Republic of South Africa

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE No: A 689/2007

In the matter of

MARIUS JANSE VAN RENSBURG	**First Appellant**
MARIUS VISSER	**Second Appellant**
and	
THE STATE	**Respondent**

JUDGMENT DELIVERED : 24 JULY 2008

MOOSA, J:

Introduction

1. The appellants (individually, referred to as first appellant and second appellant), were convicted, in the district court of Khayelitsha, on a charge of assault with the intent to do grievous bodily harm. On 18 September 2007, they were sentenced to 24 months imprisonment in terms of Section 276(1)(i) of the Criminal Procedure Act, No 51 0f 1977 ("the Act"). The appellants appeal to

this court, with the leave of the court a quo, against both their convictions and sentences.

Grounds of appeal

2. The appellants' grounds of appeal are firstly, that the trial court failed to approach the evidence of the complainant, as a single witness, with the necessary caution; secondly, that the trial court erred in accepting the explanation of the complainant concerning the contradictions and omissions contained in the various police statements made by him to the police; thirdly, the trial court failed to give sufficient weight to the contradictions between complainant's statements and oral evidence and between his evidence in chief and his evidence under cross-examination and fourthly, that the trial court erred in making a favourable credibility finding in respect of the complainant and an adverse credibility finding in respect of the appellants.

Plea Explanation

3. First appellant gave a plea explanation to the effect that he, legitimately and in accordance with the provisions of Section 49(1)(b) of the Act, used an official police dog under his control as an instrument to effect the arrest of the complainant, who was in the act of fleeing. In the process of affecting such arrest, the complainant was bitten by the police dog. Second appellant gave a plea explanation to the effect that he was present, when first appellant affected the arrest of the fleeing complainant, but denied that the dog under his control was used to affect such arrest or to assault the complainant.

Findings of the trial court

4. The complainant was the only witness for the State. The appellants testified in their defence and called Inspector Theunis as a witness in their defence. Inspector Theunis took two statements from the complainant. The trial court found that the complainant did not deviate from his evidence in chief or contradict himself and gave a reasonable explanation for the omissions and contradictions in the various statements of the incident he gave to the police. The trial court concluded that he was an honest and truthful witness and, as a single witness, his evidence was satisfactory in all material respects. The court accordingly accepted his evidence.

5. On the other hand, the court observed that the appellants were very uncomfortable in the witness stand and was not impressed with them as witnesses. The court found that there were too many contradictions in their version and concluded that their version was a fabrication. After making certain factual findings and considering the inherent probabilities on the totality of the evidence, the trial court came to the conclusion that the complainant's version was inherently true and the appellants' version was inherently false. The court accordingly concluded that the State had proved the offence against the appellants beyond reasonable doubt and found them both guilty as charged.

Conflicting versions

6. There are two conflicting versions as to how complainant sustained the injuries. The State's version is that complainant's car was forced off the road by the

marked police car driven by first appellant; first appellant approached him at the driver's side of his vehicle and asked him: *"Why are you running away?"* and complainant replied: *"I am not running away"*; first appellant pulled him out of the car and said: *"Dis die kaffer wat baie praat"*; second appellant handed one dog to the first appellant; first appellant swore at complainant, threw him to the ground and instructed the dog to bite *"the kaffir"*; accused 2, who also had a dog, then set his dog on the complainant and as a result of the attack by the two dogs, complainant sustained the bite wounds. The complainant, prior to the attack had driven past a taxi that was standing in the middle of the road. He stopped his car to ascertain what was wrong. He got out and approached the taxi. When he noticed that the passengers were being searched by two police officers, he returned to his car and drove off. He was followed by the appellants and pulled off the road by them.

7. The version of the defence is that, while doing patrol duty, they noticed that complainant collided with a stationary Hi-ace vehicle. The appellants told both the complainant and the taxi driver to report the accident to the Khayeltisha police station. While they were following complainant to the police station, he suddenly speeded off, went through a few stop signs and almost collided with other cars. They gave chase. They noticed that the complainant slowed down, jumped out of the car, crossed Lansdowne Road and ran towards the bushes on the other side of the road. First appellant ran after the suspect with his dog on a leash. After warning the suspect to stop, he let the dog loose and gave it instructions to catch the suspect. The dog attacked and bit the fleeing

complainant. While the dog was busy with him, he was apprehended. Second appellant remained at the car and his dog was never used to secure the arrest of the complainant.

8. Logic dictates that, where there are two conflicting versions or two mutually destructive stories, both cannot be true. Only one can be true. Consequently the other must be false. However, the dictates of logic do not displace the standard of proof required either in a civil or criminal matter. In order to determine the objective truth of the one version and the falsity of the other, it is important to consider not only the credibility of the witnesses, but also the reliability of such witnesses. Evidence that is reliable should be weighed against the evidence that is found to be false and in the process measured against the probabilities. In the final analysis the court must determine whether the State has mustered the requisite threshold – in this case proof beyond reasonable doubt. (See: **S v Saban & ḥ Ander** 1992 (1) SACR 199 (A) at 203j to 204a-b; **S v Van der Meyden** 1999 (1) SACR 447 (W) at 449g-j – 450a-b and **S v Trainor** 2003 (1) SACR 35 (SCA) at para [9].)

