Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case Nr: CA&R 118/2005

Case Heard: 05/12/2005
Date delivered: 14/12/2005
In the matter:

MARTIN GOOSEN **1ST APPELLANT**
COBUS SACHARIA BAARTMAN **2ND APPELLANT**

versus

THE STATE **RESPONDENT**

Coram: Kgomo JP *et* Majiedt J

JUDGMENT ON APPEAL

KGOMO JP:

1. I have read the judgment of my brother **Majiedt J** and concur therein that the appeal of both appellants must be dismissed in respect of both their conviction and sentence. I further agree that the constricted ground or basis that **Majiedt J** confined himself to is sufficient to found and justify the conviction and sentence meted out on the two appellants for the assault on the complainant as propounded by him. However, there are more extensive grounds which bolster the conviction in particular and the sentence concomitantly, which need traversing. There are also some disconcerting aspects in the conduct of the appellants, qua police officers, which require expressions of deprecation.

2. As the substantive facts appear from the judgment of **Majiedt J** I will only limit myself to aspects not covered in his judgment, particularly where I hold a different view to his and on aspects not addressed by the district magistrate or where some misdirections were committed. The appellants were each convicted

of assault with the intent to do grievous bodily harm and sentenced to R3 000,00 or 6 months imprisonment and a further 6 months was suspended for 3 years on certain conditions.

3. The First Appellant is Sgt Martin Goosen ("Sgt Goosen") and the Second Appellant Const Sacharia Baartman ("Const Baartman"). It emerged from the cross-examination by their legal representative of the complainant, Jerome Jafta ("Jerome"), and his brother Andrew Jafta ("Andrew") and the evidence of Sgt Goosen that the appellants' version is that they were summoned to a venue close to the Sunrise Police Station in De Aar by the latter police station to investigate some disturbance at a venue of entertainment. However the evidence presented by the State and the defence does not betray any semblance of a prior or prevailing riotous or threatening situation. As no witness was called who witnessed the alleged disturbances and as the appellants themselves witnessed nothing of the sort the evidence in this regard tendered by the defence, on the basis of which the complainant, Jerome, and his brother, Andrew, were accosted and arrested remain hearsay. See: **S v Ramavhale** 1996 (1) SACR 639 (A) at 644g-652c; and **S v Ndhlovu and Others** 2002 (2) SACR 325 (SCA) at 333j-348b.

4. Jerome was a good witness. His brother, Andrew, was less satisfactory, but in the main a credible witness. The brothers corroborate each other on the following material aspects:
    4.1. That Jerome had a screwdriver on his person, which he had earlier used to fix a domestic appliance or a garage door with. They say that Jerome had no other instrument or weapon in his possession. Jerome says he forgot the screwdriver in his pocket when they went to a pub or tavern to purchase some wine;
    4.2. That Andrew, who claimed that he was slapped in the face once and kicked once by Sgt Goosen and chose not to press any charges, had in his possession a pick-axe handle which he had picked up at the area at which the police found him;
    4.3. That they were not involved in any unlawful conduct or unruly behaviour and were in fact peacefully en route home or on the verge of doing so when accosted and arrested by the police;
    4.4. That the two of them had separated when arrested. Jerome says he only saw Andrew when the latter was escorted into the police van. Andrew in turn says he only saw his brother when he was forced into the police van.

He heard his brother enquiring aloud why he had been arrested;

4.5. Although there are some minor discrepancies in the brothers' evidence on the point that follows, as can be expected where a scene is not static and described by two people, the thrust of their averment is that Jerome was variously kicked, slapped, shoved, throttled, banged against a wall and pummeled by the appellants acting in concert. All these assaults happened at the police station in a holding open area or lapa leading to the police cells and inside the police cells;

4.6. That Jerome sustained injuries as a result of these assaults on him for which he received medical treatment.

5. I note at this stage already that the assault described in para 4.5 (above) excludes the major assault that **Majiedt J** confined himself to and which he found the conviction could be sustained even on the defence version. That scenario has to do with an incident that Sgt Goosen and Jerome are substantially *ad idem* on: That Sgt Goosen dragged Jerome by his leg(s) from the police-pickup and deliberately causing him to land on his back and bump the back of his head on a cement slab causing an open injury.

6. The defence called two witnesses: Sgt Goosen (First Appellant) and Mr Joubert Diamonds, who was attached to the De Aar Commando Unit. I am satisfied that their evidence ought to be rejected where it conflicts with that of the Jafta brothers unless the latter's evidence is found to be incorrect or improbable. The reasons for adopting this approach follows below.

7. Mr van Zyl who represented the appellants put unequivocal statements to the Jafta brothers that the defence will adduce evidence that demonstrates that each one of them was armed with a pick-axe handle. However, under some very effective and purpose driven cross-examination by the prosecutor who pointed out that only one screwdriver and one pick-axe handle were entered in the Exhibits Register Sgt Goosen conceded that only Jerome, who stood in a docile manner next to the police van, was armed with a pick-axe handle.

