

given an opportunity to read the record and he represented the appellant to the end of the proceedings. Although I would have acceded to Mr. Monapathi's application to recall two prosecution witnesses, I do not find the magistrate's refusal to grant the application as being an unreasonable exercise of his discretion. Mr. Matlhare had cross-examined these witnesses at length on the most important issue affecting the appellant (his identification) and there was no need for two lawyers to have a bite at the same cherry. The appellant was not in any way prejudiced in his defence and his complaint on this aspect of the case is not justified.

The appellant conducted his appeal in person. At the commencement of his argument he proposed to the Court that if it is prepared to alter the magistrate's order to read that the two years sentence imposed on him in this appeal run concurrently to the sentence he was serving, he (the appellant) would abandon the appeal against conviction. I asked the appellant what sentence he was then serving and he said 6 years imprisonment imposed upon him for an offence of robbery. It transpired that he was convicted in that other case by the High Court. It was a different case of robbery committed at a different date which involved the use of firearms. In the appeal before me the robbery on which the appellant was convicted also involved the use of firearms. Moreover he had two other previous convictions in 1968 and 1975. It was clear that if the conviction was in order, the sentence, if anything, was on the light side and not a day too short. I intimated to the appellant that his proposal was unlikely to succeed. The appellant took the hint and said he will proceed with the appeal against his conviction on the sole ground that he was not properly identified as being a participant in the robbery. It becomes necessary to outline the facts:-

At about 9.30 a.m. on the 14th April 1978 Mrs. Margaret Stewart (PW1) was being driven in her Mercedes Benz car Reg. No. LE 1 from Mafeteng to Wepener. Her driver was Ntoane Samoko (PW2) otherwise known as Glenboy. Before reaching the South African borders and near a village called Matholeng, a Mazda van No. LH 120, (which has since been proved to have been stolen from Malebanye Mokhethi - PW5) with three persons inside it (see the evidence of the driver Ntoane, and two other witnesses 'Matumelo Sekoala PW3 and 'Mateboho Selebalo PW4)

blocked and rammed the Benz forcing it to stop. Two persons with Balaclava hats jumped out and at gun point forced the driver of the Benz (Ntoane), after a brief struggle, to get out. The two men boarded the Benz leaving Ntoane stranded. One sat at the back next to Margaret Stewart and the other took over the wheels. The Benz (with Mrs. Stewart inside) and the Mazda van drove off in the direction of Mafeteng. The Benz dropped Mrs. Stewart on the way but not before she was dislodged, also at gun point, of some M.30 or M.40 that she was carrying in her handbag.

None of the above four witnesses were able to identify the three men. The Mafeteng Police however had been apprised of the robbery and they alerted the Maseru police at about 10 a.m.. Sgt. Sekatle (PW6) of Mafeteng with a posse of policemen set off towards Maseru in a police vehicle (they later borrowed another vehicle from a civilian) in search of the Benz LE 1. The Maseru police under W/O Masupha (PW8) also set off in the direction of Mafeteng in search of the Benz. Both police teams were armed and they numbered 9 or 10.

The Benz was sighted by W/O Masupha(PW8) and his party coming towards them from the direction of Lancer's Gap near Maseru. The police signalled the Benz to stop. It failed to stop and sped past them. Fire was exchanged between the police and the occupants of the Benz. A civilian witness (Lebusa Phomane - PW7) who saw the Benz being chased puts the time as between 11 a.m. and 12 noon. He adds that there were 3 men in the Benz but he could not identify them. Det. Sgt. Molelengoana (PW9) testified that he saw three persons in the Benz but he too did not recognise them. If I may digress for a moment here, on the facts so far outlined, two irresistible inferences emerge:

1. That the man who drove off the Mazda van had joined the two men who boarded the Benz with Mrs. Stewart sometime after she was dropped and
2. That the three men in the Benz who failed to stop and exchanged fire with one of the police vehicles that tried to intercept them near Lancer's Gap were the robbers.

