

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: A3042/17

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE:
- (2) OF INTEREST TO OTHER JUDGES:
- (3) REVISED:

01-09-2020

DATE

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SIGNATURE

In the matter between:

JASON ASHLEY THERON

Appellant

and

THE MINISTER OF POLICE

Respondent

J U D G M E N T

Introduction

1. This appeal lies against the judgment and order of the Magistrate's Court for the district of Ekurhuleni North, Kempton Park, in terms of which the delictual claims for unlawful arrest and detention was dismissed. The appellant's claim was for a globular sum of R200 000.00.

Background facts

2. The appellant was arrested on 3 November 2014 after he was found in possession of a vehicle, to wit a Toyota Yaris ("*the motor vehicle*") which was suspected to have been stolen. The appellant was detained from 3 November 2014 to 5 November 2014 whereafter he was released without appearing in court.

Court a quo

3. It was common cause that the appellant was arrested by a police officer, Captain Mthembu ("*Mthembu*"), and that he was detained for approximately two days. At the commencement of the trial the parties agreed that the respondent bore the *onus* to justify the arrest and detention. The respondent therefore also had the duty to begin.

4. The respondent's first witness was Mthembu. He testified that on 3 November 2014 he received information that a suspected stolen motor vehicle was parked at Birchleigh Mall (also referred to in evidence as the Pick n Pay Mall) ("*the Mall*") in Norkem Park and he proceeded there with his colleague, Constable Mazibuko

(*"Mazibuko"*) by motor vehicle. When they arrived at the scene he parked his motor vehicle about 100 meters from where the suspected stolen motor vehicle was parked. Shortly thereafter the appellant appeared and proceeded towards the suspected stolen motor vehicle, opened the driver's door and got into the motor vehicle. The appellant started the engine, but before he could drive away, he was intercepted by Mthembu, who identified himself and requested the appellant to search the motor vehicle. The appellant cooperated and on inspection it was noted that the engine chassis numbers and the licence disc were not the same. Mthembu then requested the appellant to accompany him to the police station and the appellant obliged. At the police station the particulars of the motor vehicle were loaded onto the SAPS computer system and it was then discovered that the motor vehicle was reported stolen under case number 374/08/2014. When the appellant was confronted with this information he stated that the motor vehicle belonged to a person by the name of Bongani. The appellant was thereafter read his rights, arrested and detained.

5. Mthembu, together with his colleague, Mazibuko, then proceeded to the address of the person who appeared in the SAPS computer system as the owner of the stolen motor vehicle. On arriving at the address, the owner stated that his car had never been reported as stolen. It was also discovered that a similar car with registration numbers was parked in the yard. Both Mthembu, and the said man then went back to the police station where it was ascertained that the said motor vehicle was duplicated, having similar registration numbers and being of the same colour as the motor vehicle that had been found in the man's yard earlier that day during the investigation. That was the last time Mthembu dealt with the matter.

6. The respondent then called the investigating officer, Constable Sefago Moroko ("*Moroko*"), who is attached to the Motor Vehicle Theft Unit. Moroko testified that he interviewed the appellant on 4 November 2014. After receiving certain information from the appellant he went to the appellant's house where he met with the appellant's sister, Kutlwano. Kutlwano told him that she knew where Bongani stayed and she accompanied Moroko to a certain property. They were however unable to access the property as it was situated inside an estate and an access tag was required to gain entry to the estate. Kutlwano also provided Moroko with Bongani's cell number which rang unanswered when Moroko attempted to phone him. The docket was thereafter reallocated to another investigating officer, Monty Mahlare ("*Mahlare*").