8. In a diametrically contrasting version to the concession made by Sgt Goosen in para 7 (above) Mr van Zyl had put the following categorical statements earlier to the complainant who was the first state witness:

8.1. "Hulle (the police and the Commando Unit) *het gestop met die polisievoertuig daar by hierdie plek Baartman* (Second Appellant) *het*

ingegaan saam met van hierdie persone van die Kommando." (Record p37 (12) – (17));

8.2. "Baartman se saak sal wees dat hy u broer (a reference to Andrew Jafta) *binne in die plek gevind het. … Dat dit u broer was wat Baartman gesien het met die skroewedraaier in sy hand."* (Record pp38(18) – 39(1));

8.3. "Goed, nou sê Baartman en hy sal ook so kom getuig dat toe hy nader beweeg aan u broer u broer … die skroewedraaier in sy broek ingedruk het en toe Baartman ongeveer by hom is hy afgebuk het na die grond toe op gekom het met 'n piksteel en dat hy met die piksteel gewink het 'n gewink-hou uitgevoer het na Baartman toe. Baartman sê hy het gerittereer op daardie stadium het u broer omgedraai, die piksteel neergegooi en uitgehardloop uit die gebou uit. Baartman sê hy is agterna." (Record p40(3)-(10)).

9. It must be borne in mind that what was therefore put to Jerome was not only that each one of the Jafta brothers was armed with a pick-axe handle but that each one also had a screwdriver, a fact not borne out by the exhibit register and an untruth that Sgt Goosen was constrained to concede to, as already alluded to.

10. Const Baartman did not testify in his own defence or for the defence. The reason is not difficult to work out: He would have had to contradict his co-accused, Sgt Goosen, and/or go against the statements so elaborately put to Jerome by his legal representative on his (Const Baartmans's) instruction and that of Sgt Goosen. As will be seen later, the defence witness, Mr Joubert Diamonds, muddied the defence water even further.

11. Sgt Goosen says Const Baartman shouted at him to cut off the path of the fugitive Andrew. He in turn shouted at Const Baartman to keep guard over Jerome, who was then still armed with a pick-axe handle. This sounds stage-managed or contrived. When Goosen was asked why members of the Commando did not assist with the apprehensions he stated that it was only himself, Baartman and the Jafta brothers in the vicinity. He, Sgt Goosen, ran after Andrew, overhauled him and wrestled him to the ground and took him to the van. Whilst he stooped with his upper body in the van as he was pushing Andrew into the back thereof he felt a blow on his back. When he turned around he saw Jerome literally merely strolling away from the van with the pick-axe handle in his hand. What next happened is even more astonishing. Sgt Goosen says he grabbed Andrew from behind, removed the pick-axe handle from him and tucked it under his arm-pit and carried the admittedly bantam weight Andrew to the police van and bundled him into it.

12. No coherent, let alone cogent, explanation was forthcoming from both Sgt Goosen and Mr Joubert Diamonds as regards why Sgt Goosen who had earlier been with Jerome did not disarm the seemingly meek as a lamb Jerome of the pick-axe handle even before he ran after and apprehended Andrew at the behest of Const Baartman. It is also inexplicable why Baartman did not confiscate the pick-axe handle from Jerome whilst guarding him at the time that Sgt Goosen is said to have chased after Andrew. According to the defence evidence Const Baartman did not lift a finger to prevent Jerome from striking his partner with the pick-axe handle nor did he (Baartman) try to restrain Jerome when he is said to have sauntered away after allegedly striking his working-partner (Goosen) therewith. Put differently, he was guilty of dereliction of duty or he failed to rally to the rescue of a colleague. It does not seem that they regarded the instrument in question as a dangerous weapon.

13. Enters Joubert Diamonds, the poorest witness of all by a long stretch. He saw people carrying *"gevaarlike wapens, pikstele, skroewedraaiers en goeters"*. He then witnessed Sgt Goosen pursuing and apprehending Andrew. He says Baartman was not in a position to overtake Andrew because *"daar was te veel mense in die pad gewees"*. The question arises immediately: How could Const Baartman have communicated so easily and effectively with Sgt Goosen to catch the fleeing Andrew and conversely how could Goosen so easily have alerted Baartman to guard over Jerome in the midst of the suggested throng of people who were apparently not stationary and not as silent as the grave.

