 9th November 1959.

(B)

Coram Beyers, Malan et Ramsbottom

A.D.V.

Postea: Thursday 26th November 1959

Appeal of both appellants dismissed.

D. Pace Beyers
Rep.

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

DANIEL NGWENYA — First Appellant

MANDHLENKOSI NTOMBELA — Second Appellant

and

R E G I N A — Respondent

Coram: Beyers, Malan et Ramsbottom, JJ.A.

Heard: 9th November, 1959. Delivered:- 26 — 11 — 1959

J U D G M E N T

BEYERS J.A. :- The two appellants appeared before MILNE J. and assessors in the Durban and Coast Local Division on charges of attempted murder and attempted robbery. Both charges arose from an unsuccessful attempt by two persons to hold up a motor-van, in which the complainants, Govender and Mncunu, were conveying money from the Noodsberg area of Natal to Durban. A number of shots were fired from a revolver in the course of this attempt. The case against the second appellant was that he was one of two persons who attempted to hold up the van. The case against the first appellant was that he had conspired with these persons and had laid the trap into which

it/.....

it was hoped the complainants would fall.

The appellants were found guilty of attempted robbery. The first appellant was sentenced to seven years imprisonment with compulsory labour, and six cuts; the second appellant to eight years imprisonment with compulsory labour, and six cuts.

At the time of the attempted robbery the first appellant was employed as a traveller by a firm of general dealers in Durban. The two men upon whom the attempt at robbery was made - Govender and Mncunu - were employed by the same firm. The first appellant and Govender, each of whom drove one of the firm's vans, frequently operated in conjunction with one another in delivering to customers in outlying districts the merchandise, mainly groceries, for which the first appellant had booked the orders. The practice was for them to travel together to a certain point, with both vans fully loaded with goods. The first deliveries would then be made from the first appellant's van. When he had emptied his van he would replenish it with goods from Govender's van, and complete the deliveries whilst Govender returned to Durban. The deliveries were made against payment of cash, always. The first appellant was the one who normally would collect the money and convey it back to his employer in Durban.

On/.....

On October 8th 1958, the day of the attempted robbery, the two vans were fully loaded with goods for delivery to customers in the Noodsberg area. The first appellant arranged with Govender that he would meet him at a shop - Cele's tearoom - somewhere in this area. It happened to be the appellant's birthday and as he had planned not to return to Durban that night, he had arranged with his employer that he would hand over the money collected by him to Govender and Mcunu, who would be returning to Durban that same day.

Before leaving Durban that morning the first appellant picked up three passengers. They were a young girl called Royal Nellie, who was going to attend a wedding in the region which the first appellant would be visiting; Lloyd Mtembu, an acquaintance who had asked to be taken as far as a place called Thaba Mhlope, where the girl he was courting lived ; and the second appellant, who was a friend of Lloyd Mtembu. On the way to Noodsberg he dropped his two male passengers at the foot of the hill known as Thaba Mhlope. This was in the late fore-afternoon.

The first appellant and Govender duly met one another later in the day at Cele's tearoom. From there they proceeded to deliver their goods to their various customers.

That/.....

That evening after dark, as Govender and Mcunu were returning to Durban with the money handed to them by the first appellant, their van was waylaid by two men as it was climbing the hill, Thaba Mhlope, more or less at the spot where the first appellant had previously dropped Lloyd Mtembu and the second appellant.

Govender was driving the van. The man on his side of the road thrust a paper bag containing a substance ~~containing~~ resembling chili powder into his face. The man on the other side of the van, where Mncunu was sitting, banged on the door of the van, and fired some shots from a revolver. Despite the attentions of the man on his side Govender urged the van up the hill and the two highwaymen fell away from its sides.

Upon subsequent examination of the van a palm-print was detected on the door on which the man with the revolver had banged. The print was lifted, and was found to correspond with the right-hand palm-print of the second appellant.

There can be no doubt that the second appellant was one of the two men who attempted to hold up the van that evening. He and his companion Lloyd Mtembu were dropped at that very spot earlier in the day. A witness Ellen Magwanazi, who lives at the foot of the hill, testified

to/.....

to having seen two men alighting from a van at that spot that morning. The van from which they got down was a small blue van, which answers to the description of the first appellant's van. One of them appeared to her to be carrying a paper bag. She says they sat down under a tree, and, from her house, she observed them there for the rest of the day. The two whom she saw were, without doubt, Lloyd Mtembu and the second appellant. At about sunset she saw them leave the spot where they had been sitting, and start walking up the hill. After a while she heard the sound of a motor-vehicle travelling up the hill. She also heard three reports.

