THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

NOT REPORTABLE
CASE NO: 508/2007

In the matter between

JACO GUNTER SWANEPOEL **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: **FARLAM, MTHIYANE JJA and KGOMO AJA**

HEARD: **15 FEBRUARY 2008**
DELIVERED: **18 MARCH 2008**

Summary: **Appellant employer alleged to have assaulted and insulted employee following disciplinary inquiry – Appellant failing to appear in court on time due to misunderstanding between his attorney and public prosecutor – whether charges of assault, *crimen injuria* and contempt of court proved against appellant.**

Neutral Citation: **JG Swanepoel v The State (508/07) [2008] ZASCA 8 (18 March 2008).**

JUDGMENT

MTHIYANE JA

MTHIYANE JA:

[1] The appellant was convicted of assault with intent to do grievous bodily harm, *crimen injuria* and a contravention of s 55 of the Criminal Procedure Act 51 of 1977 in the magistrate's court for the district of Pretoria. He subsequently applied for and was granted leave by the magistrate to appeal against his convictions and sentences. The appeal to the Pretoria High Court (Legodi J et Louw AJ) succeeded partially when the court made an order:

(a) setting the conviction of assault with intent to do grievous bodily harm aside and replacing it with a conviction of assault;

(b) confirming the conviction of *crimen injuria*;

(c) replacing the wholly suspended sentence of twelve months' imprisonment, imposed in respect of both offences, taken as one for purposes of sentence, with a fine of R500 or two months' imprisonment;

(d) setting aside the conviction of a contravention of s 55 of the Criminal Procedure Act and replacing it with a conviction of a contravention of s 170 of the Criminal Procedure Act, and confirming the sentence of caution and discharge in respect of the said offence.

[2] This appeal with the leave of this court is against the above judgment and order of the High Court.

[3] The charges of assault with intent to do grievous bodily harm and *crimen injuria* arose out of an incident on 17 March 2003 at the appellant's place of work at Vibro Bricks (Pty) Limited in Laudium. At the time of the incident the appellant was a director and the complainant, an employee of the company. On the day in question the complainant was called to answer to charges of poor work performance, which led to the holding of a disciplinary enquiry. At the

conclusion of the enquiry the appellant was found guilty and given a written warning. The complainant alleges that when he enquired why he had been issued with the warning the appellant insulted him by calling him a 'kaffir'. The appellant then made him sign a resignation form and thereafter assaulted him by kicking him on the ribs and neck.

[4] The above version was disputed by the appellant. In his plea explanation in terms of s 115 of the Criminal Procedure Act, the appellant denied that he had insulted the complainant and pleaded self-defence to the allegations of assault with intent to do grievous bodily harm. In his defence the appellant alleged that it was the complainant who had acted aggressively towards him by lunging at him with a bunch of keys. As the appellant tried to ward off the complainant by pushing him on his shoulder, he hit the complainant inadvertently with his open hand on the cheek.

[5] The appellant also denied that he was guilty of contravening s 170(1)[1] of the Criminal Procedure Act. He pleaded that his failure to appear in court on time was due to a misunderstanding between the public prosecutor and his attorney. The prosecutor had informed his attorney that the matter was not on the roll for hearing that day, i.e. on 3 November 2003. The prosecutor had however subsequently telephoned the appellant's attorney and informed him that there had been a mistake and that the matter was in fact enrolled for hearing. The appellant had been contacted by his attorney and they hastily

[1] Section 170 reads:
'(1) An accused at criminal proceedings who is not in custody and who has not been released on bail, and who fails to appear at the place and on the date and at the time to which such proceedings may be adjourned or who fails to remain in attendance at such proceedings as so adjourned, shall be guilty of an offence and liable to the punishment prescribed under subsection (2).
(2) The court may, if satisfied that an accused referred to in subsection (1) has failed to appear at the place and on the date and at the time to which the proceedings in question were adjourned or has failed to remain in attendance at such proceedings as so adjourned, issue a warrant for his arrest and, when he is brought before the court, in a summary manner enquire into his failure so to appear or so to remain in attendance and, unless the accuses satisfied the court that his failure was not due to fault on his part, convict him of the offence referred to in subsection (1) and sentence him to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.'

proceeded to court. By the time they arrived at court at 14:00 they found that the matter had been called and a warrant had been issued for the appellant's arrest. In a summary enquiry conducted in terms of s 170(2) of the Criminal Procedure Act, the magistrate was not satisfied with the explanation offered by the appellant through his attorney and convicted him of contempt of court.