7. Mahlare, who is attached to the Vehicle Identification Unit, testified that he took the appellant to court on 5 November 2014 where he conversed with the public prosecutor. It was decided to release the appellant, but with the prosecutor's instructions that a further investigation should be conducted. During his investigations Mahlare also attempted to visit Bongani's house but he could similarly not access the property as it was in an estate and only accessible using a tag. He tried calling the cellular number which was given to him but calls to the cellular phone number always went directly to voice mail. Mahlare testified that what made it even more complicated was the fact that he was only give the name Bongani; the surname, and the exact details of the unit Bongani was supposedly occupying, were not provided. He conceded during cross examination that more could have been done such as tracing the Body Corporate of the estate in order to gain permission to access the property, as well as invoking section 205 of the Criminal Procedure Act 51 of 1977 ("*the CPA*") which could have assisted in locating and getting

the details of Bongani. However, at that time the appellant had already been released without being charged. The investigation was not finalised and the docket was subsequently reallocated to another investigating officer. That concluded the evidence on behalf of the respondent.

8. The appellant testified that he was at the Mall with his sister, Kutlwano, to draw money for his mother from Pick n Pay. On entering the Mall, they spotted Bongani sitting in a restaurant. They then went to greet him. Bongani requested the appellant to fetch his motor vehicle and to bring it closer to where he was seated. The appellant agreed and proceeded to the motor vehicle. He opened the driver's door, got into the motor vehicle, and started the engine. This was when he was confronted by Mthembu and Mazibuko. Mthembu instructed him to alight from the motor vehicle and Mthembu inspected the vehicle. Mthembu then told him that the motor vehicle was reported stolen. Bongani and Kutlwano then came to the scene. The appellant told Mthembu that the motor vehicle belonged to Bongani, who, in the presence of the police officers, confirmed that the motor vehicle was his. Mthembu however only instructed the appellant to accompany them to the police station and left Bongani behind. At the police station he was detained and Mthembu then went back to the Mall and searched for Bongani, but was unable to find him

9. The appellant called his sister, Kutlwano, to testify. She testified that she drove with the appellant in their mother's car to withdraw money from Pick 'n Pay at the Mall. They first stopped at the Engen garage for petrol and then proceeded to the Mall. They spotted Bongani seated at the restaurant eating. They approached Bongani to greet him

and that is when Bongani requested the appellant to drive his car and park it closer to where he was seated. The appellant proceeded to the car and was confronted by Mthembu who accused him of driving a stolen car. Kutlwano and Bongani then went to the motor vehicle and Bongani told Mthembu that the motor vehicle belonged to him. Mthembu informed them that he was taking the appellant with him and Bongani may come if he so wished. Bongani did leave with them but Kutlwano later learnt that he was not arrested and detained with the appellant. In a subsequent discussion with Bongani he did not give a clear account why he was not detained, but undertook that he will make a plan for the appellant to be released. That concluded the evidence on behalf of the appellant.

10. The court *a quo* held that the onus was on the respondent to demonstrate that the arrest was lawful. The court made reference to section 40 of the CPA which requires that the arresting officer should have a reasonable suspicion based on reasonable grounds that the suspect committed an offence referred to in schedule 1. The magistrate held that the requirement is not that the arresting officer should satisfy himself of all the elements of the offence, but that the arresting officer should only have reasonable suspicion that such an offence has been committed. The court noted that on inspection the arresting officer established that the chassis number on the motor vehicle's engine did not correspond with the registration numbers of the motor vehicle. In addition, on subsequent enquiry, it transpired that a case of theft was indeed registered under Primrose Cas. 374/08/2014.

11. The court *a quo* found that because there were reasonable grounds for the suspicion, the arrest was lawful and it therefore follows that the detention was lawful. The magistrate proceeded and stated that "...when Capt. Mthembu decided to arrest the

plaintiff he had no powers to release the plaintiff since the powers to release or detain the plaintiff rested with the courts. On the basis I am of the view that the detention of the plaintiff was not unlawful". (sic).

Before this court

12. The appellant applied for condonation for the failure to comply with Rule 51 (3) and 51 (4) of the Magistrate Court Rules. The appellant had failed to serve and file the notice of appeal on the magistrate. This application was not opposed and the explanation given by the appellant for the non-compliance is accepted. Condonation is granted.

