

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

NIGEL TITUS APPELLANT

and

THE STATE RESPONDENT

CORAM : RABIE, ACJ, JANSEN et KUMLEBEN, JJA

DATE HEARD : 24 MAY 1988

DATE DELIVERED: 24 MAY 1988

J U D G M E N T

KUMLEBEN, JA

On the 21st of October 1985 the appellant was
arrested in Peter Brown Avenue, in the district of

Bellville/.....

Bellville South, on a charge of public violence. In due course he stood trial in the Regional Court and was found guilty as charged. A sentence of 5 years' imprisonment was imposed. He appealed to the Cape of Good Hope Provincial Division against both the conviction and sentence. The appeal was dismissed, as also his application for leave to appeal. Such leave was, however, granted on petition by this court.

The conviction in the Regional Court was based on three grounds. Firstly, the acceptance of the evidence of an eye witness, warrant-officer Scholtz. Secondly, the rejection of the evidence of the appellant as false. And thirdly the acceptance of an extra judicial statement made by the appellant to detective-sergeant

Lampbrecht. In this statement the appellant implicitly admitted that he was on the scene, acknowledged that he had thrown stones but denied that any had found their mark.

I turn to consider briefly each of these three grounds, starting with the evidence of warrant-officer Scholtz. He said that on that particular morning there was rioting in South Bellville and that it was intense and widespread. He arrived near the scene of the rioting at a certain stage in a Combi motor car which he parked at a sports field behind a cement wall. He climbed on top of the Combi and was then in a position to survey the commotion that was taking place. He saw that tyres and large stumps of wood were burning and smouldering

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in the street. These had been placed there to impede the free-flow of traffic and a crowd of about 150 - 200 youths were gathered there. They threw stones at motor vehicles as the cars attempted to avoid these obstructions. When a police vehicle arrived the crowd dispersed, only to re-assemble and resume the stone-throwing when it had continued on its way. At that stage the witness said that he identified the appellant and another person, whom he described as "ring-leaders". Each time the crowd dispersed they would rally them and egg them on. He states that he did not see the appellant himself at any stage actually throwing any stones. After he had observed this for a short while, he climbed from the top of the Combi, went over to the cement wall, and approached the scene.

At/.....

At a distance of about 80 metres he noticed that a large black lorry had been held up by the improvised barriers. He saw the driver being instructed to leave the cabin, which he did and fled, and as he approached and was some 15 - 20 paces from the rear of this large lorry, he noticed that the appellant, who had wedged two large bags of paper under the rear of the lorry near the petrol tank, was striking matches in an attempt to set fire to the lorry. At this stage he fired four shots from a shotgun with which he was armed. I stress again that at this time he was only some 15 paces from the appellant. The effect of the shots was to cause the crowd to disperse. He kept his eye on the appellant, chased him, but lost sight of him momentarily as he went through/.....

through the front door of the block of flats some 50 paces from the lorry. He was nevertheless hard on his heels and followed him into a flat on the second floor of this building, through the front room, into the bedroom where he forcibly extracted the appellant from under the double bed where he was hiding.

The magistrate, after carefully examining the evidence of Scholtz, came to the conclusion that he was both a truthful and a reliable witness. On a reading of the evidence on record, these conclusions seem to be fully justified. There is really no good ground for questioning the honesty of Scholtz. Mr Albertus, who appeared for the appellant, whilst not conceding his credibility, concentrated his argument on the possibility that/.....

that there might have been mistaken identity on the part of this witness. To my mind there is really no scope for an argument that there was bona fide error.

Quite obviously at the distance from which he viewed the

scene at the Combi, which he initially estimated at a

hundred yards and at a later stage said might have been

as far as 200 yards, any identification at that stage

would not necessarily be accurate or reliable. He never-

theless said at that stage he could distinguish the facial

features of the appellant, and on this point he was not

cross-examined. He said he had a firm impression from

the facial features plus the height of the appellant, that

he was the person who took such a prominent role in what

was going on. But the pertinent point is that, from the

stage/.....

stage when he was some 20 paces away watching in broad daylight what the appellant was doing, there can be no doubt that he had ample opportunity to identify the appellant. This is of course confirmed by the fact that he gave chase, followed the appellant into this block of flats and, as I have said, must have been hard on his heels to know precisely where to go in the flat building to find the appellant in a particular flat, in a particular room, and under a particular bed.

Counsel suggested that this evidence was unreliable in a number of respects. To my mind, none of those submissions indicated that there was any reason to doubt the accuracy or the veracity of the testimony of this witness. It was said that he contradicted himself on whether he lost sight of the appellant on one or two occasions./.....

occasions. If his evidence is read in context, it is perfectly clear that when he made his one statement he was referring to that portion of the episode before he approached the lorry, and on the second occasion he was referring to the time after the shots were fired. It was also said with reference to his evidence relating to what happened in the Bellville Police Station, that his evidence, given in a trial-within-a-trial to determine whether the statement ought to be admitted, was in various respects vague and evasive. If one bears in mind that he had intermittent contact with the appellant there, that various people were being interrogated and others were involved with other arrested persons, my understanding of his evidence is that he was uncertain in respects where certainty could/.....

could not be expected, and that he was not being deliberately evasive.

