IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO. 152/95

PETRUS DIKHAKENG MATOLO 1st APPELLANT

KABELO JOSEPH LEBAKENG 2nd APPELLANT

EPHRAIM NKOSI 3rd APPELLANT

and

THE STATE

RESPONDENT

CORAM: NESTADT, VAN DEN HEEVER et SCHUTZ JJ.A

DATE HEARD: 17 NOVEMBER 1995

DATE: 23 NOVEMBER 1995

SCHUTZJA

JUDGMENT

SCHUTZ JA:

The three appellants, all police constables, were convicted by a Regional Court of assault committed on 14 April 1991. At the time they were members of the Welverdiend riot unit, and the complainant, one White Mabitsa, was under arrest as a suspect. Although acknowledging their presence at the time of his arrest, they denied all knowledge of any assault upon him by anybody. He claimed that he had been assaulted some hours after his arrest. The Court accepted his version and rejected that of the three appellants and of another member of their unit who was

called as a witness on their behalf. They were each sentenced to a fine of R1500 or three months imprisonment, the whole being suspended. Their appeal against conviction to the Transvaal Provincial Division failed, but they were given leave to appeal by that Court.

For all practical purposes the complainant was a single witness and he was so treated by the magistrate. His version comes to this. On the morning of 14 April the riot unit arrived at his house in force and searched it. The first appellant pointed out the complainant to the sergeant as the man who kept firearms for the "comrades." He was asked to point out firearms but said he knew nothing about them. In the presence of the other two appellants the first appellant warned him that they would take him away and he would speak the truth. He was taken

to the Khutsong and then the Carletonville police stations and back to the Khutsong station, where he was locked up.

At some time after 7 pm the three appellants took him into a room. The first appellant slapped his face several times so that he fell down, while the third desired to know whether he was ready to speak the truth. The second appellant also struck him, kicked him in the ribs with shod feet when he was down and trampled him. The third appellant kicked his mouth so that the lip swelled and a tooth or teeth had to be extracted later. While this was going on his three assailants complained that he still would not speak the truth. They demanded to know where his brother was and he said that he did not know. In order to extract "the truth" they tied up his hands and feet as he lay prone and pulled a plastic

covering tightly over his face so as to suffocate him. He was electrically shocked in the anus and on the left arm. As a result a mark was left on that arm. He was also struck on the eye while his face was covered. The plastic was somewhat loosened, and upon a further demand to know the whereabouts of his brother he said he was in Welkom. He was then untied and placed in the back of a closed police bakkie. The first appellant sat in front. They drove to Welkom. The second and third appellants accompanied them in another vehicle.

They failed to find his brother at Welkom. On the return journey the first appellant drove the bakkie. The other two appellants were not with them and, as appears from the unchallenged defence evidence, at a certain stage they took a different route. After a while the first appellant

said that he was feeling sleepy. He handed over to the other policeman with him. This man soon showed that he was also affected by tiredness, and at times he swerved off the road. The complainant was observing matters from the back of the bakkie till he noticed that both the driver and the passenger had fallen asleep, and that a vehicle was approaching from the front. He knocked to awaken the driver, and when he had succeeded in doing so, the latter, upon seeing the oncoming vehicle, swerved off the road and stopped. The bakkie did not capsize, and the complainant did not suffer any injuries. He had been holding on tightly.

This event is important. Only two witnesses gave evidence about it - the complainant and the first appellant. Although there is much in common in their versions, there was diametric opposition in two respects.

The first appellant said that the bakkie came to a violent halt: and that the complainant was injured in consequence. The complainant denied suffering injury. As to the manner in which the vehicle came to a stop, his initial version was that it stopped sedately. Underlying the difference as to his being injured are the two latent theories of the case: on the State side that the appellants seized on this event and embroidered on it in order to explain the complainant's visible injuries (which had been sustained earlier in the day and which might yet have to be accounted for): and on the defence side that the complainant seized upon the injuries here accidentally sustained and used them to give credence to a false charge to be laid against them and also a civil claim for damages. To return to the complainant's version. He was taken back to the

Carletonville police station. On the following evening the appellants again sought to prevail upon him to take them to his brother, but without success. On the 17th April he was taken to court and the charge against him (he said that he was never informed what it was) withdrawn, upon which the presiding magistrate ordered his release.

