

SOUTH AFRICA / JUDGMENT

Sweeney and Others v S (CA&R320/2010)

[2011] ZAECGHC 82 (22 December 2011)

[2011] ZAECGHC 82**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

E Revelas, JD Pickering

CASE / FILE NUMBER

CA&R320/2010

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NOT REPORTABLE**IN THE HIGH COURT OF****SOUTH AFRICA****EASTERN CAPE –****GRAHAMSTOWN****Case No: CA&R320/2010****Date Heard: 7/12/2011****Date Delivered:**

22/12/2011

In the matter between

MORNÈ SWEENEY

AND THREE OTHERS

.....Appellants

and

THE STATE

.....Respondent

JUDGMENT**REVELAS J**

- [1] The four appellants were all serving police officers when they were charged, pleaded not guilty to, and were convicted in the Magistrate's Court in Grahamstown on one count of assault with intent to do grievous bodily harm. All four appellants were sentenced to terms of three years' imprisonment of which one year was conditionally suspended for five years.

- [2] The case for the prosecution was that on the evening of 18 July 2008, at the complainant's house in Joza, the appellants assaulted the complainant, a fellow police officer, by "hitting him with clenched fists, open hands kicking him with booted feet and spraying him with pepper spray".
- [3] With leave obtained on petition to the Judge President of this Court, the appellants appeal against both their conviction and sentence.
- [4] The evidence presented by the State and the findings of the magistrate were based on the testimonies of the complainant, his wife, two of his neighbours and the private medical practitioner who examined the complainant and completed a medico legal report in respect of his injuries.

The State's Case

- [5] The testimony of the complainant was that on the night in question, he was at home with his young daughter when two senior police officers arrived and requested him to accompany them to the police station in connection with an enquiry which had been opened into an earlier incident concerning himself and Director Moyake (the most high ranking police officer in Grahamstown). According to him, the incident concerned his transfer which was not approved by the director ("Moyake"). They took his fire-arm (which he took with him when he went to open the door), after he allegedly said that he would hand over his fire-arm if they were arresting him. He insisted that he was not under arrest and that he voluntarily accompanied the two senior officials, Captain Mamatobe ("Mamatobe") and Superintendent Cassim ("Cassim") to their vehicle.
- [6] During the course of their discussion which commenced in the house and was continued in the vehicle, the complainant said he remembered about a document which he wanted to take with him to the enquiry. He alighted from the vehicle to fetch this document, in which he had inter alia, criticized the management style of the South African Police Services.
- [7] The complainant testified that having left the vehicle, he entered his yard, and he noticed that numerous policemen were on his property and he requested them to leave. The four appellants then approached him and one of them told him that he was under arrest, but would not tell him why. Both the second and fourth appellants he said, then sprayed him with pepper spray in his face, which blinded him for some time. According to him, he obeyed their instruction to lie on the ground, face down. Whilst the second and fourth appellants pinned his arms and feet down, the first appellant held his neck down with his foot, "standing" on the back of his neck and handcuffed his hands behind his back. The four appellants then proceeded to assault him by hitting him with clenched fists, trampling on him and kicking him in the head and all over his body with booted feet.
- [8] After being handcuffed, he said he was lifted by them, pushed outside the yard and thrown onto a heap of sand where he was assaulted again and sprayed a second time with the pepper spray, while the perpetrators ignored his cries and pleas for mercy. He was also told

by them that he was an “unruly policeman”. Ultimately he was thrown into a police vehicle, which had arrived in the interim, driven by Sergeant Feni. The complainant testified that during the assault he sustained injuries to his head and body. His head wound required four sutures.

- [9] The complainant claims that the assault lasted for a period of 25 minutes. During cross-examination, when the inherent impossibility of this statement, in the light of the medical evidence was pointed out to him, he shortened the duration of the assault to 15, and later to 10 minutes. This aspect of the complainant’s testimony will be dealt with more fully further on in this judgment.
- [10] The complainant testified that his wife had also arrived at their home and witnessed the assault on him, in particular when it was at the stage when he was being kicked while lying on the ground in the yard. The complainant’s wife, Mrs Nyamanda confirmed her husband’s evidence. She testified that the first appellant held her husband down with his foot at the back of his head (not neck) and that the second appellant was kicking him on his upper body from both sides while the third appellant kicked him on his legs, lower body and feet. According to her, the assault lasted for approximately 10 minutes. She said she observed two of the complainant’s assailants holding pepper spray canisters. At some point Captain Green (“Green”) led her away into her house. From within the house she said, she observed her husband being pushed out of the yard by the second and first appellants. They kicked him on his behind “bum (sic)”, and below it, as they pushed him along.
- [11] Mr Makina, a neighbour who lives opposite the appellant, said his attention was drawn by the noises outside. When he went to look, he observed that his neighbour (the complainant) was being assaulted “from the door towards the gate and handcuffed at the back. As they went out there is some sand and then _ _ _ they threw him on the sand and they kicked him. Then he started crying, but not loud and saying “forgive me”. Mr Makina was unable to say how many policemen had assaulted the complainant but he said there were many and added:

“What amazed me was the people who were assaulting my neighbour were police and he is a police as well”.

