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111/93

Case No : 62/92
N v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

A C KRIELING AND ANOTHER — **APPELLANTS**

and

THE STATE — **RESPONDENT**

SMALBERGER JA -

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(APPELLATE DIVISION)

In the matter between:

ALAN CHRISTOPHER KRIELING	**First Appellant**
DANIEL VAN ROOI	**Second Appellant**

and

THE STATE	**Respondent**

CORAM:	**SMALBERGER, GOLDSTONE, et VAN DEN HEEVER, JJA**
HEARD:	**25 August 1993**
DELIVERED:	**6 September 1993**

J U D G M E N T

SMALBERGER, JA :-

The appellants, both policemen, pleaded guilty in the Regional Court, Paarl, to a charge of assault with intent to do grievous bodily harm. The basis of their plea was contained in a joint written statement handed in on their behalf in terms of s 112 of the

Criminal Procedure Act 51 of 1977. The relevant portion of the statement reads:

"1. Die klaer, Eugene Wayne Davey, is deur die polisie te Paarl op 26 Mei 1990 aangehou, as gevolg van die feit dat hy 'n verdagte was in 'n aantal diefstal sake.

2. Ons is belas met die ondersoek van genoemde diefstal sake.

3. Ons het die klaer gedurende die tydperk wat hy aangehou was ondervra te Paarl polisiestasie. Hy het geweier om enige inligting te verstrek - op 27 Mei 1990 het ons hom weer ondervra.

4. Ons het gefrustreerd geraak aangesien die klaer se volgehoue stilswye ons ondersoek belemmer het en het hom aangerand in 'n poging om inligting van hom te bekom.

5. Ons het hom vasgeboei en sy kop met 'n sak bedek. Ons het 'n paal tussen sy bene en arms gedruk en hom opgehang op die paal. Ons het hom laat heen en weer op die paal swaai.

6. Hy was ook met 'n elektriese ets-masjien wat 'n lae stroomsterkte elektriese stroom ontwikkel het geskok.

7. Sekere houe met die hand en vuis is hom ook toegedien.

8. Die apparaat wat ons gebruik het om hom aan te rand is alles alledaagse toerusting wat ons in die polisiestasie gevind het en aangewend het in ons aanranding op die klaer.

9. Ons het nie bedoel om die klaer ernstig te beseer nie, maar wou slegs inligting van hom bekom. Tog het ons die klaer sekere letsels, beserings en kneusings toegedien, soos blyk uit die fotos hierby angeheg, wat ons erken fotos is van die klaer wat sy genoemde letsels, beserings en kneusings toon. Inderdaad het ons geensins bedoel om die klaer te beseer.

10. Ons het wel besef dat ons optrede die klaer mag beseer, maar het gehoop dat dit nie die geval sou wees nie. Ons het 'n kans gewaag dat die klaer nie beseer sou word nie.

11. Ons het besef dat ons optrede onwettig was, maar was tot so 'n mate gefrusteer dat ons onvermoë om inligting in te win oor die reeks diefstalle dat ons desnieteenstaande dié feit voortgegaan het met ons optrede teen die klaer.

12. Die klaer is wel later deur inligting deur 'n ander polisiebeampte ingewin verbind met die reeks diefstalle, is vervolg in die Distrikshof te Paarl en is skuldigbevind op 'n aanklag van diefstal (3 (drie) aanklagtes). Ons optrede op

> 27 Mei 1990 het nie bygedra tot die suksesvolle vervolging van die klaer nie. Hy het volgehou in sy weiering om inligting te verskaf."

The appellants were duly convicted and, after evidence in mitigation was given by their commanding officer, Capt Visagie, they were each sentenced to three years' imprisonment, half of which was conditionally suspended for five years. They appealed against their sentences to the Cape of Good Hope Provincial Division. Their appeals were dismissed, but they were granted leave to appeal to this Court. Hence the present appeal.