His father was present at court. After the release he took him to a photographer, where five photographs of his face were taken, then to a doctor and then to the charge office at Carletonville to lay a charge of assault. This attempt met with no success as the police on duty said that they did not hear what he was trying to say. He said to his father that he would rather go home and first recover before pursuing the matter further.

He had heard of and seen the three appellants before these incidents but did not know them. After his release he did not see them again until the court proceedings.

Later, apparently on 26 April, the complainant did succeed in laying a charge, when a certain Sister Shelly (her correct name appears to be Sally Seasley) took him into the presence of a newly arrived police major. Of Sister Shelly he said that he could not, because of ignorance, agree with the proposition put in cross-examination, "(dat sy) mense in bakkie-vragte vol aangery het om te gaan klagtes lê teen die polisie". But he agreed that she had helped some persons to lay such charges.

The appellants had a wholly different version of what had led to the expedition to Welkom. Not only did they deny witnessing any

assault on the complainant, but they also denied taking any part in his interrogation and claimed that they were not present when the complainant agreed to point out his brother at Welkom. It was put to the complainant that their commander, Lieutenant Viljoen, had taken him to Welverdiend police station, where, with constable Sindi (also of the unit) interpreting, he had agreed to point out his brother, which led to Viljoen's ordering the trip to Welkom, of which the appellants were in due course informed. It was further put that Viljoen would say these things, but near the end of the case it was agreed, on the basis of a psychiatrist's report, that Viljoen had become so disturbed by his experiences in the riot unit that he was no longer mentally fit to give evidence. But the defence did call Sindi who supported their version. The complainant

denied it entirely, insisting that it was the appellants and not Viljoen who had questioned him.

All three appellants gave evidence. Most of their version has been set out already. A few points require further exposition. Dealing with the incident on the return from Welkom, the first appellant said that the driver lost control of the vehicle and bumped into a rock. He was injured when his head banged against the vehicle. His neck was sore but he did not receive medical treatment subsequently. He went to see what had happened to the complainant and found that the side of his nose was bleeding. He asked him how he was. The complainant answered that although he had suffered a hard bump he was alright. The injury on the side of the nose was all that he had seen on that morning (it was by then

5 or 6 am on 15 April) but the complainant had pointed out further injuries when they were going to Bekkersdal on the following day. Then he noticed also that his eye and mouth were swollen. He did not observe a laceration on his lip, nor any injury to his arm, but the complainant did complain that his body was sore. It was possible that his arm was injured in the accident or subsequently.

Upon his return he reported the incident to Viljoen as his commanding officer, and the complainant himself told Viljoen that his body was sore as a result of the accident. He also reported the complainant's injury to the duty sergeant at Carletonville. He could not remember who he was, but the records should reveal his identity. It was the duty of the sergeant to make an entry in the occurrence book, and

also his responsibility thereafter to decide whether the complainant should be examined by a doctor. Again when he arrived at Welverdiend police station he reported the incident to warrant officer van Graan, and in respect of this occasion he could say definitely that not only should an entry have been made, but that van Graan in fact made one, both in respect of the damage to the vehicle and of the injury to the complainant. The complainant made a strongly favourable impression on the magistrate. He did not make credibility findings adverse to the appellants but he found reasons nevertheless to reject their evidence as being not reasonably possibly true. Their witness Sindi he rather brushed aside. Mindful of the need for particular circumspection where the State relies on a single witness (see R v Mokoena 1956(3) SA 81(A)) I turn

to the question whether this Court should reach a different conclusion to that of the magistrate.