The second appellant says that when he and Lloyd Mtembu alighted from the first appellant's van they went to a place some distance away where Lloyd Mtembu hoped to find his friend. They got to this place at about 11 a.m., and found that the girl was no longer there. They returned to the road at about 12 noon, and waited there in the hope of getting a lift back to Durban. At about 3 or 3.30 p.m. they hailed a passing taxi and were taken in it as far as Tongaat. He denies that he was in the vicinity of Thabe Mhlope that evening, and that the palm-print on the van was put there by him.

The trial court accepted Ellen's

evidence/.....

evidence that the two of them were still at this spot when darkness fell, and I can see no good reason for disturbing this finding.

The position then is that the second appellant waited at this spot throughout the day. Govender's van was waylaid at that very spot, and the second appellant's palm-print was found on the door of the van on which the highwayman with the revolver had banged.

The revolver from which the shots were fired was subsequently found by the police. The witness Vela Ntombela, who is a brother of the second appellant, told the court that early in October 1958, the second appellant handed him a parcel. Vela in turn handed the parcel to one Jona. Jona was not called as a witness. On October 10th, that is, two days after the attempted robbery, Jona sold a revolver to his brother, Sijumba, who secreted it in the house of another brother called Ndwana. The police retrieved the revolver from the last-named. As a result of tests carried out and comparisons made with a spent cartridge case, which was found at the scene of the attempted robbery, this revolver was proved to the satisfaction of the court to have been the one from which a shot was fired at the spot where the van was attacked.

The second appellant says that the

parcel/.....

parcel which he handed to Vela contained a torch. Despite the fact that Jona was not called as a witness the court drew the inference that the parcel must have contained the revolver in question. Quite apart from the question whether the court was entitled to draw this inference in the absence of evidence from Jona, I have not the slightest doubt regarding the second appellant's participation in the affair. That it was an attempt at robbery also admits of no doubt. The second appellant and his companion were masked, and clearly demonstrated their intention of holding up the van.

The second appellant was therefore rightly convicted and his appeal fails.

With regard to the first appellant, the evidence which I have so far reviewed implicates him only in so far as it shows that it was he who dropped the two highwaymen at the place where the attempt at robbery was made.

For the rest, the evidenc against the first appellant is purely circumstantial.

Eight factors, from which the inference of guilt was drawn, are listed in the trial court's judgment. They are :-

(1) The abovementioned fact that it was he who brought the highwaymen/.....

highwaymen to the scene of the crime.

2. That he delayed the departure of Govender and Mncunu until it was dark. According to Govender the first appellant wasted a great deal of time in delivering the goods to the customers that day. He says "he would go into the shop and talk a lot and "have tea and so forth." The first appellant denies that he tarried unnecessarily at any of the stores. He says the goods had to be delivered and he would enter the stores and take orders and speak to the people there. What is perhaps of more significance is Govender's complaint that the late deliveries were being made from his van. The usual practice was for the goods to be transferred from his van to the first appellant's van, and for the latter to complete the deliveries. Govender says that by arranging the work in this manner he was usually back in Durban by 4 p.m. On this day his departure was delayed until after 6 p.m. It was dark when he reached Thaba Mhlope. It may of course be that, as he was staying over at Noodsberg for the night, the first appellant wanted Govender to be there to receive all the money before returning to Durban. On this aspect of the case the learned judge says :-

"We accept Govender's evidence that the accused was purposely delaying deliveries from Govender's vehicle, nor are we dissuaded from so doing by the consideration that Govender admitted in cross-examination that it would be in order for a commercial traveller - which No. 1 accused was - to spend

some/.....

some time tea-drinking and talking with his customers. "