As a consequence of the assault upon him the complainant sustained widespread albeit not unduly severe injuries. There were abrasions of both forearms and both lower legs. One assumes these were sustained when he was swung from the pole inserted between his handcuffed legs and arms. The inside of his upper lip

was cut; there was a large bruise on the right side of his face behind and below the right ear; his left eye was swollen, with a large subconjunctival haemorrhage and bleeding of the eye; there were electrical burn wounds on the web spaces between the fingers of both hands and on top of the right middle finger; he had abrasions at the back of both his upper thighs, and both his wrists were swollen and tender.

The appellants, both first offenders, were 23 and 28 years old respectively at the time of the commission of the offence. Both had served for some years in the police force and had studied to advance their positions. According to Capt Visagie, both appellants were conscientious and dedicated policemen who worked hard, often under difficult conditions. Both have family commitments, and homes of their own in respect of which they receive housing allowances. The trial magistrate accepted, in their favour, that both

were remorseful for their conduct.

While it is a salutary principle of sentencing that a first offender should, as far as possible, be kept out of prison, it is well recognized that in appropriate cases first offenders may, and indeed should, be incarcerated. Whether or not imprisonment is indicated depends essentially upon the facts of each particular case. It is true that imprisonment will cause the appellants great hardship. It will effectively terminate their careers, they will probably lose their homes, their families will unfortunately suffer and they will be exposed to all the negative influences of prison - possibly even to acts of revenge and vindictiveness by certain elements in prison in consequence of their previous police connections. One is not unmindful of these considerations. No court would deliberately seek to harm a convicted person or cause him undue hardship - no enlightened system of

justice would tolerate that. But harm or hardship may be the unavoidable consequence of an otherwise fair and proper sentence. A balanced approach to sentencing requires that not only the appellants' personal circumstances and the potential hardship to them be given due weight, but also the nature of their crime and the interests of the community.

The crime committed was a serious one having regard both to its nature and the identity of its perpetrators. It involved an assault by policemen on a prisoner in their custody who was powerless to protect himself. The assault itself was unprovoked, calculated, callous and prolonged. It resulted in the injuries to the complainant which I have detailed. The appellants did not act on the spur of the moment and had ample time to reflect upon what they were doing. Their purpose was to extract information from an uncooperative suspect. No right thinking community can

tolerate conduct of this kind on the part of members of its police force.

The police operate under difficult and often dangerous conditions. It is understandable that, given the pressures and circumstances of their work, a lack of co-operation on the part of a suspect can lead to frustration. But with the wide powers of arrest and detention enjoyed by the police come a concomitant responsibility. They are, in keeping with their training, required to act throughout in a disciplined and professional manner, with due regard to the rights of citizens and, in particular, those in their custody. Every suspect has a fundamental right to remain silent if he so chooses, and no policeman may be permitted or encouraged to extract information from a suspect by unlawful, and least of all violent, means. That such person has a long record of crime, or his complicity in other crimes is suspected, makes no difference. He

is nevertheless entitled to protection from such conduct. Where a policeman abuses his authority and assaults a suspect in his custody, right thinking members of the community will demand appropriate action and adequate punishment.

As appears from Capt Visagie's evidence, frequent warnings were issued against conduct of the kind the appellants indulged in. They failed to heed these warnings. Their conduct constituted a denial of the rights of the complainant and an abuse of their authority. They acted in breach of their police duties and functions. What they did undermines the proper administration of justice and is detrimental not only to the image and interests of the police force generally, but to the interests of the many policemen in particular who strive to carry out their duties in an exemplary manner. Any sentence imposed on them should reflect society's concern at such a state of affairs.

This Court can only interfere on limited grounds with the exercise of a trial court's discretion in regard to sentence. None of the recognised grounds for interference are present. The trial magistrate, in a careful judgment, has shown himself to be well aware of the objects of punishment and the need, in assessing an appropriate sentence, to balance the nature of the crime, the personal circumstances of the appellants and the interests of the community. He has not misdirected himself in any material respect. Nor, in the light of the considerations that have been mentioned can the sentence imposed be said to be one which creates a sense of shock.

The appeals are dismissed.

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J W SMALBERGER
JUDGE OF APPEAL

GOLDSTONE, JA)
VAN DEN HEEVER, JA) concur