CASE NO: CA286/90

DATE: 12 SEPTEMBER 1990

IN THE SUPREME COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION)

GRAHAMSTOWN

AUBREY MGEBHUZA

versus

MINISTER OF LAW & ORDER

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JUDGMENT:

COOPER, J:

The appellant was the unsuccessful plaintiff in an action in the Magistrate's Court in which he sued the respondent in his official capacity for R8 000 damages for an assault upon him by a special constable. At the conclusion of the trial, the magistrate granted absolution from the instance. (20

The appellant alleged that at approximately midday on the Saturday 28 January 1989 at Hill Street Grahamstown, in the vicinity of His Majesty's cinema he was assaulted by special constable Siphiwo Ngcangca (also known as Nase) in the employ of the South African Police. As a result of the asssault the appellant suffered a fracture of the right side of the mandible with accompanying dislocation and claimed damages in an amount of R8 000. The respondent denied that special constable Nase had assaulted the appellant and put him to the proof of his injuries and damage. (30

According/...

According to the appellant, on Saturday 28 January 1989, he and a friend, Mzwake Lukwe were walking in the vicinity of His Majesty's cinema Grahamstown, when he saw Nase, who accused him of being drunk. Nase grabbed the appellant by the belt and pulled him until he fell to the ground. Nase kicked the appellant's jaw twice. Appellant stood up and Nase took him to the New Street Police Station. This occurred at between noon and 1 p.m. At the charge office Nase said he had arrested appellant because he was drunk. The appellant's belt was taken from (10 him and he was lodged in the cell by Nase and another white policeman. Later that day appellant was taken from the cells to the charge office. There he was asked by a white policeman whether he had any money which he didn't. Appellant was given back his belt and told to go home. On the Monday, that is, 30 January, appellant went to the hospital. X-rays were taken. Thereafter he returned to the hospital and was seen by a medical doctor who examined the X-rays, prescribed certain tablets and referred the appellant to a dentist who wired his jaw. After the (20 assault he was again arrested in the coloured area by white policemen who wore civilian clothes. He could not recall the date . In answer to the question whether he had threatened to sue special constable Nase, the appellant replied that he had threatened to do so on the day, that is the Saturday 28 January 1989 when special constable Nase had injured and arrested him. Appellant denied that special constable Nase had arrested him in Bathurst Street in February.

Mr Lukwe, confirmed the appellant's version in its (30 essentials of how he was assaulted by Nase on a Saturday

in January. Dr Richard Ogonowski, a qualified dentist employed at Settlers Day Hospital, Dental Clinic examined the appellant on 31 January 1989. His examination confirmed the X-ray photographs that appellant had a fractured jaw on the right side of his head. The appellant's lower jaw was wired and he was given an antibiotic injection. The wires were removed in 5 weeks, the prescribed time, but treatment took longer because of secondary infection. The doctor was not prepared to comment on the manner in which the appellant said he was assaulted. (10

Special Constable Nase testified that he knew the appellant very well. He denied that he had assaulted the appellant. He said that, on Saturday 28 January 1989, he was not on duty and had not been in the town on that day. Special Constable Nase claimed that on a Saturday in February 1989, he arrested the appellant at between 1.00 and 1.15 p.m. in Bathurst Street, Grahamstown on a charge of of drunkeness. At the charge office, he handed over the appellant to a Constable Muller. The appellant said he could not be placed in the cells because he was receiving (20 medical treatment. At the same time, the appellant threatened to have Constable Nase arrested. Nase was emphatic that appellant did not threaten to sue and he did not get the impression that appellant intended to sue him.

Sergeant Frederick Daniel Els, who described himself as the Station Commander's clerk was the only other witness called by the respondent. Sergeant Els handed in the occurrence book and the cell register of the New Street Police Station. He explained the procedure to be followed by the responsible officials at a charge office when an (30 arrested person is brought in and lodged in the cells. He

could find no entry in these official books that the appellant had been arrested and detained on 28 January 1989. He could also not find any entry that the appellant had been arrested and detained on a`Saturday in February. However, an entry in the occurrence book of the charge office with which we are concerned, has an entry that at 18.30 on Monday 27 February 1989, Constable Muller arrested Andre Abdul, Hambisa Nelusa, Thomas September and Aubrey Mgebhuza,and the appellant for drunkeness. They were in "free of injuries" and had no complaints. Sergeant Els (10 reluctantly conceded - "want mens is mens"- the possibility that an arrsted person could be detained in the police cells without an entry of his detention being made in the relevant official registers.