[6] The complainant was a single witness for the State. Before convicting the magistrate had to be satisfied that his evidence was clear and satisfactory in every material respect. The magistrate accepted the complainant's evidence and, in relation to the assault, found corroboration first, in the J88 medical report and second, in the fact that the complainant had been seen by a doctor. The J88 medical report was admitted in evidence despite an objection by the appellant's attorney who argued that it should be excluded as hearsay because the doctor who saw the complainant and prepared the report was not called to give evidence.

[7] As a basis for admitting the J88 in evidence the magistrate relied on a passage in Schmidt, *Bewysreg*, 3ed at p 319, where the learned author deals with different methods whereby documents may be admitted in evidence. The magistrate dealt with only two of these. The first is by a person who was the author of the document and the second by the person who was present when the document was drawn up. It is the latter that the magistrate considered applicable. He found that the complainant's presence when the doctor completed the J88 medical report rendered it permissible for the J88 to be admitted in evidence through the complainant. However, the point missed by the magistrate was that in the passage referred to the author was dealing with proving authenticity ('egtheid') rather than the contents of a document. The heading under which the topic is discussed makes this clear. It reads:

‘Inlewering: Identifikasie en bewys van egtheid (i.e. Handing in: Identification and proof of authenticity).’

In the discussion the author makes it clear that a document whose authenticity has been proved is not necessarily admissible: the contents thereof might still be inadmissible, where, for example they are hearsay. He explains (at 318):

‘‘n dokument wat eg bewys is is nie noodwendig toelaatbaar nie. Die inhoud kan ontoelatbaar wees – byvoorbeeld as dit hoorsê is.’

[8] It follows therefore that the magistrate should not have allowed the J88 to be admitted without the doctor having been called to give evidence. It is clear from his judgment that the J88 was tendered by the State for its testimonial value (i.e. as evidence of the truth of what it asserts) and the magistrate accepted it as such. The following passage in *R v Miller* 1939 AD 106 at 119 is instructive:

‘. . . statements made by non-witnesses are not always hearsay. Whether or not they are hearsay depends upon the purpose for which they are tendered as evidence. If they are tendered for their testimonial value (i.e., as evidence of the truth of what they assert), they are hearsay and are excluded because their truth depends upon the credit of the asserter which can only be tested by his appearance in the witness box. If, on the other hand, they are tendered for their circumstantial value to prove something other than the truth of what is asserted, then they are admissible if what they are tendered to prove is relevant to the enquiry.’

[9] The magistrate also erred in regarding the J88 as providing corroboration for the complainant’s evidence in relation to the assault. Counsel for the appellant objected to its admissibility and contended that even if the J88 were properly received it does not provide corroboration. First, submits counsel, it contradicts the complainant’s evidence that he was kicked on the right ribs and neck: the J88 records that he had tenderness on the left side of the body. Nothing is noted on the right side of the body. Second, the J88 records no visible injuries.

[10] The magistrate, as did the court *a quo*, accorded undue weight to the fact that the complainant went to see the doctor and reasoned that he would not have visited the doctor if he had not been assaulted. I have already alluded to the fact that this was considered as providing corroboration of the complainant. In this respect the magistrate erred once again. The point is effectively neutralised by the fact that the complainant did not go to the doctor of his own volition. As happens where the complainant has laid a charge of assault with the police he was handed the J88 medical report form and referred to a doctor for the completion of the relevant form. He had no choice in the matter.

[11] The complainant's evidence in relation to assault is not without blemish. He contradicted himself in a material respect. When he gave his evidence in court he only mentioned one incident of assault and said that this had taken place in the appellant's office. But he told the police a different story. In his statement to the police, which he repeatedly averred in court to be the truth, two incidents are mentioned: one in the office and the other outside the office. The magistrate dismissed this contradiction as a mistake. It remained unclear whether the mistake occurred with respect to his evidence in court or in his statement to the police. When the appellant's attorney pressed the complainant to explain the contradiction during cross-examination, the magistrate intervened and ruled the question as unfair. The unwarranted intervention prompted the attorney to enquire from the magistrate whether he was limiting him in his cross-examination of the witness whereupon the ruling was immediately retracted and the attorney was allowed to continue to pursue the point. In my view the retraction was well made as there was nothing unfair about the question. The intervention was a veiled attempt unduly to protect a witness who was hard pressed to explain the contradiction. Although the magistrate readily accepted this contradiction as a mistake, there is in fact no explanation for it.

