THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable / Not reportable

CASE NO: 401/2002

In the matter between :

JACOBUS PETRUS SMITH **Appellant**

and

THE STATE **Respondent**

Coram: **MARAIS, CAMERON JJA *et* MLAMBO AJA**

Heard: **21 MAY 2003**

Delivered: **30 MAY 2003**

Assault to do grievous bodily harm – sentence – incident videotaped – effect upon sentence.

J U D G M E N T

MARAIS JA/

MARAIS JA:

[1] It is rare indeed for a court called upon to impose sentence to have actually witnessed the commission of the crime. But, because the crimes involved in this case were videotaped that is what occurred in the court *a quo* and again in this court. Before us, with leave granted by this court, is an appeal by the appellant against the sentence of seven years' imprisonment (of which two were suspended conditionally) imposed upon him by the court *a quo* (Van der Merwe J) consequent upon his conviction on three counts of assault with intent to do grievous bodily harm. The judgment is reported in 2002 (1) SACR 188 (T).

[2] The case is one of considerable notoriety. The appellant (and, allegedly, three others) were policemen attached to the police dog unit of the South African Police Service. They rounded up three allegedly illegal

immigrants and drove them to relatively deserted locations. One by one they were told to flee whereupon police dogs were despatched to pursue them and, once they were caught, the dogs were incited to savage them by biting them. The appellant and his cohorts also kicked the complainants and struck them with both flat hands and fists. Insulting racist remarks were addressed to them. The entire event was videotaped by one of the policemen at the scene, allegedly for instructional purposes. It was this videotape which ultimately came into the hands of the police investigating the incident and which made it possible for both the court *a quo* and this court to witness the incident as it unfolded.

[3] This brief account of what happened does not capture what only the videotape can reveal: the precise nature and true extent of the cruel and brutal behaviour of the policemen involved; the frightening ferocity of the

dogs; the abject terror of the complainants and their howls of anguish as they were mauled by the dogs, egged on, as they were, by their handlers; their absolute defencelessness against the onslaught of both the dogs and their handlers; the devastation of their fragile human dignity as aliens in a land not their own. They are searing scenes which haunt the mind and fill one with revulsion and anger. They are an ugly manifestation of what society detests: the brutal abuse of power and authority when dealing with the defenceless and vulnerable.

[4] Yet, for a court intent upon dispensing justice in a calm and dispassionate manner, the emotions which well up on viewing the videotape can be a hindrance rather than a help, if not properly controlled. That does not mean, of course, that a justified sense of indignation at the gross affront to society's sensibilities has no place at all in sentencing an

offender. It undoubtedly has. But it cannot be permitted to so overwhelm all other factors which are relevant to just sentencing that they are virtually ignored.

[5] Our courts deal daily with distressing crimes of violence: murder, rape, and all manner of serious assaults. The consequences for the victims are frequently far more serious than those which resulted in this case and the pain and terror to which they are subjected is often worse. With no videotapes of the commission of such crimes available to enable a court to relive the horror of the violence done to the victim, there is less risk of a court being swept along on the tide of emotion and failing to give due weight to other relevant factors which should be placed in the balance. The level of sentencing generally resorted to in even more serious cases has to be borne in mind when considering what sentence should be imposed in a

case such as this. Unless that be done, all sense of proportion may be lost and a sentence imposed which, by comparison, is too harsh and owes too much to the fortuitous fact that the commission of the crime happens to have been videotaped.

[6] The central thrust of the argument advanced by counsel for the appellant is that the court *a quo* did fall prey to the emotions which a viewing of the videotapes evoked in its own mind, in the minds of the members of the public who were in the court at the time, and in the minds of the millions of South Africans who saw the videotape when it was aired on national television. The attention given to the incident by the written media was considerable and that too, so it was argued, predisposed the court to imposing a custodial sentence whatever contra-indications the evidence given in mitigation might reveal. In elaboration of the contention

counsel for the appellant highlighted those contra-indications and submitted that the court *a quo* had failed, because of its preoccupation with the exceptional publicity attending the incident, to give them the weight which they deserved to be given.