I shall deal first with constable Sindi. The magistrate referred to the fact that he corroborated the appellants' evidence, in that he said that when they left Welkom the complainant was not injured. However, he questioned why Sindi should be so certain of this fact, as he had accompanied the party only as an interpreter. It was unclear to the magistrate why he should have observed such matters so closely. Further, the circumstances at the time and the condition of the lighting had not been revealed. With regard to these points it should be observed that neither the prosecutor nor the magistrate enquired about them, so that his version stood essentially unchallenged. Moreover, on his

evidence he saw the complainant not only before they went to Welkom but also when they came back (and presumably in between). The record does not indicate that he lacked opportunity to make his observations.

The magistrate gave another reason for questioning his evidence, that the injuries shown on the photographs are not very striking and could easily be missed by a stranger. This may be, but then the comparison of the photographs with the assault described by the complainant, to be dealt with below, becomes more pointed. As to Sindi's interest in the complainant, or lack of it as the magistrate found, the complainant was, after all, the key figure in the all-night expedition, and Sindi was not merely an interpreter but a member of the much-tried unit. It was only a dozen days later that charges were brought against fellow unit

members, and it is unlikely that he would not have heard of this and cast back his mind to the night of the 14th. But most important is the fact that the magistrate did not deal with the essential point of his evidence - that it was Viljoen who extracted the information about the complainant's brother, and that the appellants were not then present. If this was true there would have been no point in their alleged assault on him. It may very well be that Sindi was telling lies to protect his comrades, and it may be that it is difficult to expose such a simple story as false, but the magistrate did not find him to be untruthful. It does not seem to me that this part of Sindi's evidence can simply be ignored in weighing the evidence as a whole, as the magistrate did.

The failure to call Viljoen despite the fact that his version had

been put has been fully explained, and no inference can be drawn against the appellants in that regard.

I return to the opposed versions of the accident on the road back and the associated question whether the first appellant reported it and the complainant's consequent injuries. In the complainant's evidence in chief there is no suggestion of the vehicle colliding violently with anything before or when it stopped. In fact the prosecutor asked him whether the "pluk van die voertuig uit die pad uit" might have caused him any injury and he answered, no. In cross-examination this was at first repeated:

> "So daar was nie 'n botsing of 'n probleem nie? Die voertuig is bloot afgetrek van die pad af en tot stilstand gebring? ... Dit het uit die pad beweeg en stilgehou."

But a further question by the defence produced a different answer:

> "Die punt wat ek maak verstaan ek u reg daar was geen botsing van die voertuig met enige lets met 'n boom of 'n klip of enige iets wat hierdie voertuig erg beskadig het of kon beskadig het? ... U sien dit het teen die wal aan die kant gebots. Dit was toe dit stilstaan" (emphasis supplied)

The impression created is that fear of independent proof of damage to the vehicle began to shift the complainant's prior insistence that the vehicle had simply glided to a halt. It was then put to him that the vehicle had been badly damaged and had been at the garage for eight months. To this he responded that it had been damaged only slightly on the front, "want van daar af het ons met daardie voertuig gery tot hier."

The cross-examination proceeded:

> "My instruksies is dat daardie voertuig heeltemal van die pad af geloop het, dat dit 'n redelik groof klip getref het waarna die voertuig heeltemal in die lug gespring het as ek so kan stel, met die botsing met die klip wat dit oor die klip

> gegaan het. ... Nee, dit het net teen daardie klip gebots en stilgestaan, dit het nie oor dit gegaan nie. Dit was net daar langs die pad. En hulle het uitgeklim om ondersoek te gaan instel en my kom vra of ek beseer is, beserings opgedoen het toe se ek vir hulle nee" (emphasis supplied)

From these passages it appears that the unimpeded stop has turned to collision with a "wal", then to collision with a "klip", even a "groot klip." And the policemen are concerned that as a result of the collision the vehicle has been damaged and the complainant injured: a setting by now very close to that put on behalf of the first appellant and later deposed to by him. Nor is this a mere detail in the case. It goes to the root of the main issue - how the complainant came to be injured.