The Benz, now chased by two police vehicles, swerved into Mabote village on the outskirts of Maseru, and stopped there. The robbers alighted, abandoning the Benz, and dispersed in the village with the two groups of policemen at their heels. One of the absconding men was shot dead and the other (the accused who did not appeal) surrendered. The appellant allegedly fled in

another direction into a house and then into another. He was ordered to come out. When he emerged he was shot. Whether he was shot in the back as he was fleeing as the policeman (Sgt. Sekatle PW6) alleges, or whether he was shot in the front as he maintains, is not a problem that concerns me in this appeal. The appellant's defence was that he was not one of the men in the Benz but was paying a bona fide visit to a friend in the village.

The evidence of identification of the appellant was as follows :-

1. W/O Masupha(PW8): pp 38, 39 and 40 of the typed record:

"When we were making enquiries at Tsosane's village and after we drove a few paces we saw a Mercedes Benz car, blue in colour and registered as LE 1, drive down Lancer Gap and come towards us. Troopers Mafitoe and Monaheng were armed with 303 rifles each and were sitting at the back of the van. I got out of the van and waved down the LE 1. The driver of our vehicle also waved down the driver of LE1. The car accelerated as it approached us. As the road was narrow and I feared that there would be a collision, I stood aside and the car passed very close to me. I identified the driver of the car as accused 2". (A2 is the appellant).

"We chased after the car until the point where the road from Sebaboleng joins the tarred road from Maseru. The car took the direction towards T.Y. and we followed it. The car stopped near the gate of the old age home. On the left side of the car alighted two people one from the front seat and the other one from the back seat. From the right seat alighted one person who went into the yard and ran uphill while the other two ran eastwards towards the direction of T.Y."

"As we were outside the fence, we drove towards T.Y. road, with the intention of intercepting the two men who ran eastwards. We took a turn near Mapeleng cafe and followed the gravel road into Mabote's village".

2. Det. Trooper Monaheng(PW 11): pp 52 and 53, 57 and 58.

"The car took the road to T.Y. but stopped near the home for the aged. Three people alighted from the vehicle and ran into the village. Two of these people alighted from the back seat and the driver was alone in the front. I recognised accused 2(App) as the driver of the car as the car drove past our vehicle at Tsosane's and when he emerged from the car at Mabote's. We drove into Mabote's village and intercepted accused 1 and the other one who has since died. Accused 1 and deceased were arrested by PW8. I followed the direction taken by accused 2.(App). He was still in sight.

/"I chased

"I chased accused with the villagers until he went into one house at Mabote's but later got out of that house and entered the house of one Mrs. Mbelle. As I was far from him I found PW6 having arrested him. He was taken back to the LE 1 and later to hospital. Accused 2 had bullets wounds on the hip and was bleeding. I guarded the car (LE 1) until it was towed to the garage on the same day. I had known accused 2 for two months at the time of this incident".

- XX:"Q : What direction did accused 2 take?
A : He ran uphill and in easterly direction.
Q : Did you see the driver of the car all the time?
A : Yes.
Q : How many people chased accused 1 and deceased?
A : It was PWS and four other policemen.
Q : Did you see accused 2 all the time that you chased him?
A : Yes.
Q : Were you the only one chasing him?
A : Yes.
Q : Were you still alone when you met accused 2?
A : Yes.
Q : Is it correct that you got to accused 2 first?
A : Yes.
Q : Accused 2 will say that he saw you with another policeman as he came out of the house and PW6 shot at him?
A : I arrived on the scene after he was caught.
Q : Accused 2 said he had been taping the house in which he was?
A : It is not true".

3. W/O Mokhoele (PW 10) : p. 47:-

"I am a Warrant Officer stationed on Maseru. On 14/4/78 I was at Lancer's Gap with other policeman following the information we had received. As we drove towards Lancer's Gap. The car was blue in colour.

I was the driver of the police vehicle and I flagged it but it drove past in great speed. After it drove past I followed it. There were three people in the car and I identified accused 2 (App) as the driver of the car. I did not identify the other occupants of the car".