Thus as far as the first ground for conviction is concerned, I consider that there were good reasons for the magistrate accepting the evidence of Scholtz as truthful and accurate. The appellant gave evidence on oath and he told a very different story. In brief his evidence was that on that particular morning he had been seeking employment elsewhere and was walking along Peter Brown Avenue on his return. He admitted that he was at that point where he was subsequently arrested and he says that nothing untoward was taking place. There were some children on each side of the road but he saw no stone throwing. He saw no large lorry on the scene

but/.....

but a small Dyna lorry (or "bakkie" as he called it)

arrived and stopped there. The driver and other occu-

pants of this vehicle alighted and went to one side of

the road. They spoke to the children standing there.

He remained and watched simply out of curiosity. Sudden-

ly he heard shots being fired and this caused him to run

to the flat where he was found by Scholtz. He denied the

presence of this large black lorry, denied that he attempt-

ed to set anything alight or that there were a large

crowd of people in the road at the time, and finally he

denied that he was under the bed when arrested by Scholtz.

He said that he was simply sitting on a bed in that room.

One only has to read his account to appreciate

its gross improbability. Understandably, when

cross-examined/.....

cross-examined on these improbabilities, he was unable to furnish anything that could be regarded as a satisfactory answer. For instance, he was unable to say why he should have run away without first seeing whence the shots were being fired and at whom. He indeed was not able to explain why the shots were fired at all.

On his account of what happened there was no need whatever for any policeman to stop let alone take such drastic action. His statement that he was on the bed, to my mind, was clearly a false answer: one that he had to give, because if he were to acknowledge that he was under the bed, he would have to explain why there was any cause for him to hide.

Mr Albertus, in dealing with the appellant's evidence, was constrained to concede that he had told less/.....

less than the truth but submitted that this ought to be overlooked and that his evidence that he was innocently walking down the street ought to be accepted. To my mind the evidence of the appellant, which falls to be rejected as false, goes to the heart of the whole matter and if it is looked at in relation to the reliable evidence of Scholtz, the conclusion to be drawn is that Scholtz's account is accurate and that of the appellant is false. These two considerations, jointly, justify the conviction and, to my mind, as was pointed out in the court of first appeal, there is therefore no need to consider whether the magistrate was correct in deciding at the end of the trial-within-a-trial, that his statement had been voluntarily made.

As to sentence, it was submitted that the

magistrate/.....

magistrate had misdirected himself in two or perhaps three respects. Firstly, it was said that he erred in finding that the appellant was a "ringleader". Whether or not this is the most accurate term to apply to him, it is manifestly clear from the evidence of Scholtz, to which I have referred, that the appellant played a leading role in encouraging and rallying those who were involved in what amounted to large scale rioting. Secondly, submitted as a misdirection, is the proposition that the magistrate treated the appellant as an adult simply because he had left school, and had fathered a child at the youthful age of 15 years. But if one examines the evidence of the magistrate, it will be seen that he acknowledged that he was dealing with a young person, in his own

words/.....

words "n opvallende jong persoon", but with good reason regarded him as a young person living the life of an adult in certain important respects and certainly one who, on the face of it, was more mature than other young people of his age. In taking these factors into account pointing to maturity, to my mind the magistrate cannot really be faulted. Finally, it was submitted that he misdirected himself in holding that the public interest ought to prevail against, as it is put in the Heads of Argument, "the private interest of the appellant." The magistrate certainly placed emphasis on the public interest, but, on my reading of his remarks on sentence, he was certainly also mindful of the personal circumstances relating to the appellant, notably the fact/.....

fact that he was a first offender. That the public interest in this particular case is a very important consideration is really self-evident. The violence in this particular case involved extensive and sustained disruption of the public order. It involved, as I read the record, actual damage to motor vehicles caused by stone-throwing, and it, of course, also involved the potential danger to life and limb. But for the intervention of warrant-officer Scholtz, a vehicle, valued according to the evidence at about R60 000,00, would have been destroyed and, no doubt, further damage caused.

In the course of his submissions on sentence counsel referred us to a recent decision of this Divi-

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sion and quite rightly pointed out that public violence is a protean crime. It can vary from an isolated incident to a large scale disruption of the public order.

The facts in that case, as summarised by counsel, satisfies me that it is not really in point and indeed, as one knows, each case of sentencing depends on its own particular facts.

In this case the sentence was a severe one,

but, in the absence of any misdirection - and I hold

there was none - I do not think it can be said that the

sentence is disturbingly inappropriate, and therefore

that the magistrate failed to exercise a judicial dis-

cretion in imposing it. I would therefore, dismiss the

appeal/.....

appeal against the conviction and sentence.

RABIE ACJ - I agree

JANSEN JA - I agree

RABIE ACJ - It is so ordered