As I have said, the first appellant's version was that because of his report to the sergeant in charge of the charge office there ought to have

been an entry in the occurrence book at Carletonville, and that there was in fact an entry in the one at Welverdiend. No further evidence is on record concerning the contents of these books, despite the fact that on the occasion of a postponement late in the trial the magistrate asked the prosecutrix to ensure the presence at the postponed hearing of the sergeant on duty at Carletonville on the morning of 15 April together with the occurrence book.

In his judgment the magistrate said that the first appellant "wel te kenne gee dat hy (the complainant) beserings opgedoen het in die loop van hierdie voorval waar daar teen 'n klip vasgery is. Nou moet ek sê dat die getuienis is maar redelik vaag op daardie aspek". The magistrate added, correctly, that it was the duty and interest of a policeman to have

a record made of injuries suffered by a person under his control, and also such an interest on the part of another policeman receiving an injured suspect into his custody. He criticised the first appellant for not having made his own note of the incident, and I think, with justice. But I do not agree with the magistrate that the first appellant's version had been "redelik vaag". He had given explicit accounts of reports he had made, and he stood open to exposure as a liar if his evidence concerning them was false. Also, it is most unlikely that he would not have reported at least the damage to the vehicle, whoever's version was true. Yet, the magistrate concluded on this part of the case:

> "Nou daar is op 'n stadium te kenne gegee dat of die indruk wat ek gekry het dat hierdie getuienis aangebied gaan word. Tot op hede was daardie getuienis nie aangebied nie. Dit is uiteraard getuienis wat redelik beskikbaar is veral vir

mense soos die beskuldigdes." Equally at least to the State, I would have thought. And the State had been asked to produce at least the Carletonville evidence. The magistrate seems to have forgotten about his request, which led to a misdirection as explained below. I think that his reaction at the earlier hearing, to call for evidence in terms of S 186 of the Criminal Procedure Act 51 of 1977, had been the correct one. It seems to me that it was essential to the just decision of the case that before rejecting or seriously questioning the first appellant's version the magistrate should have insisted on the production of the occurrence books. The fact that he had called for the evidence suggests that there had been a doubt in his mind, and it was not resolved. Instead the burden of producing a self-serving

statement was cast on the first appellant. The subject was clearly important. The consequent unfairness to the appellants is enhanced by two facts - first, the State never put it to the first appellant that he had not made the reports that he claimed to have made, so that he could not rely on the rule as to recent fabrication allowing him to produce a self-serving statement. Nor was there a challenge to produce it. Secondly, the magistrate did not extend to the first appellant the benefit he extended to the complainant, of accepting what he said he had said in his statement in the absence of proof by the defence that he had not done so. The last remark relates to the fact that in his particulars of claim in the civil action which he brought arising out of the same facts, the complainant had alleged that during or about the period 14 to 17 April

he had been assaulted at the Carletonville police station not at Khutsong police station, and not only on the 14th and 15th, as was his evidence. The complainant insisted that he was not responsible for this error. It must have resulted from a misunderstanding on the part of his attorneys. His statement, he said, referred to Khutsong not Carletonville. The magistrate accepted this explanation, attributing the lack of effective communication to the sparse contact that the complainant had had with his attorneys. This may be so. One knows only too well how carelessly instructions are often taken, leading to later amendments. But this is a criminal case. And, there being a suggestion of recent fabrication in this instance, the prosecutor was presented with a golden opportunity to produce the complainant's statement. He did not avail himself of it. By

contrast, the defence did not have access to it as it was privileged. In my opinion the difference between the pleading and the evidence is another point to be weighed in the scale on the side of the appellants. I would add that the matter is further compounded by evidence given by the complainant, not mentioned in the judgment, that at Welkom also he was punched which caused a "blou oog". It is not clear though, that he attributed this assault to the appellants rather than another policeman.