Evaluation

9. It is common cause that the complainant was a single witness for the State. Section 208 of the Act stipulates that an accused may be convicted on the evidence of a single and competent witness. This does not displace an important principle in our law that the evidence of a single witness must be approached with caution. Before the court can place any reliance thereon, the

evidence of a single witness must be clear and satisfactory in every material respect. In other words, the evidence must not only be credible, but must also be reliable. In this respect see: **R v Mokoena** 1956 (3) SA 81 (A); **S v Webber** 1971 (3) SA 754 (A) at 758G; **S v Sauls and Others** 1981 (3) SA 172 (A) at 179G-180G**; S v Stevens** [2005] 1 All SA 1 (SCA) at 5 **and S v Gentle** 2005 (1) SACR 420 (SCA) para17. However, our courts have repeatedly warned that the exercise of caution should not be allowed to replace the exercise of common sense. (**S v Artman and Another** 1968 (3) SA 339 (A) at 341C.)

10. A perusal of the judgment discloses that the trial court failed to critically evaluate complainant's evidence as a single witness. It does not appear that the trial court had warned itself against the non critical acceptance of the evidence of a single witness nor does it appear that it treated such evidence cautiously. (**See S v Heslop** 2007 (1) SACR 461 (SCA) at para 14.) After critically analysing the evidence of the appellants, the court concluded that the complainant's evidence was satisfactory in all material respects. That conclusion is not borne out by the evidence as contained in the record and, in my view, amounts to a misdirection.

11. A close scrutiny of a conspectus of the evidence shows that there are a number of contradictions in the evidence of the complainant. They are to be found firstly, in the four statements complainant gave to the police; secondly, between

these statements and the oral evidence the complainant gave in court; thirdly, between his evidence in chief and his evidence under cross-examination and fourthly, between the version of the complainant and that of the appellants.

12. I will briefly refer to some of these contradictions. They are: whether first appellant was implicated or both appellants were implicated in the commission of the offence; whether complainant came from work or friends on the evening of the incident; whether he was on the way to the police station to report the accident or on the way home; whether first or second appellant pulled him out of the car and whether first or second appellant put the dog on him or whether both pulled him out of the car and put their dogs on him; whether or not he knew that the police vehicle was following him; whether the blue lights were flashing and the siren was wailing. There are also conflicting versions between that of the complainant and that of the appellants as to what transpired during the critical period of the incident which forms the basis of the charge against the appellants. Individually these contradictions and omissions may not necessarily be material, but collectively they impact negatively on the credibility of the complainant. The favourable credibility finding of the trial court is therefore not borne out by the record or the evidence.

13. The time span for the taking of the four statements of the complainant by the police stretched over a period of approximately five years. The first statement was taken by Constable Vapi on 20 July 1999. The second statement was taken by Inspector Theunis on 25 August 2000, more than one year later. The

third statement was taken by Inspector Theunis on 2 October 2003 more than three years after the incident. The fourth statement was taken by Inspector Cloete on 16 August 2004, more than five years after the incident. The parties testified more than seven years after the incident. The time lapse, in my view, accounts for the poor quality of the evidence of both the complainant and the appellants.

14. It is generally accepted by our courts that the memory of witnesses to recall or remember events fades with the passage of time. Inspector Theunis conceded that, because of the lapse of time, his ability to recall the details or the circumstances under which the two statements were taken was limited. He testified that he does not have an independent recollection of the taking of the two statements. However, in his line of duty, it is his practice, when taking a statement from a witness, to get the deponent to read the statement or if he or she cannot read, the witness reads the statement to him or her. If the deponent is satisfied with the contents, he then administers the oath. The complainant testified that Constable Vapi read over the statement to him before he appended his signature thereto. Whereas the statements by Inspector Theunis were not read over to him nor was he given an opportunity to read them himself. It is highly improbable that the complainant can, after seven years, categorically remember that the statements were either not read over to him or that he was not afforded an opportunity to read the statements himself.

15. The complainant explained the omissions and contradictions in the police

statements in his evidence under cross-examination, as follows:

> "Mr Maartens: …Why not in one of these (three) statements is the word about the insulting language which is deeply insulting not mentioned? --- I can look at the statements your Worship, they wrote what I did not say.

Court: Just hold on, I just want to reflect on what you said now, you're saying in the statements they wrote things that you did not say? --- They wrote what I did not say.

> *Things that you said they didn't write? --- It's not clear. Are you saying things that you said they didn't write and things that you didn't say they wrote? --- Yes."*

16. The complainant tarnishes, with the same brush, all the police officers who took statements from him. It is highly improbable that all the police officers who were involved in the investigation of this matter, would have made themselves guilty of the conduct alleged by complainant. The complainant's signature is reflected on all the statements. It appears that he is a literate person and occupies a responsible position at his work. It is unlikely that the complainant would have appended his signature to the statements without satisfying himself that the contents were correct. These omissions and contradictions were not evaluated by the trial court in its judgment. The court merely concluded that the complainant gave a good explanation for the various statements. This does not appear to be the case if we examine his evidence critically.