When the attorney asked the complainant if he had made a mistake in his evidence this was denied by the witness. When asked if what he said in his statement to the police was the truth, he answered in the affirmative. The discrepancy therefore remained unclear and this must of necessity detract from the complainant's reliability as a witness.

[12] As against the complainant's evidence the testimony of the appellant and his witnesses had to be considered. The magistrate made no adverse credibility findings against the appellant's witnesses but considered their evidence as not taking the matter any further in that they said that they had not seen what happened in the appellant's office. But if regard is had to the fact that they corroborate the appellant in his denial of the assault (at least outside the office) their evidence cannot be considered to be of little value. They contradict the version contained in the police statement, viz the suggestion that the appellant assaulted the complainant outside the office. It therefore follows that their evidence cannot simply be rejected out of hand in as much as it throws serious doubt on the complainant's version. That doubt must in inure to the benefit of the appellant.

[13] I turn to the charge of *crimen injuria*. As already indicated the complainant was a single witness for the State and his evidence was not entirely satisfactory. There is no corroboration of the complainant's assertion that the appellant used the 'k' word against him.

[14] Given the confrontation that took place in the appellant's office, followed by a highly emotive disciplinary enquiry which culminated in the complainant being issued with a written warning and being asked to resign, his evidence should, in my view, have been approached with caution. The emotive scene I have sketched provided a fertile ground for allegations and counter allegations

to be made by both sides, which might not have been based on fact. In my view the allegations made cried out for corroboration to provide some guarantee that the truth had been told. Under the circumstances it is, in my view, not possible to say where the truth lies and the appellant should have been given the benefit of the doubt and acquitted on both the charges of assault with intent to do grievous bodily harm and *crimen injuria*. This is by no means a vindication of his version. The fact of the matter is that the State bore the onus to prove his guilt beyond reasonable doubt and that onus was not discharged.

[15] As to the conviction for contempt of court there was at best for the State, negligence on the part of the appellant. Counsel for the state fairly conceded that negligence was not sufficient to sustain the conviction.

[16] Two further matters are worth mentioning concerning the magistrate's approach to the matter. The first relates to the question of onus. At the commencement of his judgment the magistrate correctly stated that the onus was on the State to prove its case beyond reasonable doubt and that if it failed so to do the appellant was entitled to his acquittal. Where he went wrong, however, was to assert that once the State had established a prima facie case, the appellant was required to 'place evidence before [the court] on a balance of probabilities' to rebut the prima facie case. The consequence of this approach was to expect more from the appellant than the law requires. What is required in a criminal case is for the State to establish, as I have said, that there is no reasonable possibility that his or her version is true. If that possibility is not excluded he or she is entitled to be acquitted.

[17] The second aspect relates to the magistrate's comments based on the fact that the appellant's two witnesses, Messrs Daniel Andries Swanepoel and

Robert Mark Rhyn are directors of the company. What the magistrate said in this regard was this:

'And further on, to look into further aspects of this case, it is so that the accused, Daniel Andries Swanepoel, Robert Mark Rhyn, the three of them, are the directors of the company. The complainant was in fact, according to the version of the State, assaulted at the time when the accused was promoting the interest of this company. Legally speaking it is the company itself, the whole company, meaning the accused, together with these accused, defence witnesses, should have been taken up as accused 1 and 2 on the assault case. It is so that at the end of the day, the whole impact of the whole case does not only fall on the accused person, it also falls on the second and the third state witness and it is highly improbable that under those circumstances they will come and say that the company itself has committed an offence through the conduct of the accused, by hitting and calling the complainant a kaffir. Highly improbable.'

In my view this comment can only be described as bizarre. There was no evidence that the appellant was acting in the furtherance of the interests of the company. The alleged assault took place after the disciplinary enquiry and the resignation, both of which were of interest to the company, had long taken place. But even if the company could have been charged as a co-accused this would not have justified the summary rejection of what the witnesses had to say. Accordingly the magistrate misdirected himself in the above respects and this court is therefore obliged to reassess the evidence itself on the record.

[18] For the above reasons the appeal succeeds and the following order is made:

1. The order of the court *a quo* is set aside and replaced with the following order:

   'The appeal is allowed. The convictions and sentences are set aside.'

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KK MTHIYANE
JUDGE OF APPEAL

CONCUR:

FARLAM JA
KGOMO AJA