The magistrate was not impressed by arguments that the photographs taken of the complainant on 17 April and the findings of the doctor who examined him on the same day did not match his description of the assaults on him. The findings of the doctor went in by consent, and they were:

> "Geswolle bo-lip met 'n klein laserasie aan die binnekant van die bo-lip. 'n Ernstige rugpyn. 'n Swelling oor die regter oog. 'n Skraapwond oor die linker voorarm."

In the cross-examination of the complainant the following appears:

> "En die enigste beserings wat u gehad het was 'n klein merkie aan die neus (the photographs show this, though the doctor did not mention it) en 'n lip wat geswel het, bo-lip en 'n onder-lip en 'n klein merkie onder. ... Ja."

I have some comments to make upon the correspondence between these observations, and the complainant's evidence as to the assaults he suffered. Although the doctor mentions a swelling over the right eye, I cannot observe it on the photographs, even less a "blou oog". Bearing in mind that the "blou oog" had had almost three days to develop, it seems to me that the account of it was at least exaggerated. Neither the photographs nor the medical report gives any indication of teeth broken,

loose or extracted because of looseness. Yet in his evidence the complainant spoke of broken teeth (in the plural) and two foreteeth (in one passage a tooth) which were removed by a doctor because they were loose. It is difficult to understand why there should have been no record of something so important, no complaint to the doctor, no photograph, when the object of the visits to both the photographer and the doctor was to record real evidence. Nor was there any dental evidence.

I will pass over the question whether the electrically caused injury to his arm described by the complainant could be the "skraapwond" described by the doctor, although not photographed. But what has happened to the assault inside his anus, an area I would suppose more tender than the forearm's epidermis? Yet there is no complaint, and no

record of any injury.

I turn to some of his further descriptions of the assault:

> "Hoeveel keer is u geskop in die gesig? ... Ek weet nie hoeveel kere is ek geskop nie.
>
> Kan u 'n aanduiding gee? Skatting maak? ... Ek is geskop, seer gevoel, daarna ek is aanmekaar geskop dat ek nie meer seer gevoel het nie.
>
> Is u 'n groot aantal kere in die gesig gekop? ... Ja bale kere.
>
> Wil u nie 'n poging aanwend om vir die hof 'n aanduiding te gee hoeveel nie, meer as tien of is dit minder as tien. ... Nee, ek sal nie weet nie. Ek was deurmekaar.
>
> Is dit dan juis van hierdie skoppery wat jy deurmekaar was? ... Ja want ek is teen die kop geskop en teen die vloer gestamp."

Again there seems to be exaggeration, and this is important when it is enquired whether the injuries reflected on the photographs and in the doctor's report could have been caused by the bakkie's forced stop. Had

the doctor been called as a witness the magistrate would probably have been better placed to decide the case.

The magistrate remarked that the complainant did not contradict himself on any occasion. This observation may be compared with the cross-examination about the assault upon him by the appellants. After he had said that he had been slapped in the face on several occasions, he was asked if he had ever been hit with a fist, and it was in answer to this question that he answered that he had been so struck at Welkom, so that his eye swelled up. He was asked if any other policemen were present when the appellants assaulted him, and he answered that there were. He could point them out, but he could not say how many there were. The questioning proceeded:

"Het enige van hulle iets aan u gedoen? ... Nee.

Is u seker daarvan? ... Ek was nou deurmekaar.

So kan u nie vir die hof se of iemand anders u ook aangerand het nie? ... Nadat ek uitgehaal is nit die kamer waar ek aangerand is, ek is mos na die kamer of die kantoor waar verklaring afgeneem word. Daar is een in daardie kantoor wat my met vuiste geslaan het.

Wie is dit? ... Hy is a lang ou, ek ken nie sy naam nie. En hy het nie tande nie.