The Trial Court was thus confronted with two conflicting versions. And in deciding whether the appellant had discharged the onus of proving that Nase had assaulted him, the magistrate adopted the approach adopted by EKSTEEN AJP (as he then was) in NATIONAL EMPLOYERS GENERAL INSURANCE COMPANY LTD v JAGERS 1984(4) (20 SA 437 (E) at 440 D - G.

As the magistrate did, I will deal with Nase's evidence first. The magistrate found that Nase was not an impressive witness. He was hesitant and evasive. This is borne out by the transcript of the evidence. Nase's habit of replying to a question with a counter question, when there was no justification to do so, is a familiar tactic adopted by a mendacious witness. Nase's denial that the appellant threatened to sue him (which is in conflict with what was put to appellant in cross-examination) and his (30 contradictory evidence on whether he accompanied appellant

to/...

to the cell create serious doubts about his veracity. His inconsistency on these two material issues, justifies the inference that he could not remember the version that he had given to his legal advisor and that the only reasonable explanation for this loss of memory was that his version of what occurred was concocted as is apparent from his allegation that he arrested the appellant in February. It was implicit in appellant's cross-examination that his arrest by Nase was effected on 27 February 1989. The entry in the occurrence book contradicts Nase's allegation (10 of arresting appellant in Bathurst Street on 27 February in every material respect. There is no adequate basis in the evidence, as counsel for the respondent conceded, for the magistrate's finding that respondent arrested appellant for drunkeness on 25 February. The only reasonable inference to be drawn from Nase's failure to remember the date that he arrested appellant,and his complete inability to explain the conflict between his evidence and the entry of 27 February in the occurrence book is that Nase's version is a concoction. At the same (20 time, the occurrence book entry concerned, verifies appellant's evidence of how he came to be arrested on 27 February, by white policemen driving a combi in the coloured area and not by Nase,and must therefore be accepted as being true.

Whereas Nase did not impress him the magistrate had no serious criticism of the manner in which appellant and Lukwe gave their evidence. He referred to their uncertainty of the date in January on which the appellant was assaulted, without making reference to Dr Ogolowski's evi- (30 dence that the fracture was relatively fresh when he

examined/....

examined him on 31 January 1989. As both the appellant and Lukwe insisted that the appellant had been assaulted on a Saturday and it is clear from the appellant's evidence that it was the Saturday immediately preceding his visit to the hospital, the inference is obvious that it was Saturday 28 January. Their uncertainty about the date therefore, does not detract from the evidence of appellant and Lukwe as the Magistrate seems to suggest.

In response to an argument advanced by Mr Weakley who appeared for the respondent that appellant and Lukwe (10 conspired to give false testimony against Nase, the magistrate stated:

> "Daar het 'n vraagteken by die Hof ontstaan in verband met die aanvaarbaarheid van die eiser en sy getuie, (mnr Lukwe) se getuienis aangesien hulle weergawes in alle insidente en in alle opsigte met mekaar gestrook het, as jy óf in ag neem dat daar reeds 'n geruime tyd verloop het tussen die datum van gebeure en die hofsaak." (20

In my view, the magistrate erred in finding that their versions and the inference were consistent in all respects. Counsel for respondent has pointed out various aspects in which the details of their versions differed and it is unnecessary to refer to them except for one, namely appellant's denial that he was drunk when he was arrested. Lukwe testified that appellant gave the appearance of a person who, "slept late while he was drunk" and could see that he was suffering from "babalaas". This conflict between appellant and Lukwe is (30 inconsistent with a conspiracy between them to fabricate a

false charge of assault against Nase.

While on the one hand the magistrate relied on the so-called inconsistency which he found in their versions, as pointing to a conspiracy between appellant and Lukwe, at the same time he found that Lukwe was biased in favour of the appellant, where his evidence differed from the appellant's version, when he conceded that the appellant might have been speaking the truth. In my view, the magistrate's two lines of reasoning are mutually incompatible and precluded him from making a balanced (10 assessment of the evidence given my appellant and Lukwe.

Mr Lang, who appeared on behalf of the respondent subjected the evidence of the appellant and Lukwe to a critical scrutiny and submitted that, differences in their respective versions were so material as to give rise to doubt the reliability of both witnesses. In my view, the blemishes in their evidence and the inconsistencies between their versions are not of such a nature as to create grounds for doubting their reliability as witnesses. On the contrary, the inconsistencies point to (20 the independence of their separate recollections of the incident in question and tend to strengthen the reliability of their evidence.