This witness also expressed dismay at the fact that a policeman could be assaulted in this fashion in the presence of his wife. He argued that the complainant could not have been the “aggressor and never resisted arrest, because how does he do that when he is handcuffed?” The magistrate cited the aforesaid passage verbatim and with apparent approval, in his judgment on conviction.

- [12] The appellant’s next door neighbour, Mr Makabeni also testified. He said that he also went outside because of the noise in his neighbour’s yard. Near the fence he saw the complainant’s wife and small daughter both crying and that the complainant was on the heap of the sand outside his yard, in handcuffs, while he was being kicked and trampled. He also testified that he heard the complainant crying and pleading for forgiveness. According to him, two white policemen and three black policemen were “trampling” on the

complainant. (Two of the appellants are white and two are coloured). The witness said that the black policemen could have been coloured. The magistrate assisted by pointing out that some coloureds were more black and others more white in complexion. The complainant described the four appellants as follows: "All of them white guys".

- [13] Dr Jagathee Santhia, examined the complainant at Settler's Hospital at the complainant's behest on the night of the incident. He wrote in his medico legal report that he observed six injuries on the body of the 35 year old complainant. These were: A three centimetre laceration to the back of the complainant's head; an abrasion with swelling above and in front of the left ear; internal bleeding on the outer half of the left eye, below the eye surface; swelling and abrasions over the left cheek; tenderness over the inside of the right knee; and lastly, tenderness of the upper back. He testified that the complainant had pointed out to him where on his body he was injured. He also noted that the injuries were of moderate severity "consistent with being kicked".
- [14] On the evidence of the State witnesses there were two assaults. One inside the complainant's yard, and the second one outside at the heap of sand. It would appear that the two neighbours only saw the second assault which occurred after the complainant was handcuffed and taken out of the yard to the heap of sand.

The Version of the Appellants

- [15] The four appellants had been made aware of certain facts before they followed the orders of their superiors and went to the complainant's house. This occurred at a meeting where ten policemen, including the four appellants, were briefed by Green that the purpose of their visit to the complainant's house was to assist with his arrest. They heard that earlier in the day, the appellant had threatened the life of Moyake. He had approached Moyake's daughter and told her something to the effect that "people could die", clearly referring to her father. The complainant had also on a previous occasion assaulted Captain Jafta. He was regarded as a potentially dangerous policeman who was also armed. The plan was to first seek the complainant's co-operation to accompany the senior officers to the police station in their vehicle. The complainant would also have to be disarmed. If it became necessary to arrest him, or if he became violent, there was to be a significant police presence in place at the complainant's house, to secure his arrest. It was thus foreseen that force would be used, if necessary.
- [16] Each of the four appellants testified in his own defence. They denied that they ever kicked the complainant or hit him with fists. Their defence was that the complainant resisted arrest and they had used the necessary force in the circumstances to subdue him, and that the injuries sustained by him were inflicted during the struggle.
- [17] The first appellant testified how the complainant left the police car and came running onto his property, shouting and swearing at the many policemen present, ordering them to get out of his yard. When he came close to the appellants, the first appellant tried to stop him and placed his hand on the complainant's shoulder telling him that he was under arrest. The

complainant then tried to hit him in the face, but struck him in the chest. On the first appellant's evidence he managed to handcuff the complainant, only after a struggle between the complainant and the appellants.

