IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between -

LIONEL P. FRANCES	First Appellant
WAYNE P. FRANCES	Second Appellant
and	
THE STATE	Respondent

CORAM: RABIE, TRENGOVE, JJA, et HOLMES, AJA.

HEARD: 27 MAY 1981

DELIVERED: 29 May 1981

J U D G M E N T

HOLMES, AJA :-

This appeal comes from the Supreme Court (Natal Provincial Division) which dismissed an appeal to it from the Magistrates' Court, Durban, which had convicted

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the two appellants (father and son) of assaulting the complainant. The father (the first appellant) was sentenced to a fine of R250. He was also sentenced to imprisonment for four months, suspended for three years. The son (the second appellant) being a juvenile, was sentenced to a moderate correction of a whipping of six cuts with a light cane. The father was also convicted of injuria in that he swore at the complainant. The sentence for that was a fine of R50. That is not the subject of appeal. The Natal Provincial Division, having dismissed the appeal, granted leave to the first appellant to appeal only in respect of his conviction of assault. The second appellant was granted leave to appeal against both conviction and sentence.

The appellants were first offenders, and the Magistrate said that they appeared to him to be decent and respectable members of society; and that it "certainly

cannot/.....

cannot be said that they are the type of people who habitually commit this type of offence". As regards the complainant, the Magistrate said that he could be described as "militant and perhaps arrogant"; but that he gave his evidence in a satisfactory manner.

THE BACKGROUND

The appellants live in the residential district of Glenashley and employ a maid named Agnes Dhlamini, who has worked for them for several years. The complainant, a Black man, lives with his wife who is employed by a family in that area. There had been a longstanding feud between these two women; and it had been a source of trouble to the appellants' family. There was evidence that on one occasion the complainant's wife had stabbed Agnes. The Magistrate held that this feud was obviously the reason for the appellants' "aggression" in this case.

THE INCIDENT IN THIS CASE

Upon a summer's evening Agnes Dhlamini was waiting for a bus at the bus stop close to the appellants' home. There she found the complainant. He is a man of 32 years of age. He questioned her about some things which she had said about him, according to his information. She denied this. He persisted, saying he wanted to lay a charge against her. She raised her voice and said she knew nothing about it. So far, this accords with the complainant's evidence. He does not say why she raised her voice; but Agnes said it was because he threatened to hit her.

This noise was within earshot of the appellants and family, who had just finished dinner and were enjoying a cup of coffee on the lawn, close to the bus stop. The first appellant went forward to the wall in front of the house and asked Agnes what was amiss. She said that the

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complainant wanted to hit her. (This conversation was denied by the complainant.) The first appellant, aged 45 years and unarmed, then went round to the bus stop. He said that he asked the complainant to leave Agnes alone. The complainant says that the appellant pushed a finger against his chest and swore at him and told him to leave the bus stop and go back to his ugly wife. The appellant denies this. Be that as it may, it is common cause that the complainant (who was under the influence of alcohol, according to the police) armed himself with his sjambok which he had left lying on the seat on the bus shelter. The appellant says that the complainant then started waving the sjambok "in tribal fashion". Agnes Dhlamini puts it thus: "he whistled and then kept on waving his stick around". (I pause here to observe that, in the record, the word "stick" is sometimes used for sjambok.) The complainant denies this, but the probabilities support it, because it is common cause that, about this stage, the unarmed first

appellant asked his son, who had followed him, to fetch his sjambok from the house. After the boy (No. 2 accused) had brought it, the complainant (according to his evidence-in-chief) raised his own sjambok "as though to hit accused No. 2 and then pushed him to one side". (In cross-examination he retracted the word "pushed".)

Well, that is how the hostilities started. Thereafter, according to the complainant, facing the appellant he began to retreat down the street in the direction of his place of abode. This continued for a distance of 30 to 50 metres, according to the first appellant. The complainant said:

> "All the time they were striking at me but I was warding the blows off with my sjambok."