14. As pointed out earlier Sgt Goosen says he and Const Baartman were left to their own devices because at the time of the arrest of the Jafta brothers it was only the two of them versus the two detainees. Not so says Mr Diamonds because according to him apart from the *"te veel mense",* aforementioned, when Goosen reached the police vehicle with Andrew there were multitudes of people who surrounded the vehicle. He says *"ons het probeer"* to remove the pick-axe handle from Jerome *"maar hy het verset (onduidelik) en aan te val want hulle was twee met die piksteel ... (sic)"*. Later on the presiding officer asked Diamonds: *"U sê u wou die piksteel afneem?"* He answered: *"Nee die polisie wou die piksteel afgeneem het."*

15. The prosecutor asked Diamonds whether any other people assisted the appellants to dispossess Jerome (or perhaps anyone else) of the pick-axe handle. He responded: *"Van die Kommandolede het*

ook hand bygesit, was ook daar om te help." This was news to the Court because neither the Jafta brothers nor Goosen spoke of any intervention by other police other than the appellants or the intervention of members of the Commando. The appellants' legal representative did not put this aspects to the witnesses either.

16. Perhaps the nearest that Diamonds came to the truth is when he said under cross-examination: *"Ek was nie agter die bakkie gewees nie ... ek was 'n ent van die bakkie af."* This admission by Diamonds is more consistent with what Jerome said in his evidence-in-chief (corroborated by Andrew) that after their arrest: *"So het daar 'n geraas aangegaan en so het Mnr Diamonds my deur die vangwa se venstertjie gevra wat gaan aan"* and he told Diamonds that he did not know why he and his brother were arrested. It is peculiar that at the inception of the trial the appellants' legal representative proclaimed that Joubert Diamonds would be called by the defence. This already eliminated him as a potential witness for the State. There was no suggestion at that early stage that Diamonds exhibited any hostile attitude towards the cause of the State. The normal procedure is that if at the close of the State case the State is not disposed to calling a witness it makes available such witness to the defence – sometimes with a brief explanation by the prosecutor on record.

17. Some of the troubling aspects relative to the circumstances under which one or the other of the Jafta brothers were arrested are the following:

    17.1. Firstly, not one witness identified any of the brothers of being involved in any illegal activity or potentially threatening situation. See du Toit, Commentary Law on the Criminal Procedure Act at chapter 5-10:

"The question as to whether the suspicion of the person effecting the arrest is reasonable, must be approached objectively. Accordingly, the circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable man to form the suspicion that the arrestee has committed a First Schedule offence ***(R v van Heerden** 1958 (3) SA 150 (T) 152). A policeman who receives a report that a lorry has been stolen, and who, during a subsequent patrol, comes upon a stationary lorry upon which two blacks are busy working, cannot entertain a reasonable suspicion that the vehicle is stolen if a bystander denies knowledge of the identity of the driver. The suspicion is also not made reasonable simply by virtue of the questioned bystander fleeing after the policeman treats him in a heavy-handed fashion in order to exact information from him (**R v Oosthuizen** 1961 (1) SA 604 (t) 606; See also **R v Basson** 1961 (3) SA 279 (T) for an example of a suspicion which was not reasonable). In order to ascertain whether a suspicion that a*

*Schedule 1 offence has been committed is 'reasonable', there must obviously be an investigation into the essentials relevant to each particular offence (**Ramakulukusha v Commander, Venda National Force** 1989 (2) SA 813 (V) 836G-837B). Conflicting statements by a complainant and uncertainty as to the chronology of events can give rise to the suspicion that a Schedule 1 offence had been committed. This could place an obligation on an investigating officer first to read the complainant's police statement so as to clarify the position. If the procedure is not followed any subsequent suspicion cannot be perceived to be reasonable (**Nkambule v Minister of Law and Order** 1993 (1) SACR 434 (T) 437i-438e)."*

17.2. Secondly, stripped to its salient features, not discounting Sgt Goosen's concession, the appellants' version is that Andrew had no pick-axe handle but a screwdriver. The screwdriver, Sgt Goosen testified, was only discovered when they searched Andrew for the first time as they shoved him into the police van. The question is why was Andrew chased and tackled rugby-style if they did not see him commit any offence or was not aware he had a screwdriver or was not reasonably suspected of having committed or it was not suspected that he was about to commit an offence;

17.3. Is a screwdriver or a pick-axe handle a dangerous weapon when a citizen in a democratic South Africa has it in his or her possession for innocuous purposes or if the possessor can or has given a reasonable or acceptable explanation for its possession?

17.4. As it was common cause that the Jafta brothers were not involved in any known illegal activity or threatening the safety of the inhabitants it seems to me that logic and common sense dictated that as a precautionary measure the instruments could have been confiscated and the brothers asked to fetch them the following day or whenever it was convenient during bright day light. They did not need a license to possess these domestic implements;

17.5. If the police were adamant to charge the Jafta brothers they could have done so but let them out on a written notice to appear in Court in terms of Section 56 of the Criminal Procedure Act 51 of 1977 or a summons could have been issued. It was totally uncalled for, heavy-handed and an abuse of power to have locked them up from Friday the 2nd November 2002 to Monday the 4th November 2002 when they were released on warning when they appeared in court;