17. From the record it appears that the evidence of the appellants was equally unsatisfactory and contradictory. This is confirmed by the trial court's findings.

There are a number of contradictions: firstly, between their evidence in chief and their evidence under cross-examination and secondly, between the evidence of the first appellant and that of the second appellant. They contradicted themselves as to how the collision between the stationery Hi-Ace and complainant's vehicle occurred and in which direction complainant was driving immediately before the alleged collision. Complainant denied that there was a collision. There is no evidence that the collision was reported to the police station either by the appellants, the driver of the Hi-Ace taxi or the complainant. Another version was put to the complainant by appellants' counsel, namely, that the appellants were driving behind the complainant when they saw the collision and witnessed complainant driving away from the scene of the collision. The version of the appellants as to how the collision occurred and in which direction the complainant was driving is not only contradictory but also highly improbable. It is highly unlikely that a collision occurred as alleged by appellants. It is more probable that no collision took place as alleged by the complainant.

18. The dictum of **Brand AJA** (as he then was) in **S v Shackell** 2001 (2) SACR 185 (SCA) at para 30 sets out in clear and concise terms the approach to be adopted in evaluating the sort of evidence found in the present case under consideration. It reads as follows:

> "It is a trite principle that in criminal *proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the*

observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. On my reading of the judgment of the Court a quo its reasoning lacks the final and crucial step."

19. In evaluating the evidence the court must evaluate all the evidence irrespective of the nature and quality of the evidence. **Nugent J** (as he then was) observed in **S v Van der Meyden** (*supra*) at 450b as follows:

"What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; *but none of it may simply be ignored."*

20. In this matter we are faced with two conflicting versions. There are no objective

facts to support either version. The medical evidence is neutral and is consistent with either version. However, what impacts on the credibility of complainant is the denial by him that he had consumed liquor that day. The medical report indicates that complainant had *"alcohol on his breath"*. This negates his evidence that he had not consumed any liquor. Both versions are tainted with unsatisfactory features. The complainant is a single witness and in the light of all the omissions and contradictions, I do not agree with the findings of the trial court that the evidence of the complainant was satisfactory in every material respect. The version of the appellants, although highly suspect, cannot, on the totality of the evidence and the probabilities, be said to be not reasonable possibly true or false beyond reasonable doubt. In our view the State has failed to cross the threshold of proof beyond reasonable doubt. The trial court, in our opinion, convicted the accused on a balance of probabilities. In the circumstances, the appellants ought to have been given the benefit of the doubt. (**S v Jaffer** 1988 (2) SA 84 (C); **S v Heslop** *(supra)*.)

Statutory Justification

21. Counsel suggested that we consider whether or not first defendant forfeited the protection afforded him in terms of Section 49 (1) of the Act on his own version. I do not agree. It is common cause that complainant sustained certain injuries as a result of dog bites. The medical report described the injuries as *"multiple dog bites on both hands, both legs, between eyes".* There are two conflicting versions under what circumstances these injuries were sustained. Because of the conflicting versions and the quality of the evidence as whole, we cannot

make a finding which version is beyond reasonable doubt true and which version is beyond reasonable doubt false. In my view the State has not passed the threshold of proof beyond reasonable doubt in respect of the assault with intent to do grievous bodily harm to put first appellant to his defence in terms of Section 49(1) of the Act. The evidential burden to show, on a balance of probabilities, that those factors which excuse him in terms of Section 49(1)(b) of the Act were present, therefore, does not arise.

22. I am supported in this conclusion by the dictum of Du Toit *et al* in **Commentary on Criminal Procedure** at page 5.25 to the effect that where a police official is charged with assault with intent to do grievous bodily harm on the ground that more force than was necessary was used to prevent a suspect from escaping, it is the duty of the State to prove beyond reasonable doubt that he committed the offence. Once the State has discharged such onus, the accused will have to prove on a balance of probability that he complied with the requirements of Section 49(1)(b) of the Act before his conduct may be statutorily justified. (See also: Hiemstra: **Suid Afrikaanse Strafreg** by Kriegler (Sixth Edition) at page 110.)

Findings

23. I am of the view that the trial court in coming to its conclusion to convict the appellants, firstly, failed to account for all the evidence (**S v Van der Meyden** (*supra*) at 450b); secondly, the court convicted the appellants on a balance of probabilities instead of proof beyond reasonable doubt (**S v Shackell** 2001 (2)

SACR 185 (SCA) at para 30); thirdly, that the finding of the court that the evidence of the complainant, as a single witness, was satisfactory in every material respect is not borne out by the record (**S v Gentle** (*supra*) at para 17); fourthly, that the court failed to warn itself that the evidence of complainant, as a single witness, must be approached with caution (**S v Stevens** [2005] 1 All SA 1 (SCA) at p 5) and fifthly, that the court had only considered the merits of the complainants evidence and failed to consider the demerits of such evidence.

Order

24. For the reasons given, I am of the view that the appeal should succeed and the conviction and sentence of each of the appellants should accordingly be set aside.

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LE GRANGE, J: I agree.

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