3. That at one of the stores the first-appellant tried to dissuade Govender from taking as a passenger to Durban a man named Tusi. When he heard that they intended giving Tusi a lift he said to Govender and Mncunu that they must not do it. He said that "if anything happened on the van and Tusi got hurt, the in-"surance would not pay. " The first appellant does not dispute this. This remark may of course have been made in all innocence, but when Govender pointed out that Tusi was one of their customers and might be offended if he were refused a lift, the first appellant would not see the logic of this. The first appellant had himself freely given lifts to others that day. It may be asked, if there was to be an armed robbery, what difference would it make if Tusi was also in the van, in which, besides Govender and Mncunu, there would also be two others, assistants of Govender. Apart from the fact that the robbers would find it easier to cope with four persons than with five, one does not know what else the first appellant may have had in mind. Tusi might be a "difficult" customer to rob, his presence may have upset the seating arrangements in the van, he might be a man who normally carried a firearm, etc. Whatever the position might be, the trial court does not appear to have attached much importance to this aspect of the case.

4. That in seeing them off, the first appellant wished Govender and Mncunu "happy landings". The first appellant denies that he used these words. Here again, the learned trial judge quite rightly observes that "Wishing them happy landings was not, "of course, in the least necessarily/ sinister, nor does the ac- "cused's false denial that he said it prove the case against "him. "

5. That in order to dissuade Govender and Mncunu from taking Tusi with them, the first appellant also warned them that "Tusi "might have a gang waiting for them on the road. " The first appellant denies that he said this. The trial court accepted the evidence of Govender - who made a good impression on the court - and Mncunu on this point, and in my opinion quite rightly considered it to be important. The learned trial judge says in this connection :-

"The warning about Tusi's gang was not explained by the accused, but simply denied by him. In the absence of some explanation as to why he said this we find ourselves unable to think that he did not know that a robbery of the complainants was going to be attempted that evening.....

On the basis that the accused did say this about a gang of Tusi' taken in conjunction with other factors, it seems to us to be in consistent with his innocence of the projected attempt. Nor can we conceive it as reasonable that Govender and Mncunu might have conspired falsely to say that the accused had warned them about the possibility of their being waylaid. "

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6. That, at Tusi's store, the first appellant ~~took~~ called Mncunu ~~aside,~~ to the back of the store, and when they were alone ~~and~~ said to him : "You must not die for the property of someone else. If someone shows you a thing which kills. hand the money to that person." This also was denied by the first appellant. Despite the fact that the trial court found that Mncunu "was not an altogether satisfactory witness" it accepted his evidence on this point. Mr. Hefer, who appeared on behalf of the first appellant, submitted that Mncunu was not only an unsatisfactory witness, but a thoroughly bad one, and ought not to have been believed. My own impression, after reading through his evidence carefully, is that he is a thoroughly stupid and dull-witted witness. On more than one occasion the trial court's patience was sorely tried by him. Notwithstanding this the trial court accepted this evidence of his. The learned judge says :-

"Mncunu's evidence that he was privately told by the accused not to risk his life but to hand over the money if a thing were shown to him, is uncorroborated and is denied by the accused. Mncunu was not an altogether satisfactory witness but in spite of that we are disposed to believe him on this point. We do not think that he invented this, partly because after assessing his quality as best we could, we do not think he could have invented it - and if he did not invent it, it was the truth. It was in accord with what the accused said both to Govender and Mncunu about Tusi's gang. It is not improbable that he said what Mncunu said he said to him, because he either wanted to pave the way to an unresisted robbery or to protect Mncunu - or both."

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The trial court appears to have treated this matter with the necessary amount of care and circumspection, and its finding in this regard must, I think, be accepted. I may perhaps add that it is not without significance that it was Mncunu who was singled out and given this warning. He was the one who carried the money-bag, and it was on his side of the van that the man with the "thing that kills" showed up when the attempt at robbery was made.

7. That the first appellant knew before he went to Moodsberg that he would be handing the day's takings to the complainants for them to take back to Durban.

8. That he falsely denied to Sergt. Malan that he had dropped two men at Thaba Mhlope on the day of the attempted robbery. Sergt. Malan says that he interviewed the first appellant on the following day. He says : " I informed him that there had been an attempted robbery on the slopes of Thaba Mhlope Hill, and I informed him that I was in possession of information that he had conveyed two native males to a spot at the foot of Thaba Mhlope Hill. I also informed him that those natives were dropped there by him, and the reply that the accused gave was that he knew nothing about it. " The first appellant denied that he was told this by Sergt. Malan.

