Republic of South Africa

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 : 30 MAY 2008

MOOSA, J:

Introduction

1. The appellants (hereinafter, for the sake of convenience, referred to as accused 1 and 2), were convicted, in the district court of Khayelitsha, on a charge of assault with the intent to do grievous bodily harm and sentenced, on 18 September 2007, 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, both in respect of the conviction and sentence.

2. The allegations against the appellants were that, during the evening of 16 July 1999, they mounted an attack on the complainant with the assistance of police dogs under their respective control. At the time they were performing patrol duty in the Khayelitsha area as members of the South African police dog unit. The appellants denied the allegation of assault.

3. Accused 1 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 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. Accused 2 gave a plea explanation to the effect that he was present when accused 1 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 Detective Theunis who took statements from the complainant as a witness in their defence. The court a quo found the complainant an honest and truthful witness and was satisfied that, as a single witness, his evidence was satisfactory in all material respects. The court accordingly accepted his evidence. The court rejected the evidence of the appellants as a fabrication and as not reasonably possibly true. The court accordingly found that the State had proved the offence against the appellants beyond reasonable doubt and found them both guilty as charged.

Grounds of appeal

5. The main thrust of appellants' grounds of appeal was based firstly, on the fact that the trial court erred in accepting the explanation of the complainant concerning the alleged contradictions and omissions contained in the various statements made to the police by the complainant in respect of the incident giving rise to the charge; secondly, the fact that he was a single witness and the court failed to approach his

evidence with the necessary caution and thirdly, the court erred in making a favourable credibility finding in respect of the complainant and an adverse credibility finding in respect of the appellants.

The facts

6. It is common cause that on the evening of 16 July 1999, the complainant was driving his motor vehicle in Lansdowne Road, Khayelitsha; at the same time, the appellants, as members of the police dog unit, were doing patrol duty in a marked police vehicle in the same area; the complainant sustained certain injuries consistent with dog bites; he was taken to the Khayelitsha day hospital and after receiving treatment, he was detained at the Khayelitsha police station; he was released the following day without being charged and he thereafter laid a charge of assault.

Conflicting versions

7. 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 accused1; accused 1 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"*; accused 1 pulled him out of the car and said: *"Dis die kaffer wat baie praat"*; accused 2 handed one dog to accused 1; accused 1 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 and was pulled off the road by the two police officers.

8. 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, he suddenly speeded off, went

through a few stop signs and almost collided with other cars. They gave chase, noticed that the complainant slowed down, jumped out of the car, crossed Lansdowne Road and ran towards the bushes on the side of the road. Accused 1 ran after the suspect with his dog on a leash and after warning the suspect, let the dog loose and gave it instructions to catch the suspect. The dog bit and caught the suspect. Accused 2 remained at the car and his dog was never used to bite or secure the arrest of the complainant.

The legal principles

9. In evaluating the evidence there are three legal principles of significance applicable in this matter. The first is that the complainant is 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 and Others** 1971 (3) SA 754 (A) at 758G; **S v Sauls and Others** 1981 (3) SA172 (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. The second is that a court of appeal will not easily interfere with the factual and credibility findings of the trial court unless the court has materially misdirected itself in respect thereof. The trial court hears and sees the witnesses in the witness box and observes their demeanour. The trial court is therefore in a much more favourable position than the court of appeal to make factual and credibility findings. (**R v Dhlumayo & Another** 1948 (2) SA 677 (A) at 705 and **S v Robinson & Others** 1968 (1) SA 666 (A) at 675).

11. The third is that where there are two conflicting versions, or two mutually destructive stories, both cannot be true. Logic dictates that only one can be true.

Consequently the other must be false. 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. In this regard see **S v Saban & 'n Ander** 1992 (1) SACR 199 (A) at 203j to 204a-b; **S v van der Meyden** 1999 (1) SACR 447 at 449g-j – 450a-b and **S v Trainor** 2003 (1) SACR 35 (SCA) at para [9].

Evaluation

12. The trial court found that despite lengthy and extensive cross-examination, the complainant stuck to his version. He did not deviate from his evidence in chief or contradict himself. He gave a reasonable explanation for the various statements made by him to the police. The court did not get the impression that he was fabricating a story against the appellants. The trial court found the complainant to be an honest and truthful witness. The court concluded that the complainant's evidence was satisfactory in all material respects.