13. The appellant contended that the *onus* is on the respondent to demonstrate that the arrest was lawful. The arresting officer is therefore required to demonstrate that he held a reasonable suspicion that the appellant committed a crime of theft, alternatively a crime in terms of s 36 or s 37 of the General Law Amendment Act 62 of 1955 ("the General Law Amendment Act"). Section 36 of the General Law Amendment Act provides that "*any person found in possession of any goods ... in regard to which there is a reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession shall be guilty of an offence ...*"

14. The appellant contended that there was no basis for the arresting officer to arrest the appellant especially in circumstances where both the appellant and his sister told the arresting officer that the motor vehicle belonged to Bongani.

15. The crux of the appellant's argument was that the arresting officer did not satisfy the jurisdictional fact that there was the existence of a reasonable suspicion that the appellant was committing a schedule 1 offence. In addition, so it was argued, section 36 and 37 of the General Law Amendment Act enjoins the arresting officer to satisfy himself that the possession of the stolen property was without reasonable explanation, or alternatively that the possessor had reasonable suspicion that the motor vehicle was stolen. In *casu* the appellant supported by his sister, confirmed that possession of the motor vehicle was authorised by Bongani who was the owner of the motor vehicle. As a result there was no basis for the arresting officer to conclude that the appellant was in a possession of a motor vehicle with the knowledge that it was stolen or should have suspected that it was stolen.

16. The respondent's counsel contends that the arrest was justified as the appellant was arrested in possession of a motor vehicle suspected to have been stolen. In fact, so it is argued, at the time when Mthembu intercepted the appellant he was already armed with the information that there was a motor vehicle parked at the Mall which had been reported as stolen. It was submitted that the conduct of the respondent in this regard was on all fours with the requirements of section 40 of the Act read with section 37 of the General Law Amendment Act.

17. Counsel for the respondent further contended that the evidence presented by the arresting officer and the other witnesses for the respondent were water tight, credible and probable. It was submitted that the evidence of the appellant was riddled with contradictions and should be rejected by the court. It was also contended that it was

improbable that an arresting officer of such experience will decide not to arrest Bongani who allegedly came to the scene and confirmed that he is the owner of the motor vehicle in question. The respondent also submitted that for some inexplicable reasons Bongani was not called to testify by the appellant who could have confirmed that the motor vehicle belonged to him and that he was the one who sent the appellant to drive and bring the car closer.

Evaluation

18. Section 40(1)(b) of the CPA provides that *"a peace officer may without an arrest warrant arrest any person who he reasonably suspects of having committed an offence referred to in schedule 1, other than the offence of escaping from custody."*

19. The appellant was arrested by Mthembu who testified that he arrested the appellant for possession of stolen property i.e. s 36 of the Criminal Law Amendment Act. In schedule 1 of the CPA only the common law offence of "Receiving stolen property knowing it to have been stolen" is included and not an offence under s 36 or 37 of the General Law Amendment Act. Possession of stolen property in contravention of s 36 of the General Law Amendment Act is therefore not a schedule 1 offence. The arrest could therefore not have been made in terms of section 40(1)(b) of the CPA as the circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable man to form the suspicion that the arrestee has committed a **schedule 1 offence** (my emphasis). Section 40(1)(e) which applies to the offences referred to in s 36 and 37 of the General Law Amendment, does however make provision for an arrest without a warrant if any person:

".... is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing."

20. The jurisdictional requirements for a s 40(1)(e) defence are: (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the property had been stolen or acquired by dishonest means; (iv) that the arrestee had committed an offence in connection with the property and that; (v) the suspicion was based on reasonable grounds.¹ The question whether the suspicion of the peace officer effecting the arrest is reasonable must be approached objectively.² Accordingly, the circumstances giving rise to the suspicion in terms of s 40(1)(e) must be such as would ordinarily move a reasonable person to form a suspicion that the property has been stolen/ acquired by dishonest means and that the arrestee has committed an offence in connection with the property.

21. It is trite that once these jurisdictional facts are present the discretion whether or not to arrest arises.³ In *Raduvha v Minister of Safety and Security and Another*⁴ the

¹ *Setlhapelo v Minister of Police* 2015 JDR 0952 (GP) at [25].