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As to this, the learned trial judge says :-

"The accused gave a version different from that of Sergeant Malan. He said he had been asked by the Sergeant:'With whom did you come here' and he had replied that he had come with a girl. Further,that the Sergeant had put no more questions to him until after he had seen Nellie, and that if he had been asked about the men before,he would have told the Sergeant the truth. Sergeant Malan's version was that about half an hour before he saw Nellie he told the accused about the information he had about two men being dropped at the foot of Thaba Mhlope the previous day, and that an attempted robbery had been committed by two men the previous evening, and that the accused had denied all knowledge of this. He said that it was only after he had interviewed Nellie that the accused admitted that he had dropped two men at Thaba Mhlope the previous day. On the basis that Nellie was right and Sergeant Malan was wrong in saying that Nellie was first interviewed by the Sergeant in the accused's presence, we find ourselves fully persuaded that Sergeant Malan's version is the correct one and that the accused's is not. Sergeant Malan said he diarized his interview with the accused and although he had the diary with him in the witness box he was not asked to produce it. Moreover, it seems most unlikely that when he found the accused he would not have promptly put to him the information which he had. Sergeant Malan impressed us as being a capable officer and an honest witness, and nothing that the accused said caused us to modify that impression. On the contrary we found accused's story of how he came to ~~have~~ take the two men to Thaba Mhlope most unconvincing, though, of course, there was no burden upon him to convince us of its truth. "

It is on this evidence that the trial court concluded that the first appellant was a party to

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the attempted robbery. The learned judge sums up the effect of the evidence in the following words :-

"Putting all the pieces together, including the accused's unconvincing account of how he came to take the persons who committed the crime to the admirably conceived scene of their operations, we find ourselves convinced that the accused took them there for the purpose of enabling them to hold up the complainants to whom he was going to hand the money. The only reasonable inference in our view from all the circumstances is that he had previously told Mtembu and/or the second accused that he would be handing over this money to the complainants and that he would delay their departure from Woodsberg until nightfall. "

It is true that each factor, taken by itself, is probably capable of an innocent explanation. I say "probably", because in some instances the first appellant has given no such explanation, but has falsely denied that there was evidence which called for an explanation. Apart from this, however, it is the cumulative effect of the evidence which must be considered.

In Rex v. de Villiers (1944 A.D. 493), DAVIS A.J.A., at page 508, quotes the well-known statement on circumstantial evidence, viz. :-

"Not to speak of greater numbers; even two articles of circumstantial evidence - though each/ taken by itself weigh but as a feather - join them together, you will find them pressing on the delinquent with the weight of a millstone.....

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It is of the utmost importance to bear in mind that, where a number of independent circumstances point to the same conclusion the probability of the justness of that conclusion is not the sum of the simple probabilities of those circumstances, but is the compound result of them. "

He then goes on to point out that

"The court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn . "

It is, I think, stretching the arm of coincidence rather far when one considers that the very person/s whom the first appellant dropped along the route do the very thing which he expressed a fear might be done in respect of the very persons to whom he feared it might be done. The question may be asked : How did the two highwaymen, who waited for the opportunity throughout the day, know that the vehicle which they attempted to hold up,contained something worthwhile. Was it pure chance,or had the first appellant told them that they must wait for this particular vehicle,and that they would be well rewarded, because he had arranged for it to bring back a sum of money to Durban ?

In/.....

The findings of fact from which the trial court drew an inference of guilt, are largely based on credibility. I can see no good reason for interfering with these, what I may call basic, findings. The question which remains is whether the inference of guilt was the correct one to have been drawn therefrom. Despite the statement in Rex v. Dhlumayo and Another (1948(2)S.A.677 (A) at page 698) that "upon the "bare record the Appellate Court can seldom, if ever, be in as "good a position as the trial judge even to draw inferences as to "what is the more probable from the conduct of particular per- "sons whom he has seen and whom the Appellate Court has not." I shall assume in the appellants' favour that this is one of those cases in which the Appellate Court is in as good a position as the trial court to decide what is the correct inference to be drawn from the proved facts.(cf.Regina v. George & Anor. 1953(1)S.A.382).

In my opinion the only reasonable inference which can be drawn from these facts is that of guilt. That is the inference which the trial court has drawn and,because I consider it to be the correct inference,it follows that in my opinion the appeal must fail.

In the result the appeals of both the first and the second appellant are dismissed.