17.6. I have my grave doubts that Jerome resisted arrest. He may have

protested his arrest too vocally or carried his protest a bit far. That, in my view, does not amount to resisting arrest;

17.7. I accept the Jafta brothers' testimony that Jerome had the screwdriver and Andrew the pick-axe handle. Consequently, there was no conceivable manner in which Jerome could have assaulted Sgt Goosen with the pick-axe handle without first taking it from his brother Andrew. Nevertheless, on the account of all the witnesses this did not happen and is unlikely to have happened with so many police and Commando members in attendance. The only logical explanation why Sgt Goosen and Mr Diamonds fabricated their evidence and placed the pick-axe handle in the hands of Jerome was to make the false charge of assault that Sgt Goosen has laid against Jerome stick. This counter-charge of assault and resisting arrest by the appellants levelled against Jerome could even have been motivated by the injuries they have caused Jerome.

18. I am satisfied that the version of the appellants is in certain respects not reasonably possibly true and in others patently false and was correctly rejected by the Magistrate. I am further satisfied that for the aforegoing reasons and those adverted to by my brother **Majiedt J** the State has proved its case beyond a reasonable doubt. I am also satisfied that on an overview of all the factors on record the sentence imposed by the Magistrate on the appellants is appropriate.

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F D KGOMO
JUDGE PRESIDENT
NORTHERN CAPE DIVISION

MAJIEDT R:

1. Die appellante, 2 polisiebeamptes, is skuldig bevind aan aanranding met die opset om ernstig te beseer en hulle is

elkeen toe gevonnis tot ‘n boete van R3000.00 of ses maande gevangenisstraf sowel as ‘n verdere ses maande gevangenisstraf wat voorwaardelik vir drie jaar opgeskort is. Hulle kom nou in hoër beroep teen hul skuldigbevindings sowel as die opgelegde vonnisse.

2. Die skuldigbevindings en vonnisse het voortgespruit uit die arrestasie deur die appellante van die klaer, Jerome Jafta, en sy broer, Andrew Jafta. Die Staat het beweer in die klagstaat dat die appellante vir die klaer geskop, getrap en teen ‘n muur gegooi en gewurg het. Die appellante, wat regsverteenwoordiging geniet het, het onskuldig gepleit en het as verweer voorgehou dat hulle tydens arrestasie van die klaer, bloot die nodige minimum geweld aangewend het om die klaer onder bedwang te bring.

3. Namens die Staat het die klaer en sy broer, Andrew Jafta, getuig. Namens die Verdediging het die eerste appellant sowel as ene Joubert Diamonds getuig. Inaggenome die uiteindelike bevinding hierin en die basis daarvoor, soos wat anstons sal blyk, is dit na my mening nie nodig om breedvoerig met die aangebode getuienis en die evaluering daarvan hierin te handel nie.

4. Die volgende feite was óf gemene saak óf nie ernstig in geskil geplaas tydens die verhoor nie:

4.1 Op die datum van die voorval was daar oproerigheid in ‘n woonbuurt naby die Sunrise Polisiestasie en is die polisie en kommando se hulp ingeroep om orde te herstel en om beslag te lê op gevaarlike wapens.

4.2 Die twee appellante is per polisiebakkie, waarin ook ‘n polisiehond was, na die toneel ter uitvoering van die taak vermeld in 4.1 hierbo.

4.3 Joubert Diamonds is ‘n kommandolid en was ook behulpsaam met bystand vir die polisie in hulle optrede dié aand.

4.4 Die klaer en sy broer, Andrew, is daar op die toneel gearresteer deur die appellante vir die besit van gevaarlike wapens. Daar was ‘n feitegeskil by die verhoor aangaande welke appellant vir welke een van die klaer en Andrew gearresteer het, asook aangaande welke tipe gevaarlike wapen in welke een van die klaer en Andrew se besit gevind is.

4.5 Joubert Diamonds was aanwesig op die toneel tydens die voormelde arrestasies, maar het nie die twee appellante vergesel na die polisiestasie in die dorp waar die klaer en Andrew in die polisieselle aangehou is nie. Die gebeure by die polisiestasie in die dorp vorm die onderwerp van die aanklag in die onderhawige saak.

4.6 Alhoewel dit aanvanklik ontken is deur die klaer, het dit uiteindelik gemene saak geword dat die klaer, voortspruitend uit die gebeure hierin geskets, aangekla is vir die besit van ‘n gevaarlike wapen, verset teen arrestasie sowel as aanranding op ‘n polisiebeampte.

5. Die Staat se saak, by monde van die klaer en Andrew, was dat die appellante vir die klaer hardhandig hanteer het by die eerste toneel (d.w.s. in die woonbuurt) en hom aangerand het by die tweede toneel (d.w.s. by die polisiestasie in die dorp). Die voormelde aanranding het, volgens die Staatsgetuies, plaasgevind deurdat die appellante ondermeer vir die klaer getrap, geskop, geklap, teen ‘n muur gegooi en verwurg het.