Toe ek u netnou pertinent gevra het of u met die vuis geslaan is, het u gese ja in Welkom. Waarom het u toe nie ook verwys na hierdie voorval nie? ... Soos ek se ek was deurmekaar gewees en daardie persoon het my op my maag met vuiste geslaan, ek het net gesien dat hy is 'n lang persoon. ..." (emphasis supplied).

To my mind these passages do reflect a contradiction in the complainant's evidence.

Turning back to the magistrate's rejection of the appellants' version that the complainant had been injured when the bakkie left the road. The

magistrate remarked that he found it strange that if that were so the complainant did not tell the Court that he was assaulted on the way back from Welkom. The reason for this observation rather escapes me. If one postulates for the sake of argument that the first appellant was telling the truth, then it would have been dangerous for the complainant to pin his colours to this occasion, when the evidence of an accident was to hand: and it would also have been an unlikely story when the affairs of the long night had already to all purposes ended in failure so that there would have been no reason for an assault.

As I have said already, the magistrate did not make any express findings on the appellants' credibility. Rather he criticised the improbability of their account, as he saw matters. The criticism that

seemed to him the most important was, why out of all the policemen involved should he have picked on the three appellants who, particularly in the case of the second and third appellant, had had little to do with him: unless they were indeed guilty? This is a question that many a judicial officer has asked in the past and will ask in the future. It was asked (and answered for the purposes of that case) in the single witness case of S v Mokoena already referred to (at 88 E-F):

> "One may say: Why should he have picked on the appellant? But if he had to indicate someone, anyone, why not the appellant? Here was a man whom he could identify ..."

And so on. Turning back to the facts of this case, during the course of cross-examination the complainant said the following:

"Betreffende hierdie voorval, het u vir die polisie die

name van die persone gegee wat vir u aangerand net? ... Ja ek net dit gese.

So net u presies vir haar gese dit staan in die polisieverklaring dat welke beskuldiges vir u aangerand net en presies wat elkeen gedoen het. ... Ek net dit gese wie en wie en wie wat my aangerand het. Dat daar was nog ander beskuldigdes.

Wat u nie se name ken nie? ... Ek het nie die name van die ander geken nie."

One unnamed "ander beskuldigde" whose description was partially revealed in cross-examination was the tall toothless one who hit him in the stomach. The man who hit him at Welkom may have been another. How many others were there? What exactly did each of them do? No answer is given to these questions, but the fact that they may properly be asked rather destroys the proposition that the complainant picked on only three persons, this suggesting that he was selective and truthful. Of his

truthfulness, I am not convinced. To my mind it is reasonably possible, and I need say no more, that the appellants were named because their names were known.

This leaves pendant the question, why should the complainant have accused anyone falsely? This question was not answered by the appellants, although an answer was suggested: that the complainant's accusations were politically inspired in the sense that the ANC was attempting to drive the then SAP out of the area. Given the level of distrust, to put it at its lowest, between the police and at least some members of the public at the time and the place, it is not an answer that can be brushed aside, whether in fact it be true or false. In addition, although it was not raised by the appellants in their evidence, there is the

possibility that the complainant decided to turn his accidental injuries suffered while in custody to financial profit. In other words there are reasonably possible answers to the question, why?

The law requires me to be confident of guilt before I confirm a man's conviction. I do not have that confidence in this case because, unlike the magistrate, I do not feel unbounded confidence in the evidence of the complainant, and because I do not think there is a sufficient basis for rejecting the version of the appellants and their witness as being not reasonably possibly true. The magistrate has misdirected himself in several respects, and there are traces of his having unconsciously treated the matter as one of probability rather than of proof beyond reasonable doubt. Once the proper test is properly applied there is a reasonable

doubt as to the guilt of the appellants. This may be the result of a poorly presented State case, but that makes no difference

In these circumstances the appeal succeeds, and the convictions and sentences of the appellants are set aside.

W P SCHUTZ JUDGE

OF APPEAL

NESTADT JA)

CONCUR

VAN DEN HEEVER JA)