D.O.H. Beyers

Malan, J.A.
Ramsbottom, J.A. } Concur.

13th. May, 1959.

On resuming at 9.30 a.m.:

Counsel for the Crown (Mr. Barker) addressed the Court.

Counsel for No. 1. Accused (Mr. Allaway) addressed the Court.

Counsel for No. 2. Accused addressed the Court. (Mr. Brink).

14th. May, 1959

On resuming at 10. a.m.:

J U D G M E N T.

MILNE, J.:

At the outset I should like to say the Court is indebted to all Counsel for the assistance it has received in this case. I should also like to say that the Court is impressed with the promptitude, diligence and skill with which the investigations in this case were conducted by Detective Sergeant Malan.

Before I proceed further, I announce that the Court has not found the case of attempted murder, alleged in count 1, to have been proved beyond a reasonable doubt. Apart from the fact that the occupants of the front seat in the van had all ducked before the first shot was fired, there is nothing to show that the shot was aimed in such a way that it was likely

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to injure them. There is no evidence that any of the other shots which were fired was aimed at any person. If it was a shot that broke the window it may have been fired high for the purpose of demonstrating that the weapon was loaded and could be used against life if necessary.

Both accused are accordingly found not guilty on count 1

With respect to count 2, it will be convenient first to deal with the case of No. 2. accused. The Court has come to the conclusion that the case on this count has been established against him beyond all reasonable doubt. It has no doubt that the two persons who Ellen saw alighting from the van at spot "A" were No. 2. accused and Lloyd Mtembu, and that her evidence as to the behaviour of these two during the rest of the day was as testified to by her. Apart from the fact that the vehicle answered the description of that driven by No. 1. accused, and that it was one which she had frequently seen delivering goods in that area, the evidence in our view excludes any reasonable possibility that two other native men were that morning deposited from such a van at spot "A". This was the spot pointed out by Nellie where No. 2. accused and Mtembu got off the van and the same spot is referred to by Ellen.

In dealing with this aspect of the case we have not overlooked the fact that Nellie estimated the time at which No. 2. accused and Mtembu were dropped as being between twelve and one, whereas Ellen speaks of the time soon after the 10 o'clock bus had passed, though she was unable to say whether the bus was late or not that day. Nellie's idea of the time was an estimate only and made after a somewhat cramped journey which involved a pause at Tongaat. We are satisfied that if two other men had been dropped at the same spot later in the day as the two men referred to by Ellen, and had gone to the same tree, Ellen must certainly have noticed them, although she went into her house

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from time to time during the day. No one has suggested that she is otherwise than a wholly reliable witness and that is the view that the Court takes of her.

I may say that on this aspect of the case the Court bears in mind that the palmprint of No. 2. accused was found the next morning on the vehicle driven by Govender, and the fact that it was after the two men had transferred themselves to Thaba Mhlope that Ellen heard the sounds of the reports to which she has referred. The Court after considering that evidence is satisfied that the palmprint came to be on the vehicle in the course of the attempt to hold it up. In this connection it is not merely that No. 2. accused was unable to suggest to Sergeant Malan how his palmprint came to be there. I mention that the Court has no doubt that it came to be there as a result of No. 2. accused placing his palmprint against the door of the vehicle, and also that Sergeant Malan's evidence as to the accused's inability to explain it is to be preferred to his evidence denying that palmprints were mentioned to him by Sergeant Malan. But there was No. 2. accused's inability to suggest, after adequate time for consideration, how the palmprint could conceivably have got there innocently. Govender's evidence shows that the vehicle had been washed three or four days before. No. 2. accused was, throughout his evidence, unwilling to concede that it was his palmprint that was found on the vehicle, and the Court is satisfied that this was because there existed in his mind no reasonable possibility that it could have come there in any innocent way.

With regard to exhibit 1, the pistol, we find that this was fired by No. 2. accused during the attempted hold-up as the Court is satisfied beyond all reasonable doubt that the bullet from the cartridge case, exhibit 2, which was found at the scene of the crime by Sergeant Malan, was fired from

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the pistol, exhibit 1, on the evidence of Detective Sergeant Pisani. There is no question that shots were fired that night and it is not a reasonable possibility, in our view, that they were fired from exhibit 1. by some person other than No. 2. accused or Mtembu. The remaining evidence as to how exhibit 1. was found, though not conclusive in itself, certainly supports the view that it was No. 2. accused who fired the shots and that they were fired from exhibit 1.