Dit sou na bewering geskied het buite sowel as binne die selle. Van belang verder is dat beide die klaer en Andrew ook beweer het dat die klaer aangerand is deurdat die eerste appellant hom aan sy enkels uit die polisiebakkie getrek het met die gevolg dat die klaer hard op sy kop en rug op die grond te lande gekom het. Dit is nie betwis nie dat die klaer wel beseer is tydens die laasvermelde uitruk uit die polisiebakkie en later mediese behandeling ontvang het (vir een of ander onverklaarbare rede is die mediese verslag op vorm J88 nie ingehandig tydens die verhoor nie).

6. Soos alreeds aangedui, was die appellante se verweer grootliks daarop gebaseer dat hulle:

6.1 Deel was van ‘n gesamentlike optrede met kommandolede daardie aand om orde te herstel en beslag te lê op gevaarlike wapens by die oproerigheid;

6.2 Die klaer en sy broer gearresteer het in die loop van hierdie optrede vir die besit van gevaarlike wapens;

6.3 Tydens hierdie arrestasie bloot minimum geweld toegepas het om die weerspannige klaer onder bedwang te bring;

6.5 Geensins die klaer wederregtelik en opsetlik aangerand het op enige stadium nie.

7. Daar is verskeie tekortkominge en onbevredigende aspekte in beide die Staat en die Verdediging se saak. Ek ag dit nie nodig om in besonderhede daarmee te handel nie, omrede ek die mening toegedaan is dat die appellante se appél teen die skuldigbevindings moet misluk, selfs op hulle eie weergawe

soos voorgehou in die eerste appellant se getuienis. Ek volstaan bloot met die volgende opmerkings:

7.1 Daar is ‘n aantal weersprekinge tussen die klaer en sy broer se weergawes en ook in hul eie getuienis – sommige daarvan belangriker as andere. Daar is ook etlike onwaarskynlikhede aan te merk in hul weergawes.

7.2 Die eerste appellant se getuienis bots in sekere wesenlike opsigte met dít wat namens hom en tweede appellant deur hul prokureur gestel is as hul weergawe aan die Staatsgetuies. Verder is daar ook ‘n aantal onwaarskynlikhede in die eerste appellant se getuienis.

7.3 Die tweede appellant se stilswye beteken uiteraard dat die Staat se saak onweerspreek staan en dat sy skuld of onskuld bepaal moet word aan die hand van die onweerspreekte Staatsaak sowel as die eerste appellant se weergawe onder eed vir soverre sodanige weergawe ook die tweede appellant se aandadigheid dek.

7.4 Joubert Diamonds is op die oog af ‘n onafhanklike getuie en het hy nie té sleg gevaar as getuie nie. Tog verskil sy weergawe in sekere belangrike opsigte van dié van die eerste appellant.

8. Die kern van die beslissing in hierdie saak wentel na my mening rondom die aspek van die sogenaamde minimum geweld wat toegepas is tydens arrestasie van die klaer en, meer bepaald, toe die klaer uit die polisiebakkie geruk is deur die eerste appellant. Ek het alreeds in par. 5 hierbo daarop gewys dat die klaer en Andrew getuig het oor hierdie uitruk van die klaer aan sy enkels uit die polisiebakkie deur die eerste appellant.

9. Ek ag dit belangrik om die eerste appellant se getuienis tydens

kruisondervraging op hierdie aspek woordeliks aan te haal:

"So die staalhekke is eintlik daar om hulle na die Aanklagkantoor te vat. En u stop nou daar en u sê Jerome wil nou nie uitklim nie. U sê vir hom klim uit en hy wil nou nie uitklim nie hy wil niks weet nie? ----- Dit is korrek Edelagbare hy het op sy rug gelê en die hele tyd getrap na my kant toe. Want hy het op sy rug gelê en basies geskop na my kant toe. Toe sê ek vir hom jong klim uit toe sê hy vir my ek moet hom uithaal soos ek hom ingelaai het. Toe sê ek vir hom onthou as ek jou an jou voete vat en jou uittrek gaan jy seerkry. Hy het aangegaan om te skop ek het hom aan sy voete gevat en hom uitgetrek.

Het u hom albei voete gegryp of net aan een voet gegryp? ----- Ek het een voet gegryp Edelagbare.

En wat doen Sacharias op daardie – beskuldigde twee op daardie stadium? ----- Hy het die kant van my gestaan.

Het u nie vir hom gevra om u te help nie? ----- Askuus.

Het u nie vir hom gevra om u te help om hom uit die vangwa te laai nie? ----- Dit is negatief Edelagbare want hy het gewag vir Andrew want hy het vir Andrew gearresteer. Toe het ek mos nou vir Jafta – Jerome uitgetrek en hy het vir Andrew gewag.