4. Trooper Jonathan(PW 13): pp 61 and 62:-

"Three people alighted from the vehicle. One of those people come towards us while the other two ran towards T.Y. but they were all within the

/"yard

"yard for the home of the aged. We chased the man who came towards us after he went past us. During the chase the fleeing man produced a firearm and pointed it at me. I was at a distance of about 13 paces (indicated) from the man when he pointed a firearm at me. I identified that man as accused 2. I stopped and told seargant Moiloo that accused was carrying a firearm. Seargant Moiloo and I stopped until accused 2 went through a fence. We followed him and kept him in sight until he disappeared in a garden which was grown mealies. There was a house in that garden".

XX:"Q : When did accused 2 point a firearm at you?

A : I saw his face when he came towards us.

Q : Did accused 2 turn away from you before you chased him?

A : Yes.

Q : Did you know the name of accused 2 as you started chasing him?

A : No.

Q : What did you know about accused 2?

A : I suspected that he was a fugitive from justice.

Q : How did you know that the man who was arrested was accused 2?

A : I had seen his face.

Q : How far was Seargant Moiloo from you when you chased accused 2?

A : He was about four paces behind me.

Q : Were you in uniform or not?

A : I was in uniform as I was wearing a khaki overall which is part of our uniform. I do not remember about the Seargant.

Q : Did you see the police vehicle as you chased accused 2?

A : No.

Q : Did you see accused 2 on subsequent dates?

A : Yes.

Q : Did you chase accused 2 in an open area?

A : Yes.

Q : Is it correct that there are houses and fields south to the home for the aged?

A : Yes.

Q : Where was accused 2 arrested?

A : It was not at the police where he disappeared.

Q : Is it possible that the man who was arrested was not the same man you chased?

A : No."

Sgt. Sekatle (PW6) who shot the appellant testified that

/trooper

Trooper Monaheng pointed out to him the house into which the appellant fled.

A village woman 'Mathabo Makhutla (PW12) who works in the home of Mrs. Mbelle, testified - p.60

"I live at Maseru in the district of Maseru. I work at the home of one Mrs. Mbelle. Her house has several rooms. I remember the day when there were many people at Mbelle's. On that day several people arrived at Mbelle's including the police who asked me to open Mbelle's house. I opened the house and looked into the house. I saw the hand of a person under the bed waving at me. I did not see the face of that person. The police went into the house but I did not go in. I went into the house when the police came back the second time. They found a lumber jacket, a skipper (black and yellow). I do not know to whom those articles belong as they neither belong to Mbelle nor myself. I had swept the house that morning and the articles were not in the house. One of the windows was open. I do not know how the person under the bed got into the house and I did not see how and when he left the house".

The magistrate had no doubt that that person was in fact the appellant. He was of course seen going there by Trooper Monaheng who alerted Sgt. Sekatle as I have indicated earlier.

Apart from the direct evidence against the appellant there was also circumstantial evidence. When he was finally apprehended he was found in possession of 8 rounds of .38 ammunition. When the Benz was eventually searched two .38 revolvers were found in it. I do not consider the circumstances surrounding the identification of the appellant as too unfavourable. Although there was dust and shooting it was broad day light and neither the Benz nor its occupants were lost sight of. The appellant as I have demonstrated, was identified by witnesses, both when was speeding through the interception, and when he alighted at Mabote and when chased until he was seen entering Mbelle's. The calibre of the ammunition that was found in his possession matched with the revolvers found in the Benz. The magistrate, who heard and saw the witnesses, believed the Crown's evidence and rejected, rightly in my view, the appellant's evidence that he was an innocent visitor to Mabote on that day.

The appellant, on the evidence, was properly convicted and the appeal against conviction(and sentence) is dismissed.

For Appellant: In Person

(copy of Judgment to be served on him at Central Prison)

For Respondent: Mr. Muguluma

CHIEF JUSTICE

21st July, 1980

1.5.1980