I may say that the Court disbelieves the evidence of No. 2. accused that he had handed Vela Ntombela a torch in the parcel, and disbelieves Vela when he says that it was a long narrow parcel and that he did not know what its contents were.

Mr. Brink submitted that on the basis No. 2. accused fired the shots there is nevertheless no proof that he was attempting to rob the complainant of the money in the vehicle. He suggested there was a reasonable possibility that he was attempting, for example, to steal the van, and that there was no proof that he knew there was any money in the vehicle. He has pointed out that there was no demand by either of the two men for money. In our view, however, there was no need for the Crown to prove that No. 2. accused knew there was money in the vehicle for him to be held guilty of attempting to steal that money. Further, if he was attempting to steal the vehicle he was attempting to steal it with its contents, and we can see no reasonable possibility that the acts testified to by Govender and Mncunu at the time of the alleged hold-up were other than for the purpose of robbing the complainants of whatever they could conveniently rob them.

I now deal with the case against No. 1. accused on count 2. The case against him is roughly as follows: (1) That it was he who brought the very persons who committed the crime to the scene where that crime was actually committed.

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(2) That at Luthuli's store he manifested anxiety that Tusi should not be taken by the complainant to Durban. His Counsel does not dispute this but relies on the accused's explanation in which he attributed this anxiety to the consideration that the passengers carried would not be covered by the employer's insurance if they were injured. (3) That he told the complainant at Luthuli's store that Tusi might have a gang waiting for them on the road. This was denied. (4) That he said to Mncunu, separately, at Luthuli's store words to this effect: "You must not die for the property of somebody else. If anyone shows you a thing you must hand over the money". This was denied. (5) That he delayed the business of delivery by wasting time at the places where the two vehicles went until it was dark, considered with the fact that No. 2. accused and Mtembu only moved over to Thaba Mhlope about sunset and that the attack took place after dark. The accused denied that there was any deliberate delay on his part. (6) That when Govender and Mncunu left accused wished them "Happy landings" and shook hands with Govender. This was denied. (7) That he knew before he went to Noodsberg that he would be handing the day's takings over to the complainants for them to take back to Durban. (8) That he falsely denied to Sergeant Malan on the 9th October when he was first interviewed that he knew anything about two men having been dropped at Thaba Mhlope the previous day.

It will be convenient to deal with the last point first. The accused gave a version different from that of Sergeant Malan. He said he had been asked by the Sergeant: "With whom did you come here" and he had replied that he had come with a girl. Further, that the Sergeant had put no more questions to him until after he had seen Nellie, and that if he had been asked about the men before he would have told the Sergeant

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the truth. Sergeant Malan's version was that about half an hour before he saw Nellie he told the accused about the information he had about two men being dropped at the foot of Thaba Mhlope the previous day, and that an attempted robbery had been committed by two men the previous evening, and that the accused had denied all knowledge of this. He said that it was only after he had interviewed Nellie that the accused admitted that he had dropped two men at Thaba Mhlope the previous day. On the basis that Nellie was right and Sergeant Malan was wrong in saying that Nellie was first interviewed by the Sergeant in the accused's presence, we find ourselves fully persuaded that Sergeant Malan's version is the correct one and that the accused's is not. Sergeant Malan said he diarized his interview with the accused and although he had the diary with him in the witness box he was not asked to produce it. Moreover, it seems to us most unlikely that when he found the accused he would not have promptly put to him the information which he had. Sergeant Malan impressed us as being a capable officer and an honest witness, and nothing that the accused said caused us to modify that impression. On the contrary we found No. 1. accused's story of how he came to take the two men to Thaba Mhlope most unconvincing, though, of course, there was no burden upon him to convince us of its truth.