My vraag aan u is u het nou vir – u getuienis is nou u het vir Jerome gesê as hy nou nie ophou nie gaan u hom uittrek en hy gaan seerkry? ----- Dis reg Edelagbare.

So ek meen u weet en u sê ook vir hom gaan jy nie jou samewerking gee nie dan kry jy seer? ----- As ek hom uittrek dan gaan hy seerkry want hoe gaan ek hom uitkry Edelagbare. Want (onduidelik) reg na my toe so ek kan nie sy agterkant of sy hande nie sy voete is die naaste dit is al hoe ek hom gaan uitkry.

Maar toe u die een voet gryp hoekom probeer u nie die ander voet gryp en hom vashou en vir Mnr. Baardman vra help my om hierdie man uit te trek nie hoekom onmiddellik ruk u die man net uit wel wetende nou dat hy sy kop op hierdie sementblad gaan kap ----- Edelagbare ek het die minimum geweld gebruik om hom uit te kry want hy het die hele tyd aan die binnekant vasgehou het aan die bankies.

Ek stel dit nou aan u dit is nie die minimum geweld nie. U het nie enige pogings aangewend om vir beskuldigde twee te vra om u te help om te probeer om die man uit te kry nie. U het nie eers Aanklagkantoor toe gegaan en gaan kyk of u ander polisiebeamptes kan kry om u te help om hierdie man uit te kry nie. U besluit net daar en dan u gaan die man nou hier uit trek of hy nou wil uit of nie wel wetende dat die kanse baie goed is dat hy sy kop op hierdie harde sementblad gaan kap. ----- Edelagbare dit is – ek hoor wat u vir my sê maar ek het die nodige geweld gebruik met hom want ek gaan nie die hele tyd staan en stoei met hom en ons kom nie verder nie.

U gaan nie die hele tyd staan en stoei met hom nie en u is nou …. ----- Dit is hoekom ek hom aan die voet vat want hy het die hele tyd gelê en skop. Ek het hom ordentlik gesê as jy nie ophou nie gaan ek jou uittrek uit die voertuig uit. En dit is nie te sê Edelagbare dat ek die man uitgepluk het as ek hom uitgetrek het nie.

U sê self u het hom aan die voete gegryp en u het hom uit getrek. ----- Ek kan hom uittrek tot by die kant ek kan hom uitpluk soos 'n sak aartappels.

Maar dit is wat u …. ----- (onduidelik) weet nie.

Dit is wat my nogal pla want ek sou dink dat u sê u sou hom kon uittrek gedeeltelik dan sou my logika sê dan sou u hom nie seermaak nie. Dan trek jy 'n gedeelte van sy lyf uit en u sê vir Sacharias nou gryp ons hom vas en dan laai ons uit die "van" – uit die vangwa uit. Maar u het dit nie probeer nie. ----- Edelagbare as ons hom nou vat en die ander enetjie kan weghardloop. Sy boetie kan uitspring en weghardloop (onduidelik). As ons nou altwee met die man stoei en die ander een kom by die kant

waar ons dan nou stoei waar dan nou?

Meneer as die man … ----- (onduidelik) uithardloop by die deur nou.

As die man uit die vangwa moet uitgetrek word en hy wil nie uit nie hoe kan iemand anders uit daardie spasie uit beweeg soos hierdie man die hele spasie volmaak? ----- Edelagbare hy is mos nie groot nie soos die deur aan die agterkant nie en hy stoei met jou.

As julle twee mense is wat by die vangwa staan by die opening van die vangwa wat oopgemaak word kan iemand tog sekerlik nie daar verby nie. ----- Edelagbare dit is – ek weet nie.

Dit is wat ek vra hoekom het jy nie hom net halflyf uitgetrek nie en vir Mnr. Baardman gevra om u te help nie of iemand anders in die Aanklagkantoor gaan kry om te help om hierdie persoon uit die vangwa uit te laai nie? ----- Ek kan nie antwoord nie Edelagbare.

Want dit stel ek aan u is minimum geweld. Maar dit wat u gedoen het is nie minimum geweld nie. U getuig verder u was self – u was kwaad gewees vir die beskuldigde ag vir die vir Jerome en dit is wat sin maak dan waarom Jerome die een man is wat sê hy aangerand is die dag. En Andrew volgens wat u sê omdat Jerome u nou aangerand het maak dit sin dat hy die enigste mens is persoon is wat op daardie dag getuie geyktiiseer is en aangerand is deur u en beskuldigde twee. ----- Edelagbare as ek mag ek vra.

HOF: U mag nie vrae vra nie Meneer. ----- Okay wie sal nie kwaad wees as iemand jou aanrand sonder enige rede en dit is nie te sê dat as ek die nodige geweld gebruik het ek het weerwraak op die persoon uitgehaal nie die werk wat ek doen is die nodige geweld en dit is wat ek toegepas het."