² *Rex v Van Heerden* 1958(3) SA 150 (T).

³ See *Duncan v Minister of Law and Order* 1986 (2) SA 805(A) and *Minister of Security v Sekhoto & Another* 2011 (5) SA 367 (SCA).

⁴ 2016 (2) SACR 540 (CC).

Constitutional Court confirmed the principles enunciated in *Sekhoto* and *Duncan* and held as follows:

"[42] Section 40(1) of the CPA states that a police officer "may" and not "must" or "shall" arrest without a warrant any person who commits or is reasonably suspected of having committed any of the offences specified therein. In its ordinary and grammatical use, the word "may" suggests that police officers have a discretion whether to arrest or not. It is permissive and not peremptory or mandatory. This requires police officers to weigh and consider the prevailing circumstances and decide whether an arrest is necessary. No doubt this is a fact-specific enquiry. As the police officers are confronted with different facts each time they effect an arrest, a measure of flexibility is necessary in their approach to individual cases. Therefore, it is neither prudent nor practical to try to lay down a general rule and circumscribe the circumstances under which police officers may or may not exercise their discretion. Such an attempt might have the unintended consequence of interfering with their discretion and, in the process, stymie them in the exercise of their powers in pursuit of their constitutional duty to combat crime."

22. In *Raduvha supra* the court found that as section 40(1) grants police officers a discretion whether to arrest, "*the two courts should have gone further in their evaluation of the evidence to determine whether the facts justified an arrest. This is so because an arrest is a drastic invasion of a person's liberty and an impairment of their rights to*

dignity, both of which are enshrined in the Bill of Rights. At paragraph [44] it was held as follows:

“[44] In other words the courts should enquire whether in effecting an arrest, the police officers exercised their discretion at all. And if they did, whether they exercised it properly as propounded in *Duncan* or as per *Sekhoto* where the court, cognisant of the importance which the Constitution attaches to the right to liberty and one’s own dignity in our constitutional democracy, held that the discretion conferred in section 40(1) must be exercised “in light of the Bill of Rights”.

23. At the time of the arrest the arresting officer had the following facts at his disposal; firstly, he had information that a stolen motor vehicle was parked at the Mall, secondly, on his arrival at the Mall he found the motor vehicle, in the possession of the appellant, and after inspecting the motor vehicle he discovered that the chassis number and the registration of the motor vehicle were not the same. He asked the appellant to accompany him to the police station and the appellant agreed. Thirdly, when subsequently loading the information of the motor vehicle in the SAPS computer system, it reflected that a case of theft was opened in relation to the said motor vehicle. When assessing these facts objectively, Mthembu had a reasonable suspicion that the motor vehicle had been stolen or acquired by dishonest means and that the appellant had committed an offence in connection with the motor vehicle. Under cross examination Mthembu disputed that appellant was in the company of his sister at the time of the arrest; that the appellant informed him that the motor vehicle belonged to Bongani; or that Bongani was present when the appellant was apprehended. It is Mthembu’s evidence that

the name "Bongani" was only mentioned by the appellant at the police station after the appellant was informed that the motor vehicle was stolen. Mthembu's evidence was corroborated by Moroko in all material aspects.

24. In light of the two mutually destructive versions presented before court the approach formulated by Nienaber JA in *Stellenbosch Farmers' Winery Group & another v Martell et Cie* is apposite:

"The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience

or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."⁵

25. Based on the evidence presented by the appellant it is highly unlikely that Bongani was present when the appellant was found in possession of the stolen motor vehicle and that he admitted that he was the owner of the said motor vehicle. If the appellant's version is correct it is inexplicable why Mthembu would not have arrested Bongani. The appellant's version, namely that Bongani admitted that it was his motor vehicle and that he was "let go" by the police, is, under the circumstances, highly improbable. The objective evidence points to the fact that the only time when the appellant stated that the motor vehicle belonged to Bongani was when the appellant was at the police station after the SAPS computer system confirmed that the motor vehicle was reported stolen. Section 36 of the Criminal Law Amendment Act stipulate that the person in possession of the stolen motor vehicle should give a reasonable explanation of his possession of a motor

⁵ 2003(1) SA 11 (SCA) at para 5.

vehicle suspected to be stolen. In *Doma v S*,⁶ Sutherland J held that it is sufficient that the police officer should form a reasonable suspicion on the facts presented before him and need not go to the extent of asking the stranger to account to the possession of the motor vehicle by the person found in possession of the stole item or item suspected to be stolen.