As to what is alleged was said at Luthuli's store, we have no doubt that Govender and Mncunu were speaking the truth when they said that the accused warned them that Tusi might have a gang on the road; that he did say "happy landings" and did shake Govender by the hand when the complainants left Noodsberg Wishing them "happy landings" was not, of course, in the least necessarily sinister nor does the accused's false denial that he said it prove the case against him. The warning about Tusi's gang was not explained by the accused but simply denied by him. In the absence of some explanation as to why he said

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this we find ourselves unable to think that he did not know that a robbery of the complainants was going to be attempted that evening. The notion suggested by Mr. Allaway that in the exuberance induced by the consumption of alcohol, the accused might, to use Mr. Allaway's phrase, have "slipped this in about Tusi's gang", that is to say that it was mentioned in all innocence and not with reference to something sinister which was in his mind, we find to be untenable. The suggestion that becuase Tusi was a stranger he might have a gang to waylay the complainant seems to us to be also quite incongruous. On the basis that accused did say this about a gang of Tusi's taken in conjunction with other factors, it seems to us to be inconsistent with his innocence of the projected attempt. Nor can we conceive it as reasonable that Govender and Mncunu might have conspired falsely to say that the accused had warned them about the possibility of their being waylaid.

Govender gave his evidence well and made a good impression on the Court. We find ourselves unimpressed by the fact that there is a contradiction between him and Mncunu about whether it was known before the start on 8th October that No. 1 accused would not be going back that night but would be handing the money over to the complainants. We believe Govender when he says that he was told about this by the accused at Noodsberg, and that the arrangement was not known to him until then, notwithstanding Mncunu's evidence that Govender was present when the arrangement was made. We accept it, however, that the arrangement was made before the expedition started.

Mncunu's evidence that he was privately told by the accused not to risk his life but to hand over the money if a thing were shown to him, is uncorroborated and is denied by the accused. Mncunu was not an altogether satisfactory witness but in spite of that we are disposed to believe him on this point. We do not think that he invented this, partly because after assessing his quality as best we could, we do

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not think he could have invented it - and if he did not invent it it was the truth. It was in accord with what No. 1 accused said both to Govender and Mncunu about Tusi's gang. It is not improbable that he said what Mncunu said he said to him, because he either wanted to pave the way to an unresisted robbery or to protect Mncunu - or both.

Mr. Allaway strongly urged if the accused planned this robbery or had been a willing agent in the affair he would not have been likely to talk either to Govender or Mncunu in the way alleged. He had, however, partaken of liquor and may on that account have been less discreet than he otherwise would have been. Moreover, he knew very well - that is if he knew about the projected robbery - that he would be far away from the scene of the crime when it was attempted and thus might very well think that, because of that, he was safe in giving such a warning to them.

Finally, we accept Govender's evidence that the accused was purposely delaying deliveries from Govender's vehicle, nor are we dissuaded from so doing by the consideration that Govender admitted in cross-examination that it would be in order for a commercial traveller - which No. 1 accused was - to spend some time tea-drinking and talking with his customers.

Putting all the pieces together, including No. 1 accused's unconvincing account of how he came to take the persons who committed the crime to the admirably conceived scene of their operations, we find ourselves convinced that No. 1 accused took them there for the purpose of enabling them to hold up the complainants to whom he was going to hand the money. The only reasonable inference in our view from all the circumstances is that he had previously told Mtembu and/or No. 2 accused that he would be handing over this money to the complainants, and that he would delay their departure from Noodsberg until nightfall.

/We...

JUDGMENT.
SENTENCE.

We accordingly find No. 1 accused guilty on count 2.

THE JUDGE: I will consider the matter of sentence and not pass sentence before 10 o'clock tomorrow morning.

(The Court adjourned until 10 a.m. tomorrow, 15.5.1959).

15th May, 1959.

On resuming at 10 a.m.:

S E N T E N C E.

MILNE, J.:

I address you, Daniel Ngwenya. You have been found guilty of attempted robbery but it has been urged on your behalf that there was no proof of any threat to do grievous bodily harm. It is unnecessary to consider this matter as even if aggravating circumstances were found to be present when the actual attempt to commit the robbery was made, I should not have imposed the death sentence. But even without aggravating circumstances the crime of attempted robbery is a very serious one. The attempt in this case was only frustrated by reason of the courage of Govender in driving on.

I have taken into account that you have for many years been entrusted by your employers with responsible work, and that this was your first offence. You did, on the other hand, grievously abuse the position of trust which you held in this case and used your position to further this nefarious deed, and you must be severely punished. It was your conduct in delaying Govender's lorry that enabled the attempt to be made under cover of darkness. It was inside information from you that made this plan possible. I find, in the circumstances,

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