10. Ons reg ten aansien van die regmatige toediening van geweld ten einde 'n arrestasie uit te voer berus nou op 'n stewige grondwetlike grondslag, met verwysing na die nuwe, gewysigde artikel 49 van Wet 51 van 1977 se bepalings.

In **Ex parte Minister of Safety and Security: in re S v Walters** 2002(2) SACR 105 (CC) te 126-7 het die Grondwetlike Hof volmondig saamgestem met die volgende *dictum* van Olivier AR in **Govender v Minister of Safety and Security** 2001(2) SACR 197 (SCA) te 205 d-f (par. 21):

"I am of the view that in giving effect to s 49(1) of the Act, and in applying the constitutional standard of reasonableness the existing (and narrow) test of proportionality between the seriousness of the relevant offence and the force used should be expanded to include a consideration of proportionality between the nature and degree of the force used and the threat posed by the fugitive to the safety and security of the police officers, other individuals and society as a whole. In so doing, full weight should be given to the fact that the fugitive is obviously young, or unarmed, or of slight build, etc, and where applicable, he could have been brought to justice in some other way. In licensing only such force, necessary to overcome resistance or prevent flight, as is 'reasonable', s 49(1) implies that

in certain circumstances the use of force necessary for the objects stated will nevertheless be unreasonable. It is the requirement of reasonableness that now requires interpretation in the light of constitutional values. Conduct unreasonable in the light of the Constitution can never be 'reasonably necessary' to achieve a statutory purpose."

11. Gegewe die legio gevare verbonde aan die moontlike misbruik van statutêre magtiging om geweld toe te pas tydens arrestasie, sal 'n Hof baie versigtig nagaan of daar aan die statutêre vereistes voldoen is. Die bepalings vervat in artikel 49 sal gevolglik streng uitgelê word;
Sien: **Wiesner v Molomo** 1983(3) SA 151 (A) te 157 C-D.

12. In Du Toit *et al*, **Commentary on the Criminal Procedure Act** te 5-28 tot 5-29, word 'n nuttige uiteensetting verskaf van welke statutêre voorvereistes nagekom moet word waar 'n beskuldigde polisiebeampte (soos *in casu*) steun op hierdie statutêre magtiging vir die toepassing van geweld tydens 'n arrestasie.

12.1 Die beskuldigde moet aantoon dat hy kragtens die voorskrifte vervat in die Strafproseswet regtens gemagtig was om die klaer te arresteer of om bystand te verleen tot sodanige arrestasie.

12.2 Verder moet hy aantoon dat hy 'n doelgerigte poging aangewend het om die klaer te arresteer (d.w.s. om die klaer van sy vryheid te ontneem ten einde sy teenwoordigheid in die hof te verseker **en nie om die klaer te straf nie** – sien: **Wiesner v Molomo,** *supra* te

158 E-H.

12.3 Dat die klaer homself verset het teen arrestasie en dat hy nie in hegtenis geneem kon word sonder die toepassing van geweld nie.

12.4 **Dat die geweld wat toegepas is om die verset te bowe te kom redelikerwys nodig en proporsioneel was in die omstandighede.** Die kernvraag hier ter sprake is of die arresteerder/beskuldigde in die omstandighede redelikerwys die klaer/beseerde se weerstand te bowe kon kom op 'n minder drastiese wyse as die wyse wat tot die klaer se beserings gelei het;

Vergelyk: **Macu v du Toit** 1983(4) SA 629 (A) te 635 D.

Hierdie toegepaste metode kan slegs teen ander alternatiewes opgeweeg word as sodanige alternatiewes redelikerwys effektief en prakties uitvoerbaar sou wees in die omstandighede:

Sien: **Macu v du Toit***, supra,* te 635 H.

'n Leunstoel*, ex post facto* spekulatiewe benadering moet vermy word by 'n oorweging van wat effektief en redelik sou wees in die omstandighede;

Sien: **Dikane v Minister van Wet en Orde** 1992(2) SACR 211 (W).

12.5 Dat die klaer 'n bedreiging of gevaar van ernstige fisiese leed ingehou het;

Sien: **Govender v Minister of Safety & Security,** *supra*, te 204 j – 205 a (par. 19).

13. Die redelikheid van die appellante se optrede is ‘n objektiewe toets en moet aan die hand van die voormelde vereistes gemeet word. Die heersende omstandighede in ‘n gegewe geval sal uiteraard deeglik in ag geneem moet word. Die objektiewe redelikheid en praktiese uitvoerbaarheid is wat bepaal moet word – ‘n beskuldigde se eie siening oor hoeveel geweld in die omstandighede nodig was, is gevolglik ontersaaklik.