Indeed he said that by the time that the policeman in his car first came on the scene, he had not been hit: his body had received no wounds. In fact, he was plainly contemptuous of the appellants' efforts. He said that they did now know how to wield their weapons, whereas he had grown up on a farm and knew how to use sticks; and that his dexterity was such that he could have beaten up the appellants if he had so wished. And he told the policeman, when he came on the scene, that he was able to look after himself.

When then did the alleged assault start? The complainant says that a stage was reached when the appellants were able to grab him; and then they managed to hit him because he was then not able to ward off their blows. On the other hand, the policeman said that at no time did he see the complainant being held. The

complainant/.....

complainant goes on to say that the first appellant hit him more than the second appellant did. He was hit on his shoulders and thighs "on numerous occasions".

It is not easy to reconcile this with his vaunted prowess in defence and attack. He had no open wounds. He did not need medical attention. He was rather nonchalant about it: "In fact it was not as serious such that I had to go to a doctor." There was no evidence as to the severity of the blows or the degree of pain inflicted. He was apparently not examined at the police station. He was wearing a jacket, which would tend to cushion any blows on his shoulder from blows by the boy. He said that he had one big weal on his thigh. There were no weals or swelling on other areas. He felt pain on his shoulders. There was no evidence of the physique of the complainant or of the first appellant. The former was 32 years old, the latter 45.

The evidence by the first appellant and his young son and Agnes Dhlamini painted a different picture. It was to the general effect that the complainant, who was somewhat in liquor, was the aggressor throughout. And the boy said that he was acting defensively of his father, who was in ill health and who went into hospital just after this affair. (The boy was not challenged on this, nor did the Magistrate reject it.) The first appellant said in evidence that he did not land a single blow on the complainant.

Faced with this conflict of evidence, the Magistrate decided the issue by reference to the testimony of the student constable who arrived on the scene fortuitously, albeit towards the end of the fracas. He was a student, aged 21 years, in the South African Police stationed at Durban North. He was off duty and in civilian clothes

at the time. While driving his car he came upon a disturbance at the side of the road next to the bus shelter. He saw a gathering of eight or nine people, and some form of assault taking place, but it was not clear at that stage who was assaulting whom. He stopped the car and walked back to the scene. He identified himself as a policeman and told those concerned "to stop the apparent argument" in which they were involved. They were "arguing verbally". Then the first appellant lashed out with the sjambok at the complainant, who avoided it by stepping back. The constable ordered the first appellant to stop and told the complainant to come with him to avoid any further assault. The complainant declined on the ground that he could look after himself; and then the first appellant again lashed out at him with the sjambok but again missed. The complainant turned to flee, but the second appellant hit him over the shoulders or head

several/.....

several times with the baton. After that everybody moved down the road with the constable in pursuit; but he managed to grab the complainant and to take him to the police station at Durban North. The constable did not see the first appellant actually land a blow on the com= plainant. He says he saw the boy hit the complainant on the shoulder or head. The boy says it was twice, and on the shoulder. He gives an explanation for this. He says that it was because at that stage the complainant went into "a sort of frenzy". This is consistent with the fact that, at this point, the complainant thought that the student constable (who was not in uniform) was an ally of the appellants. Hence it is probable that the com= plainant did put on an extra spurt at that atage. During all this time, continues the constable, the complainant still had his sjambok. Under cross-examination he said that at no time did he see either of the appellants holding on to the complainant. The

witness said that he would have classified the complainant as being under the influence of alcohol. Near the end of his evidence the witness said that it seemed as if the complainant was the one who started the fight. This impression was apparently based partly on what the appellants said to him at the time.

The Magistrate accepted the evidence of the student constable unreservedly. He also found the complainant to be a satisfactory witness despite his being militant and perhaps arrogant. The Magistrate did not accept the contrary evidence of the appellants and Agnes Dhlamini.