[7] It is so that there were redeeming factors present which needed to be placed in the scale. The appellant, in common with policemen everywhere in South Africa, is often at personal physical risk to life and limb and frequently encounters violence and its consequences. The blunting effect which this can have upon the natural moral aversion to the infliction of violence upon others and the erosion of respect for the human dignity of others which it causes, appear to have taken their toll of the appellant. So too have the worst excesses of a political culture prevalent among many whites which permeated the appellant's formative years: the belief that

black people were not merely different in appearance, but different in the sense of belonging to a lower order of humankind and, as such, fit subjects for humiliation. Some might say that those considerations aggravate the crimes. While mindsets of the kind I have described are odious and to be roundly condemned, they were not spawned by the appellant; they are a consequence of his occupation and his growing up in a politically and racially abnormal society. While those may not be mitigating factors in the sense in which that word is usually understood, they serve at least to make it unsafe to infer that the appellant is innately sadistic and given to violence.

[8] The appellant is a married man in his early thirties. He has three minor children. His family background is stable and renders it most unlikely that, by repeating behaviour of this kind, he will ever again

jeopardise their security and subject them to the trauma which they must have experienced as a consequence of his arrest and trial. He has rendered dedicated service in a dangerous vocation. His single previous conviction for assault occurred as long ago as 1989. Since 1996 he had had to receive psychiatric treatment for depression, stress, and aggression. His psychological deficit has predisposed him to conduct of the kind which resulted in his conviction.

[9] That the complainants were taken to receive medical attention instead of simply being released in the belief that their tenuous presence in South Africa made it unlikely that they would report the incident, also enures in some degree to the credit of the appellant. So too does the fact that the injuries sustained, despite the savagery of their infliction and the pain which they caused, were not of lasting seriousness. It is apparent from

the videotape that the dogs were forcibly separated from the complainants before they could inflict more serious injuries.

[10] The appellant was found by the court *a quo* to be genuinely remorseful. His pre-trial confession and subsequent plea of guilty was consistent with that attitude. Most importantly of all, there is no good reason to doubt that when he joined the dog unit he was expected at least by some of his superiors not only to acquiesce, but, when necessary to participate, in this longstanding and abhorrent practice. No doubt those of stronger moral mettle would have refused, but the fact remains that the practice was not of his making and that it would have required considerable courage and strength of character to refuse to co-operate in the milieu in which he earned his daily bread.

[11] As against all that, there were a number of factors present which entitled the court *a quo* to conclude that the appellant's personal interests had to yield to the need for these particular crimes to be seen by society at large, and the appellant in particular, to be regarded by the court as so odious and repulsive that nothing less than direct imprisonment would be an appropriate response. I have already referred in paragraphs 2 and 3 to most of them. There must be added the following. Not only did the appellant participate in this cruel practice, it is quite apparent from the videotape that he did so with enthusiasm and that, not content with the mauling meted out to the complainants by the dogs, he gratuitously and vindictively assaulted them himself both during and after their ordeal. It is true that charges of assault to do grievous bodily harm are seldom brought before the High Courts and that a sentence of the order imposed in this

case is more severe than many imposed in the magistrates' and regional courts. But many of the cases heard in those courts are of the kind where violence erupts in an unpremeditated way. Often there is an element of provocation present. Equally often strong drink has played a role. No such mitigating circumstances are present here.

[12] There is also the damage done to the image of the police in South Africa. It is so that the appellant cannot be blamed for the exceptionally high level of visual and written media publicity in which the incident resulted. But he cannot absolve himself from all blame for the blow to the image of the police. This in a country whose aim is to inculcate respect for law and order and those whose lot it is to administer law and order. Without the latter there is little hope of attaining the former.

[13] The court *a quo* was fully alive to all this. It gave a very full and careful judgment on sentence and, in my view, cannot be said to have materially misdirected itself in considering sentence. The relevant factors were correctly identified and the weighting given to them was not manifestly inappropriate. The court was mindful of the sentencing errors into which the viewing of the videotape could lead one and, contrary to the submission of counsel for the appellant, I do not believe that the court failed to heed its own warning.

[14] The fact that other sentencing options existed and might have been resorted to is not the test on appeal. The question is whether the sentence chosen by the trial court is unjust. In the absence of any material misdirection interference on appeal with the trial court's sentence would only be justified if that sentence was not only a sentence which this court

would not have imposed, but also one which is so different that the disparity is truly disturbing and therefore unjust. Notwithstanding that counsel for the appellant has said all that could be said in his plea for an amelioration of the sentence, I find myself unable to say that of the sentence imposed. The appeal is dismissed.

R M MARAIS
JUDGE OF APPEAL

CAMERON JA)
MLAMBO AJA) CONCUR