- [18] The second appellant admitted that he sprayed pepper spray at the complainant, but said he did so only after he warned him to calm down, which he did not do. According to him the complainant then became very aggressive, swinging with his arms running towards the gate. He then grabbed the complainant by the neck and asked the other police officers, (about six of them) to help him bring the complainant under control. He said the complainant became even more aggressive when they had him on the ground.
- [19] The third appellant referred to "a scuffle" which he witnessed between the complainant and the first appellant and confirmed the evidence of the first appellant that the complainant took a swipe at him, when he placed his hand on his shoulder to place him under arrest. According to the third appellant, the complainant's conduct as aforesaid meant that he was resisting arrest, therefore they (the appellants) tried to gain control of his body and that is how the complainant ended up on the ground where he also "struggled against being handcuffed". The third appellant said he attempted to assist with the handcuffing by grabbing the complainant's right hand. He could not participate much in this regard since he was temporarily blinded by the pepper spray which was discharged from the second appellant's canister, and had to be led away. The third appellant denied that he kicked the complainant on the legs as the complainant had testified. He also said that he did not hear the complainant shout at the police officers in the yard on entering after when he had left the vehicle. He could recall that the complainant's demeanour was very aggressive.
- [20] The fourth appellant denied that he had used any pepper spray on the complainant, or even had a pepper spray canister in his possession. He said he had pins in his hands as a result of an operation, and was therefore unable to use his hands to subdue the complainant. He therefore attempted to keep the complainant under control by lying with his full body weight on the complainant's legs, thereby preventing the complainant who was trying to "wiggle loose" while he was on the ground. In response to a question by the Prosecutor as to why it was necessary for so many policemen to subdue one person, the fourth appellant related his experience of observing a relatively small suspect, almost succeeding in fighting off five police officers who were trying to arrest him, to illustrate that their conduct was not extraordinary.
- [21] According to the appellants, they were not the ones to take the complainant out of the gate, to the heap of sand. This was done by five or six other police officers, some of whom also assisted them in subduing the complainant. Bearing in mind that Mr Makabeni said he saw three black police officers and two white police officers assaulting the complainant outside the yard in what must have been the second assault at the heap of sand, this evidence is very significant.

- [22] None of the appellants were able to proffer any explanation for the cut at the back of the complainant's head. The first appellant denied stepping on the back of the complainant's neck. He testified that he himself sustained a cut to his hand while handcuffing the complainant. None of the appellants recalled the complainant apologizing or pleading for mercy asking forgiveness.

The Magistrate's Findings in his Judgment on Conviction

- [23] The magistrate accepted the evidence of all the State witnesses. He stated that:

"I do not have to minute it in detail the reason therefore, is (sic) as they appear on record. I have carefully observed them as they testified in the witness box, and insofar as their demeanour is concerned, no criticism at all can be levelled against them. I was extremely impressed by their testimonies. I am satisfied that they told the truth. Their evidence fitted perfectly like pieces of a puzzle".

- [24] The magistrate had the following to say about the appellants' evidence:

"Their evidence is concocted so as to give an innocent explanation for assaulting and pepper spray the complainant in the manner they did. Their testimony is non-sensical and a pack of lies. I reject it as palpably false".

- [25] The magistrate's rejection of the appellants' version in these unequivocal terms was motivated by his view that they "could not convincingly explain that the complainant sustained the substantial injuries he had if they conducted themselves in the manner they described", and "What is clear in my mind is that, because of the briefing they received their minds were clouded even when the complainant did not offer any resistance".

Discussion

- [26] The elements of the crime which the State was required to prove beyond reasonable doubt were the following: (a) the application of force (or inspiring the belief that force is to be applied); (b) unlawfulness and (c) the intention to cause bodily harm (CR Snyman, Criminal Law, 4th edition at 435).
- [27] The magistrate's task in this matter was to consider all the evidence, which would include a consideration of whether or not the appellants' version might be reasonably possible, and then to decide whether the State had proved, beyond reasonable doubt, all the elements of the offence.
- [28] It stands to reason that where the offence under consideration is alleged to have been committed in the context of an arrest, the question of whether the accused had the necessary intention to cause grievous bodily harm, requires a very careful consideration of all the facts.
- [29] The complainant was not a good witness. He exaggerated the assault to such an extent that his evidence ought to have been rejected. According to him, he received one kick per second over a period of 15, and later 10 minutes, on his latest version of the duration of the assault.

(10 minutes was the estimate of the complainant's wife.) On that estimate he received at least 600 kicks to his body. Bearing in mind that the State alleged he was kicked with booted feet, one would have expected the injuries sustained by him to have been of a much more serious nature, and not just of "moderate severity", as noted by Dr Santhia. If he was kicked "from both sides" as the complainant's wife testified, one would have expected injuries to the complainant's ribs or arms, yet there were none. In fact, no injuries whatsoever to his torso were noted, and there was a complete absence of any bruising or tenderness thereto. Such injuries as he did sustain (on the side of his face, and upper back) could be consistent with someone being held on the ground (a gravel surface, on the appellants' version), face down, while struggling, as would happen to a person who resisted arrest in this manner. The magistrate curtailed the cross-examination of the appellants' attorney, by preventing him from exploring the aforesaid scenario with Dr Santhia. The magistrate did not even evaluate the medical evidence in his judgment on conviction. He only relied on it to find aggravating features in his judgment on sentence. The magistrate clearly did not have any regard to the glaring discrepancy between the medical evidence and the evidence of the complainant about the assault.