On appeal to this Court counsel for the appellants, arguing against the convictions, conscientiously went through the evidence with the aid of a microscope and a fine comb. He pointed out certain inconsistencies in the evidence of various witnesses. I shall not set them out seriatim because, having considered them, it seems to

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me that they are referable to the fact that the witnesses were describing a moving scene. In such circumstances one expects some measure of difference in human observation. The Magistrate had the advantage of seeing the witnesses and hearing their evidence, which was tested by cross-examination on both sides. And he also formed impressions as to their demeanour. He also considered the probabili=ties and the partially corroborative evidence of the independent student constable. In these circumstances it seems to me that there is no sound basis for interfering with the convictions, based as they are on findings of fact. In that respect the appeal must fail.

SENTENCE

Leave was granted to the second appellant by the Court a quo to appeal against sentence. No such leave was granted to the first appellant, but the Court

nevertheless/.....

nevertheless has power, in a proper case, to consider the matter; see S v Shenker, 1976(3) S.A. 57 (A.D.). That was an appeal from a conviction on trial in a supreior court. In such a case, Section 322(1)(b) of the Criminal Procedure Act, No. 51 of 1977 would apply. In the case of a trial in the Magistrate's Court, Section 22(b) of the Supreme Court, Act No. 59 of 1959, could be invoked. See Perskorporasie van Suid-Afrika and Another v S; and Citizen Newspapers (Pty.) Ltd. and Another v S, A.D., 29 May 1981, per RUMPFF, CJ.

Dealing first with the question of the first appellant's sentence, as mentioned earlier, it was a fine of R250 (or, in default of payment, imprisonment for 50 days); and, in addition, imprisonment for four months, suspended for three years, conditional upon non-conviction of assault during that period.

In arriving at a sentence, the Magistrate sought to balance the following valid factors -

1. The trouble arose out of the long-standing feud between the complainant's wife and the appellants' maid.

2. The appellants were first offenders.

3. They appeared to the Magistrate to be "decent and respectable members of society". "It certainly cannot be said that they are the type of people who habitually commit this type of offence."

4. The appellants are Whites and the complainant is a Black man; and it must not be thought, from inadequacy of sentence, that the Court is failing in its protective duty towards society.

5. The complainant did not suffer serious injury.

6. The boy was only sixteen years of age at the time of the assault.

On the analysis of the evidence of the complainant and the policeman (made earlier herein) as to the assault,

it seems clear that the complainant could not have been struck "numerous" blows, as he says. Nor, indeed, does the Magistrate so find. This was not a conviction of assault with intent to do grievous bodily harm. It was a conviction of assault - common assault, as the Criminal Code terms it. The complainant appears to have felt more insulted than injured - and the first appellant has already been fined R50 for having sworn at him. In all the circumstances I consider that the first appellant's fine of R250 should stand, but that the suspended sentence of imprisonment for four months should be set aside as being disproportionate to the gravity of the offence.

Turning to the sentence of a whipping for the boy, he was a schoolboy of 16 years of age at the time of the offence, due to write the matriculation examination at the

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end of the year. He was ordered by his father to fetch a sjambok when the complainant, who was in liquor, seemed to be truculent. It is understandable that the boy obeyed. He says that, when he hit the complainant on the shoulder with his home-made baton, he was acting defensively of his father, who was in poor health. In all the circumstances, in my view an appropriate order would be that he be found guilty and discharged with a reprimand, in terms of Section 297 (1)(c) of the Criminal Code. That is sufficiently disparate from the sentence passed to warrant interference.

In the result -

1. The first appellant's appeal, against the conviction of assault, is dismissed.

2. His sentence of a fine of R250 stands; but his additional sentence, of conditionally suspended ~~imprisonment for four~~ months, is set aside.

3. The second appellant's appeal, against his conviction of assault, is dismissed.

4. His sentence of a whipping is set aside in favour of a discharge and reprimand.

I would draw attention to the terms of Section 154 (3) of the Criminal Code. It prohibits the publication of information which reveals or may reveal the identity of an accused under the age of 18 years.

G.N. HOLMES
ACTING JUDGE OF APPEAL

RABIE, JA)
) CONCUR
TRENGOVE, JA)