26. The probabilities are in favour of the respondent's version and points to the fact that Bongani was a name that was only mentioned after the appellant was taken to the police station. In this regard it is also noteworthy that two investigating officers were unable to locate the whereabouts of Bongani or get hold of him on the cell phone number provided to the police. Coincidentally, the appellant was also unable to secure Bongani's attendance at court to testify on his behalf. Kutlwano, who testified that she knows Bongani very well, was, oddly enough, also unable to shed any light on "Bongani's" whereabouts.

27. During his testimony the appellant gave an elaborate version of how he was asked to bring Bongani's motor vehicle closer to the restaurant where he was eating, how he was arrested, released, and arrested again, and how the police was looking for Bongani "in the bushes" The appellant's version was riddled with contradictions and improbabilities. The appellant's explanation that he gave to the police about how he came into possession of the motor vehicle was improbable and completely unsatisfactorily.

⁶ (2012)/A447) ZAGPJHC 116

28. It is trite that a court of appeal will only interfere with the findings of the lower court where it is clear that the presiding officer misdirected himself on the facts or the law or exercised his discretion capriciously. The evidence in this matter clearly shows that the arresting officer had reasonable grounds to suspect that the appellant was in possession of stolen property. Under the circumstances of this case there is no evidence to show that Mthembu did not exercise his discretion in a proper manner. Consequently, the court *a quo* was correct in its finding that the arrest and subsequent detention of the appellant were lawful.

29. The magistrate found that once an arrest was effected the release was only left to the court. This may not necessarily be the correct legal position. However, the appellant was released without appearance in court. Section 50(1)(c)(i) of the CPA permits releasing the accused from detention in the event no charge is being brought against the accused. In *casu* no charge was brought against the accused and as such the release, even though not authorised by the court, was within the purview of the provisions of section 50(1)(c) of the CPA. Section 50(1)(c)(i) of CPA read with section 35(1)(d)⁷ of the Constitution, provides that an accused has to be brought to a lower court as soon as reasonably possible, but not later than 48 hours after the arrest. It was appellant's case that he was not taken to court within reasonable time. In any event, it is clear that efforts were made by the investigating officers in locating Bongani through visiting his place of

⁷ Everyone who is arrested for allegedly committing an offence has the right –

- (d) to be brought before the court as soon as reasonably possible, but not later than-
 - (i) 48 hours after the arrest; or
 - (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside the ordinary court hours or on a day which is not an ordinary court day."

residence and or calling the only number which was availed to them by the appellant's sister, to no avail.

30. In conclusion the court is satisfied that the arguments this court is satisfied that the court a quo did not misdirect itself on the facts or the law, and consequently this court is not at liberty to interfere with its finding. The arguments advanced in support of the appeal are not sustainable and the appeal cannot be upheld.

31. In the result the following order is made:

(a) The appeal is dismissed with costs.



NOKO AJ

ACTING JUDGE OF THE

HIGH COURT GAUTENG LOCAL DIVISION

I agree



WINDELL J.

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

APPEARANCES:

For the Appellant	:	MR EPHRAIM TALANE
Instructed by	:	E TALANI INCORPORATED
For the Respondents	:	ADV M W DLAMINI
Instructed by	:	OFFICE OF THE STATE ATTORNEY, JOHANNESBURG

Date of hearing : 1 June 2020

Date of judgment : this judgment was handed electronically by circulation to the legal representatives by email. The date and time for the hand down is deemed