13. The appellants' attack on the credibility of complainant was essentially centred on the fact that he made four statements to the police. The purpose of making statements to the police is essentially to facilitate prosecution of a complaint and is not meant to serve as a substitute for the evidence in court. A perusal and examination of the first three statements clearly reflect shortcomings in language and content thereof and as such lacked the element of professionalism. The trial court remarked that the first statement was cryptic and the subsequent two statements were inadequate. A perusal of those statements justifies such findings.

14. In **S v Mlumbi and Another** 1991(1) SACR 235 (A), **Steyn JA** at 248B said the following:

> *"Polisieverklarings is dikwels onvolledig, soms selfs ten aansien van belangrike feite. Die omststandighede waaronder en die besondere persoon aan wie so 'n verklaring gemaak was, is dikwels vir die onvolledigheid van sulke verklarings verantwoordelik."*

15. The final statement was a detailed statement and was consistent with complainant's evidence in court. The shortcomings of the impugned statements are, in my view, attributable to the statement takers and cannot be laid at the door of the complainant. I am satisfied that the complainant gave a reasonable and acceptable explanation for making the various statements and, in my view, the making of multiple statements did not adversely impact on his credibility, but in fact reflected badly on the quality of the police investigation.

16. The trial court remarked that just as it very closely observed the complainant throughout the proceedings, so it had also observed the two accused very closely, during the evidence in chief as well as during the cross-examination. It observed that both of the accused appeared to be very uncomfortable in the witness box and was not impressed with the version of the two accused. It found that there were too many contradictions in their version and concluded that their version was a fabrication. I cannot fault such conclusion.

17. After making certain factual and credibility 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 true and the appellants' version was false. A close scrutiny of the evidence of the appellants leads one to the inevitable conclusion that the appellants rehearsed their testimony; there appears to be a remarkable correlation of their evidence even insofar the details and contradictions are concerned.

The probabilities

18. The inherent probabilities favour the complainant's version that there was no collision as alleged by appellants; that complainant drove recklessly is a fabrication; that the appellants had set their dogs on the complainant as described by him and not as alleged by the appellants; that accused 1 had uttered those expletives which had racial overtones; that complainant was taken by the appellants to Khayelitsha Day Hospital for medical treatment in their car as described by complainant and not in a police van as alleged by appellants; and that the charge of reckless or negligent driving laid by appellants was a trumped up charge. I am satisfied the inherent probabilities are consistent with the version of

the complainant and accordingly provide the necessary guarantee and safeguard for his evidence as a single witness.

19. The version of the appellants is highly improbable and the trial court correctly found, in my view, that it was a fabrication. On their own version they had no opportunity to warn the driver to report the minor accident to the police station, as it appears that from their version that it was a matter of "hit and run". There is no evidence that such a charge was laid. There is no evidence of any damage either to the stationary vehicle or complainant's vehicle. If there was any damage to complainant's vehicle, they would have noticed such damage as it is common cause that accused 1 drove the vehicle to the police station. The alleged charge of reckless driving arose not from the alleged collision with the stationary vehicle, but emanated from the allegation that complainant drove away after the hit and run accident, was chased by the accused' and drove through stop signs and almost collided with other vehicles. Objectively speaking, there was no reason for complainant to practically jump out of a moving car and try to run away. He would not only have endangered his life jumping from a moving car, but he could also

have risked his life by being fired on by the police.

20. The question to be asked is: What triggered the unlawful conduct which led to the charge in question? The most probable cause, in my view, is a statement complainant apparently made to accused 1, when complainant stopped at the stationary taxi where he saw the two police officers searching the passengers. These remarks appear to have offended accused 1. Because, soon after complainant got into his vehicle and drove off, he was followed by the appellants. They forced him off the road. Accused 1 pulled him out of the car and they set the dogs on complainant. I am strengthened in this conclusion by the remarks of accused 1: *"Dis die kaffir wat baie praat"*. This is a clear indication that the complainant must have said something to accused 1.

Absence of misdirection on conviction

21. On a close scrutiny of the record, I cannot find any misdirection on the part of the trial court in arriving at the factual and credibility findings. As there is a presumption that the factual and credibility findings of the trial court are correct in

the absence of material misdirection, I see no valid reason for us to interfere with such findings. On the conspectus of the totality of the evidence, I am satisfied that the version of the appellants, as found by the trial court, is not reasonably possibly true and the State has proved the guilt of the accused beyond reasonable doubt. I would therefore confirm the conviction.