14. Met toepassing van die uitgebreide toets soos voorgehou in die **Govender**-saak*, supra*, en soos ondersteun deur die Grondwetlike hof in **Ex parte Minister of Safety and Security: In re S v Walters,** *supra*, is ek die mening toegedaan dat die geweld wat die eerste appellant toegepas het om enige weerstand wat daar mag gewees het aan die kant van die klaer, te bowe te kom, heeltemal disproporsioneel was in die omstandighede. Ek is bereid om te aanvaar, sonder om dit pertinent te beslis, ten gunste van die eerste appellant dat hy:

a) regtens gemagtig was om die klaer te arresteer; en

b) ‘n doelgerigte poging aangewend het om die klaer te arresteer deur hom uit die voertuig te verwyder en in die selle te plaas; en

c) te doene gekry het met ‘n weerspannige klaer.

15. Die eerste appellant se reaksie dat hy nie kan antwoord op die aanklaer se stelling dat hy nie "*minimum geweld*" gebruik het tydens die arrestasie nie (sien aangehaalde passasie hierbo), is tog insiggewend, alhoewel natuurlik ontersaaklik vir die huidige oorwegingsdoeleindes. Die volgende feite was óf gemeensaak of was behoorlik bewese:

a) Die tweede appellant was aanwesig op die toneel om die eerste appellant by te staan om die klaer op 'n behoorlike en nie-gewelddadige (of dan ten minste **veel minder** gewelddadige wyse) uit die polisiebakkie te haal. Die bewering vanaf die eerste appellant tydens sy getuienis dat die tweede appellant vir Andrew moes oppas, gaan glad nie op nie. Andrew was, op al die aangebode getuienis, glad nie 'n vlugrisiko nie.

b) Die eerste appellant kon ook die hulp van ander polisielede wat aan diens was in die aanklagkantoor, versoek het om die nodige bystand te verleen.

c) Verder kon die eerste appellant ook, soos hy self toegegee het (sien aangehaalde passasie), die klaer halfpad by die polisiebakkie uitgetrek het en "*soos 'n sak aartappels"* uitgepluk het, d.w.s. oor sy skouer ('n fisiese vergelyking in die hof het bepaal dat die eerste appellant aansienlik groter as die klaer van liggaamsbou is).

16. Inaggenome die voorafgaande is ek die mening toegedaan dat die eerste appellant, objektief gesproke, veel meer geweld toegepas het as wat redelikerwys nodig was om die klaer onder bedwang te bring tydens arrestasie. Hy het homself dus skuldig gemaak aan aanranding met die opset om ernstig te beseer – namens hom het Mnr. Nel dan ook uiteindelik aldus toegegee tydens sy betoog.

17. Wat is nou die tweede appellant se posisie? Die tweede appellant was teenwoordig en het hierdie (wederregtelike) optrede van die eerste appellant gade geslaan. Hy is nie bloot net ‘n gewone landsburger nie. As polisiebeampte het daar op hom ‘n regsplig gerus om te voorkom dat die eerste appellant die klaer só aanrand. Hy was na my mening deeglik daarvan bewus dat die optrede van die eerste appellant wederregtelik is en ‘n aanranding op die klaer daarstel. Hy is na my mening gevolglik op dié basis ook skuldig aan aanranding met die opset om ernstig te beseer.

Vergelyk in dié verband die feite en bevindinge in:

S v Barnes and another 1990(2) SACR 485 (N) te 492 i;

S v A en ‘n ander 1991(2) SASV 257 (N) te 273 g-h;

S v Govender & others 2004(2) SACR 381 (SCA) te 389 b-d.

18. Laastens is daar die vonnis-aspek. Alhoewel toegegee is in die betoogshoofde dat die opgelegde vonnis nie skokkend onvanpas is nie, het Mnr. Nel halfhartig voor ons probeer aanvoer dat ‘n skuldigbevinding op die basis soos in hierdie

uitspraak vervat, inmenging met die vonnis regverdig. Ek stem nie saam nie. Hierdie gedrag van die appellante is hoogs afkeurenswaardig – sien:

S v Govender and others*, supra*, te 390 d-e (par. 32).

'n Polisiebeampte is tog per slot van sake "*nie net afskrikker of opspoorder nie, maar ook beskermer"* – per Rumpff AR in **Minister van Polisie v Ewels** 1975(3) SA 590 (A) te 597 G.

Die opgelegde vonnis wek geen gevoel van skok nie, inteendeel soos Mnr. Nel uiteindelik tereg toegegee het, het die landdros die appellante baie toegeeflik behandel met die opgelegde vonnis.

19. Na my mening behoort die appél afgewys en die skuldigbevindings en vonnisse van beide appellante bekragtig te word.

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SA MAJIEDT
REGTER

Ek stem saam en dit word aldus gelas:

_____

FD KGOMO
REGTER-PRESIDENT

NAMENS APPELLANT : ADV I NEL
NAMENS RESPONDENT : ADV W BAGANANENG

DATUM VAN VERHOOR : 2005-12-05
DATUM VAN UITSPRAAK : 2005-12-09