The magistrate held that the appellant's denial that he was not drunk when Nase arrested him made his version highly improbable. The magistrate asked the retorical question,

> "Hoekom sal Siphiwe Nase hom arresteer vir dronkenskap terwyl hy nie dronk is nie en daar nog nooit probleme tussen hulle was nie.?" (30

Both the appellant and Lukwe testified that appellant had

been drinking the night before and according to Lukwe, as mentioned above, appellant gave the appearance of one who "slept late while he was drunk" and was suffering from "babelaas" on the Saturday. In my view, it is not improbable that appellant, suffering from a hangover, attracted Nase's attention. Although it is common cause that Nase arrested the appellant for drunkeness and claimed that prior to his arrest, he was staggering, I am by no means satisfied that Nase's word can be accepted that appellant was in fact drunk when he was arrested. Appellant was (10 capable of walking unassisted (Nase said he held his hand) to the police station. This is inconsistent with Nase's initial observation that appellant was staggering drunk at the time of his arrest but,even if it be accepted that appellant was untruthful about his state of sobriety, in itself, this would not in my view justify the rejection of the appellant's evidence. In view of appellant's allegation that he was not drunk, but nevertheless was held in detention the magistrate found it very strange that the respondent was not sued for wrongful arrest and detention. (20 The reason why appellant's legal advisor advised him not to sue the respondent for wrongful arrest and detention are not readily apparent and in my view the magistrate misdirected himself in drawing an adverse inference from the appellant's failure to sue the respondent for wrongful arrest and detention. The magistrate also held that it was highly improbable that a policeman in uniform would in the presence of the public commit a serious assault as alleged by the appellant. Mr Lang, for the appellant who stressed this improbability describing it as being of (30 "formidible weight", argued that the appellant's version

is even more improbable in view of the fact that Nase's police pocket book showed that he was off duty on 28 January 1989.

In my view, this consideration should not be considered in abstract. The great majority of members of the South African Police Force, in general behave responsibly. I accept that. At the same time, there have been occasions when members of the Police Force have behaved reprehensibly and exceeded their powers. The age, education, background, mental make-up, calibre, the rank of the individual and his experience are some of the factors that have an important bearing upon the probabilities. At the time of this occurrence Nase was 20 years of age. He had left school in 1984 with a standard 4 education. Between 1984 and October 1988, he, "just stayed at home." During that period he only did casual work. He joined the South African Police on 28 October 1988 and underwent 2½ months training to become a special constable. The alleged assault thus occurred very shortly after he had completed his training. The magistrate failed to have regard to these important facts and, in the circumstances, I am of the view misdirected himself in regarding appellant's version as highly improbable.

The concluding reason advanced by the magistrate for finding that the appellant had failed to discharge the onus resting on him was that because the appellant's name does not appear in the occurrence book and cell register on 28 January 1989, whereas his name appeared in them when he was arrested on 27 February 1989 it was highly improbable that he was arrested on 28 January 1989, by Nase for drunkeness and detained in the police cells. In following

this line of reasoning the magistrate appears to have forgotten his earlier finding that on 25 February 1989 Nase arrested and detained the appellant although the appellant's name does not appear in the occurrence book and cell register on 25 February 1989. This inconsistent line of reasoning amounted to a serious misdirection in the magistrate's approach to the appellant's evidence and appears to have been a decisive consideration in his final and concluding finding against the appellant. Furthermore the magistrate failed to weigh the two contradicting versions, namely appellant's on the one hand and Nase's on the other hand and to appreciate the evidential implications of Nase's false evidence. It is common cause that appellant was only arrested once by Nase and it is common cause that shortly before 31 January 1989 appellant sustained a fractured jaw. Respondent was unable to offer any explanation of how the appellant could have sustained his injury save to suggest to him that somebody else had broken his jaw. The probabilities are that the appellant sustained the injury on 28 January 1989. The appellant's version is verified by Lukwe. The magistrate had no serious criticism of the manner in which appellant and Lukwe gave their evidence. Nase did not impress the magistrate and his version that he arrested appellant in February is false. As Nase only arressted appellant once, the conclusion is unavoidable that Nase arrested and assaulted the appellant on 28 January 1989. Accordingly the magistrate should have held that the appellant had proved on a balance of probabilities that his version was true and Nase's version was false.

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The appeal must therefore succeed. Respondent has

conceded that should this appeal succeed appellant should be awarded damages in the sum of R7 000. The order of the court is as follows:

1. The appeal is allowed with costs.
2. The magistrate's judgment is altered to read, "Judgment for the plaintiff in the sum of R7 000 with costs."

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W.E. COOPER

JUDGE OF THE SUPREME COURT

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ZIETSMAN,J:

I agree, it is ordered accordingly.

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N.W. ZIETSMAN

JUDGE OF THE SUPREME COURT

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