- [30] The magistrate's findings in this regard demonstrate that he did not give any consideration to the question which he was duty bound to consider, which is whether there was a reasonable possibility that the version of the appellants might be true. Counsel for the State argued that the complainant's exaggeration of the duration of the assault was to be expected from a victim who had suffered such an ordeal. That argument does not assist in explaining the total absence of injuries to the complainant's torso and arms, which, if the testimonies of the complainant and the state witnesses were true, would have had to have been present.
- [31] Counsel for the State further submitted that the evidence of the two neighbours about the assault had to be accepted as it had the "the ring of truth" about it. Their testimonies were not impaired by cross-examination and they appeared to be fairly good witnesses. However, it should not be overlooked that these witnesses testified about a second assault, which, on the appellants' version could

not have been perpetrated by them (if it did occur), because they did not take the complainant out of the gate after he was arrested and handcuffed. The complainant contradicted himself about the events on the sand heap. During his examination in chief he said he was thrown onto the heap of sand, whereas during cross-examination he pertinently denied that he was thrown onto it. He said he just sat there. It is further not insignificant that both neighbours testified about more than four perpetrators (and some even of a different race group) being involved in an assault outside the complainant's house. However, truthful these two witnesses may have appeared to the magistrate, their description of the assault on the complainant is at variance with the injuries he sustained. Even though the witnesses for the prosecution corroborated each other in broad terms, there was also nothing about the appellants' version that was inherently improbable.

- [32] It also seems improbable in my view, that senior police officers such as Mamatobe, Cassim and Green, who, on the complainant's version looked on, would have permitted such a vicious assault in full view of the neighbours and other police officers.
- [33] According to the magistrate, there was no need for the complainant's arrest. The magistrate in effect found that the information conveyed to the appellants during their briefing, provided them with a motive to assault the complainant (who did not resist his arrest) and therefore they had the required intention. The motive imputed to them by the magistrate, was apparently to punish the complainant for his actions earlier that day. In my view, the magistrate did not appreciate the circumstances in which the arrest occurred and erred in this regard.
- [34] The State submitted that the complainant left the vehicle with the approval of the two senior officers. The relevance of this submission was that it supported the proposition that because the complainant left the vehicle with the permission of the two senior officers, there was no need for his arrest when he entered his yard. Significantly, neither Cassim, nor Mamatobe (who, according to the complainant was a father-figure to him) were called to give evidence on this aspect. It was quite apparent from the prosecutor's cross-examination and the magistrate's comments, that this uncorroborated part of the complainant's testimony, particularly that the complainant was not under arrest when he entered the premises, was crucial to certain conclusions reached by the magistrate. At times the prosecutor dealt with the matter as if it were a civil matter and regrettably, the magistrate also seems to have made the same error.
- [35] The strong police presence at the complainant's house may have appeared to be unnecessary in the magistrate's view, but it nonetheless tends to strengthen the appellant's perception that the complainant was a force to be reckoned with. The police presence at the complainant's house was not the result of a mere difference between the complainant and Moyake about his transfer, as the complainant rather disingenuously tried to convey in his testimony. The complainant had threatened Moyake and his daughter. Criminal charges were brought against him. The complainant's service pistol was taken away from him also on a previous occasion, because he attempted to commit suicide with it, albeit some years ago. The complainant testified about this and stated that the suicide rate amongst police officers was attributable to the management style of senior police officers. On another more recent occasion, he assaulted Captain Jafta, also senior officer. In the light of all this evidence about serious tensions between the complainant and his superiors, it is very likely that the complainant would have resisted his arrest. This evidence also suggests that the force applied to the complainant, was without any intention to cause him serious bodily harm.

- [36] In my view, the magistrate's findings demonstrate that he did not apply the trite standard of proof in criminal trials which is, that it is not a requirement that the court should believe the innocent account of the accused. It is sufficient that it might be substantially true (R v M 1946 AD 1023). In R v Difford 1937 AD 270 at 272 it was put thus: "If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal" (See also: S v Van der Meyden 1999 1 SACR 447 (W) at 448 f-g and S v V 2000 (1) SACR 453 (SCA)).
- [37] The magistrate had no cause to reject the appellants' evidence as "a pack of lies", nor by any stretch of the imagination could it be described as "papably false". The assault itself, as described by the complainant, is not supported by the medical evidence and my view, the appellants' version of events is clearly more probable. The magistrate therefore incorrectly held that the appellants were unable to explain the "substantial injuries" sustained by the complainant. The magistrate ought to have found that the State did not prove beyond reasonable doubt that the appellants assaulted the complainant with intent to cause him grievous bodily harm.
- [38] The appeal must succeed. Accordingly, the convictions of the four appellants and their sentences are set aside.

E REVELAS

Judge of the High Court

Pickering J: I agree.

JD PICKERING

For the State (Respondent): Adv DG Robinson

Grahamstown

For the Appellants: Mr M Wolmarans

Instructed by: NN Dullabh Inc

Date Heard: 7 December 2011

Date Delivered: 22 December 2011

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