Sentence

22. I now turn to deal with the question of sentence. The accused' were sentenced to 24 months imprisonment in terms of Section 276(1)(i). It is a trite principle of our law and our courts have repeatedly emphasized that sentence is a matter that falls pre-eminently within the discretion of the trial court. The court of appeal will only interfere with such discretion if the trial court failed to exercise its discretion judiciously. In **S v Petkar** 1988 (3) SA 571 (A) at 574C, **Smallberger, JA,** formulated the position as follows:

> "*This Court's powers to interfere with sentence on appeal are circumscribed. It may only do so if the sentence is vitiated by (1) irregularity, (2) misdirection, or (3) is one to which no reasonable*

court could have come, in other words, one where there is a striking disparity between the sentence imposed and that which this court considers appropriate."

23. On a close scrutiny of the record, it appears that the court a quo gave serious consideration to a non-custodial correctional supervision in terms of Section 276(1)(h) of the Act. The court called the complainant to testify in connection with sentence. He was adamant that he wanted the accused' to go to prison. He was not interested in being compensated. It appears that he was trying to exact revenge. The following excerpt from the record is incisive:

*"Mr **Maartens**: 'No, I am saying that you are hell bent to see these gentlemen in prison, that you will say anything to make sure they go to jail.'*

Complainant: 'Yes, the reason why I am saying, I am talking like this bitten of the dogs your Worship (inaudible) very painful your worship'."

24. The court also gave serious consideration to making an order for compensation but, because of the attitude of complainant, the court said: *"So I am not going to even consider the question of compensation for the complainant".* The court went on further to say:

> *"Mr* ***Maartens*** *made out a strong case or argued extensively for the imposition of correctional supervision as a form of sentence. I agree with the submissions made by your Advocate in this regard, then on the other hand there are also cases where it was decided that correctional supervision would not be an appropriate form of punishment, form of sentence rather."*

25. After analyzing a number of cases, the court concluded that the attack on the complainant was unprovoked and that the interest of the community would be served if the appellants are sent to prison for a short period. In my view the court misdirected itself by such findings. I have found that the attack was triggered, most probably, by a remark made by the complainant when he stopped at the stationary taxi and in the circumstances the attack was not unprovoked as the trial

court found.

26. I do not agree that the interest of the community is served by short term imprisonment of the appellants. They are gainfully employed and the likelihood is that they will lose their employment if they are imprisoned. Their family life will be disrupted. The appellants will not be able to fulfil their social, economic and parental responsibilities towards their families. The education of the children may be jeopardized. They may then become a charge and burden on society.

27. **Sachs J,** in a very recent Constitutional Court judgment namely, **S v M** 2008 (3) 232 (CC) at 264A-C, in extolling the virtues of non-custodial correctional supervision quoted with approval the *dictum* of **Conradie J**, (as he then was) in the unreported judgment of **The State v Harding**, Case No SS 61/92, September 1992 (C), a portion of which I replicate in this judgment:

> *"...A probationer does not have his freedom – far from it – but he is not cut off from the community altogether. His support systems are not destroyed and in this way his rehabilitation prospects are*

enhanced. Moreover there is the benefit that society does not lose the skills of someone who is able to maintain himself and his dependants as well as the family unit. Community service, which goes hand in hand with correctional supervision, is beneficial."

28. A further misdirection, in my view, is that the trial court was unduly influenced by the views of the complainant whose primary objective was to exact revenge. It is not the function of the court to exact revenge. The sentence must fit the crime, the criminal, be fair to society and be blended with a measure of mercy. In view of the misdirections to which I referred, this court is entitled to impose an appropriate sentence anew.

29. One cannot detract from the seriousness of the offences, which according to the trial court was racially motivated and had racial undertones. Our society has emerged from a past that was deeply divided on the basis of race and was characterized by institutional racism. In our new democratic and constitutional dispensation, there is a duty on every member of the South African society to heal

the divisions of the past and not make him- or herself guilty of inflaming the feelings and sensitivities of those who were victims of the past racial discrimination. It is clear from the objective evidence that the appellants abused their power as members of the South African police force. Instead of protecting John Citizen, they assaulted the complainant by setting their police dogs on the complainant as result of which complainant suffered serious injuries for which he had to receive medical attention. One cannot but agree with the trial court that the conduct of the appellants was reprehensible.

