

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN**

Case no. CA 222/2017

Date heard: 16/11/15

Date delivered: 20/11/18

Not reportable

In the matter between:

ASONGE DYONASHE

Appellant

and

MINISTER OF SAFETY AND SECURITY

Respondent

JUDGMENT

Plasket J

[1] The appellant instituted a claim for damages against the respondent arising from an incident which occurred on 21 October 2015 when she was shot with a rubber bullet by a member of the South African Police Service (SAPS) acting within the course and scope of his employment. In the trial, the magistrate in the court below found that the appellant had indeed been shot by a policeman but that the shooting ‘was in the circumstances not unlawful’. He accordingly dismissed the appellant’s claim with costs. She appeals against that order. The respondent abides the decision of this court.

[2] On 21 October 2015, xenophobic violence broke out in the townships of Grahamstown, as the city was then known. Mobs looted shops owned by foreigners and carried off their goods. The police attempted as best they could to protect the victims of these mobs and at times fired stun grenades and rubber bullets in order to

disperse the mobs. From the evidence of Sergeant Rudy Groats and Sergeant Gareth Prince, the SAPS was hard-pressed to contain the violence given that it was so widespread.

[3] The appellant testified that when she and some friends were walking home after school, they saw people running out of a shop that was owned by a foreigner. They were carrying off looted property. The police were on hand and, as the mob ran away from the police, so did she and her friends. She was the slowest person among this group and so had been left on her own. At some point she stopped and turned around. She saw a policeman aim his firearm at her and fire. She was struck on her right knee.

[4] This is confirmed by what is recorded on the J88 form completed at Settlers Hospital, where she was later treated. It describes her wounds as follows:

‘(1) Right knee medial aspect with a 2x2cm ragged edged wound with bullets in situ
Removed under local.

(2) Abrasion anterior right knee.’

[5] The J88 also recorded that the appellant was ‘in pain and emotionally labile’ and the conclusion drawn from the examination was ‘gun shot wound right knee’.

[6] The evidence of the appellant was not placed in dispute by evidence adduced on behalf of the respondent. Sergeant Rudy Groats and Sergeant Gareth Prince had no knowledge of what had happened to her or how she had been shot. They testified in general terms about how the police had gone about their crowd control operations that day.

[7] The magistrate appears to have formed a poor impression of the appellant as a witness. In my view much of his criticism of her is not justified. For instance, he found that her evidence that she was shot at about 14h15 was improbable because the J88 records that she was treated at 18h20. This is speculative and the appellant was not asked about the issue.

[8] The magistrate criticised the appellant for saying that the first she knew of the violence was when she saw looters emerging from a shop. He was of the view that she must have heard gunfire and the detonation of stun grenades while she was at school. Apart from the fact that this seems to me to be a peripheral issue, I cannot see why he found fault with her evidence that as she was walking home after school, she saw that ‘there were a lot of people up and down’ and as she and her

companions approached a certain shop 'we also noticed people running, coming out of the shop'. I can see nothing improbable in this evidence.

[9] The magistrate held it against the appellant that she was, in his view, reluctant to concede that school children were also involved in the looting, as the police witnesses were to testify. Her evidence, however, was that she saw adults who were looting but of the involvement of children she said:

'I won't dispute that because at that time the schools were coming out or were knocking off from the school at that time.'

[10] The magistrate appeared to accept that because Sergeants Groats and Prince testified that they and those with them acted reasonably at all times on the day in question, that all policemen on duty in the township also did, including the policeman who shot the appellant. That does not necessarily follow, is speculative and is at odds with the appellant's direct and uncontradicted evidence. Indeed, when it was put to her that the police had, in effect, acted reasonably when dispersing looters, she said:

'At the time he shot me I was looking at him. How could he disperse those people because I was looking at him and I was standing?'

[11] She also said that at the place where she was shot 'the people already ran away' and so the policeman who shot her could not have been trying to disperse the mob.

[12] The factual findings of trial courts are presumed on appeal to be correct and will only be interfered with if they are the product of misdirection. In *Santam Bpk v Biddulph*¹ Zulman JA held:

'Whilst a Court of appeal is generally reluctant to disturb findings which depend on credibility it is trite that it will do so where such findings are plainly wrong (*R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 706). This is especially so where the reasons given for the finding are seriously flawed. Overemphasis of the advantages which a trial Court enjoys is to be avoided, lest an appellant's right of appeal "becomes illusory" (*Protea Assurance Co Ltd v Casey* 1970 (2) SA 643 (A) at 648D-E and *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 (1) SA 621 (A) at 623H-624A). It is equally true that findings of credibility cannot be judged in isolation, but require to be considered in the light of proven facts and the probabilities of the matter under consideration.'

¹ *Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA) para 5.

[13] In my view, the magistrate misdirected himself in rejecting the evidence of the appellant as to how she was shot. He drew unwarranted adverse findings against her credibility, relied on speculation and unjustifiably took the general evidence of the police witnesses as to the events in the township into account to find that the shooting of the appellant was justified. There was simply no evidence that the shooting of the appellant was justified because neither of the witnesses called by the respondent knew anything about it. In arriving at his conclusion, the magistrate ignored the appellant's direct, uncontradicted evidence. It can be inferred from that evidence that the policeman who shot the appellant acted unlawfully and either intentionally or negligently.

[14] In the result, the appeal must succeed. That, however, is not the end of the matter. Because the claim was dismissed, the magistrate did not quantify the appellant's damages. That still has to be done. We declined the invitation of Ms Stretch, who appeared for the appellant's (and whose very helpful heads of argument made our decision on the merits a great deal easier), to decide on quantum ourselves. We shall instead remit that part of the case to the trial court.

[15] I make the following order.

- (a) The appeal is upheld with costs.
- (b) The order of the court below is set aside and replaced with the following order:
 - '(i) It is declared that the defendant is liable to the plaintiff for the damages that she may prove, or which are agreed, arising from the incident that occurred on 21 October 2015 when the plaintiff was shot with a rubber bullet by a member of the South African Police Service acting within the course and scope of his employment.
 - (ii) The defendant is directed to pay the plaintiff's costs.'
- (c) The matter is remitted to the trial court for the quantum of the plaintiff's damages to be determined.

C Plasket

Judge of the High Court

I agree.

V Nqumse

Acting Judge of the High Court

APPEARANCES

For the appellant:

S Stretch

Instructed by:

N N Dullabh & Co, Grahamstown

For the respondent:

No appearance