Case No 576/94

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THEMBA SAM MTHEMBU Appellant

and

THE STATE Respondent

Coram: NESTADT, SCHUTZ JJA et SCOTT AJA

Date heard: 8 September 1995

Date delivered: 11 September 1995

J U D G M E N T

NESTADT. JA:

At about 6 pm on 17 July 1993 three men entered a butchery in Tembisa. Having robbed and fatally shot the owner they escaped.

These events led to the appellant being charged and convicted in the Witwatersrand Local Division on four counts viz murder, robbery (with aggravating circumstances), unlawful possession of a firearm and unlawful possession of ammunition. The State case was that the appellant was one of the robbers and had in fact fired the shots that killed the deceased. The appellant's alibi defence having been rejected, he was convicted on all four counts. An effective sentence of 20 years imprisonment was imposed. He appeals now against his convictions.

The State case rested on the evidence of an eye-witness, namely Kenneth Mohapi. He was standing outside the butchery when the robbery took place. He testified as to what happened. At an identification parade held on 23 August 1993 he pointed out the

appellant as one of the gang and in particular as the person who shot the deceased.

The issue to be determined is whether the trial court was correct in finding that Mohapi's identification of the appellant could sufficiently be relied on to sustain the convictions in the face of the appellant's denial that he was on the scene. There are a number of factors in favour of an affirmative answer. Subject to what I say later, he had a fair opportunity to observe what happened and to identify the person who shot the deceased. The lighting was good. The three robbers passed close to where he was standing. He said he looked at their faces and could see them clearly. He was paying attention to them.

The factors referred to must not be underestimated.

There is also the consideration that whereas Mohapi was found to be a satisfactory witness, the appellant did not create a favourable impression with the trial court. On the other hand, however, the following must be borne in mind. As regards the identification of the appellant, Mohapi was a single witness. So it was necessary to approach his evidence with caution especially seeing that we are dealing with a case of identification of a person whom Mohapi had never seen before. There were no particular features of the appellant that he relied on in order to identify him. The identification parade was held more than a month after the incident. Mohapi says that he was able to observe the appellant when the gang arrived on the scene and when they left. On the latter occasion it must have been but for a brief moment; they were then running away; and at this stage

Mohapi was in a state of shock. On the former occasion ie as the appellant and the other two walked towards the deceased as he stood at the door of the premises, there was no particular reason for Mohapi to then take notice of them. And at this stage his attention was, on his own testimony, divided. He says he was looking at all three assailants and their clothing. There was, incidentally, no independent evidence of what the appellant wore on the night in question or that he possessed clothing of the kind referred to by Mohapi. According to a second State witness (who could not identify the appellant) the person who fired the shots had a "wolmus...oor sy gesig getrek". The result was that he could not see him clearly. This evidence is difficult to reconcile with Mohapi's evidence that he could see the appellant's face; nor does Mohapi

make any mention of the appellant having worn a cap of any kind. Another problem for the State is the evidence that another bystander pointed out someone else at the identification parade as the person who fired the shots. Finally, I am not convinced of the cogency of the reasons of the trial court for accepting Mohapi's identification and rejecting the appellant's defence. No particular justification is given for having done this. Nor am I impressed by the criticism of the appellant's evidence (arising, in the main, from him having made contradictory statements concerning his addresses). On the contrary, the appellant's evidence does not read badly.

In my opinion the cumulative effect of what I have stated leads me to the conclusion that this was a case where the trial court should have had a reasonable doubt as to the guilt of the

appellant on all four counts. He should therefore have been acquitted.

The appeal succeeds. The convictions and sentences of the appellant are set aside.

H H Nestadt

Judge of Appeal

Schutz, JA )

) Concur

Scott AJA, )