30. The appellants are first offenders, they have families who are dependent on them, they have permanent employment, the case is from 1999, they have surely been subjected to anxiety not knowing what would be the final outcome of the case, they showed some degree of compassion by taking the complainant to hospital, there was some element of provocation on the part of the complainant, they have family support systems in place and both are suitable candidates for correctional supervision.

31. Our courts have repeatedly stressed that non-custodial supervision is not necessarily a light sentence. In **S v Mtsi** 1995 (2) SACR 206 (W), the court held that non-custodial correctional supervision is sufficiently severe to satisfy the deterrent element of punishment. In **S v R** 1993 (1) SA 476 (A) at 488I-J, **Kriegler AJA** (as he then was) said: *"...that a sentence of correctional supervision can be more oppressive to an accused than one of short-term imprisonment".* In **S v Siebert** 1998 (1) SACR 554 (SCA) at 559c-h, the court made the following remarks:

> *"An enlightened and just penal policy requires a broad scope of sentencing options from which the most appropriate option, or combinations of options, can be selected to fit the unique circumstances of the case before the court. It requires a willingness on the part of the trial court actively to explore all available options and choose the sentence best suited to the crime, the criminal , the public interest and also the aims of punishment."*

The court went further to say:

> *"As regards correctional supervision in terms of s 276(1)(h) of the*

Act, a useful guideline is afforded in ***S v R*** *(supra at 221g-i), viz that a clear distinction should be drawn between those offenders who ought to be removed from society by means of imprisonment and those, although deserving of punishment and even severe punishment, should not be so removed."*

32. I do not think that the appellants deserve to be removed from society. What they need is counselling to disabuse their minds of the racist mindset. Such counselling they can receive just as effectively whether they serve a sentence of custodial or non-custodial correctional supervision. I am of the view that the interest of society will best be served by not removing the appellants from the community, but by imposing a suspended term of imprisonment, coupled with a term of non-custodial correctional supervision.

Order

33. In the result, each of the accused is sentenced to 2 (two) years imprisonment which is suspended for 3 (three) years, subject to the following conditions: that he

is not convicted, during the period of suspension, of assault with intent to do grievous bodily harm, or any other offence of which violence is an element and for which he is sentenced to imprisonment without the option of a fine, or without the imprisonment being conditionally suspended; that he undergoes 2 (two) years correctional supervision in terms of Section 276(1)(h) of the Criminal Procedure Act, No 51 of 1977, subject to the following measures:

a) Accused 1: Marius Janse van Rensburg, house arrest at **1 Maul Road, Kraaifontein** and accused 2: Marius Visser, house arrest at **22 Karoobos Street, Brackenfell** for the full duration of the period of correctional supervision or in accordance with such times and place as may be determined by the Commissioner of Correctional Services from time to time. House arrest shall not apply to periods reasonably necessary for employment of the accused, medical treatment, the attendance of counselling and/or rehabilitation programmes and community service in terms of this order, or for the attendance of religious services.

b) Community service for a total period of 16 (sixteen) hours per month. The nature of the community service, the place where and the times during which such services will be performed, will be determined by the Commissioner of Correctional Services, provided that the Commissioner is empowered, if merited, to suspend a maximum of 6 (six) hours per month of the community service on such condition as he deems fit.

c) Submission to any counselling, rehabilitation or treatment programme(s) which may be deemed appropriate by the designated correctional officer, in order to realise the objectives of the sentence of correctional supervision.

d) Submission to monitoring by the Commissioner of Correctional Services in order to realise the objectives and compliance with all the conditions thereof.

It is further ordered that the accused:

(i) Report to the correctional supervision officer at **BELLVILLE COMMUNITY CORRECTIONS** on Monday **9th June 2008**, in order to make the necessary arrangements for the practical implementation of this sentence.

(iii) Notify the Commissioner of Correctional Services forthwith in writing of any change of residential or work address.

(iv) Comply with any reasonable instructions issued by the Commissioner of Correctional Services regarding the administration of and compliance with the sentence.