



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 194/11
Not reportable

In the matter between:

**MINISTER OF SAFETY AND SECURITY
JONATHAN DANIËLS**

**First Appellant
Second Appellant**

and

JOHANNES FRANCOIS SWART

Respondent

Neutral citation: *Minister of Safety and Security & another v Swart*
(194/11) [2012] ZASCA 16 (22 March 2012)

Coram: Mthiyane DP, Brand, Cloete and Bosiello JJA and Ndita AJA

Heard: 05 March 2012

Delivered: 22 March 2012

Summary: Unlawful arrest – s 40(1)(b) of the Criminal Procedure Act 51 of 1977– respondent arrested without a warrant – whether the arresting officer had reasonable grounds for suspecting the respondent of having committed an offence of having driven a vehicle while under the influence of intoxicating liquor – quantum – whether there is an basis to interfere with the award made by the court below.

ORDER

On appeal from: Western Cape High Court, Cape Town (Blignault J and Samela AJ sitting as court of appeal):

The appeal is dismissed with costs.

JUDGMENT

BOSIELO JA (Mthiyane DP, Brand and Cloete JJA and Ndita AJA concurring)

[1] In the early hours of 27 May 2007, the respondent was arrested by the second appellant without a warrant on a suspicion of driving a motor vehicle on a public road whilst under the influence of intoxicating liquor. He was thereafter detained at the De Doorns police station. The criminal charges against him were withdrawn the next day after the tests revealed that his blood alcohol level at the time of driving was below the permissible legal limit.

[2] Following this, the respondent issued summons against the appellants in the Magistrates' Court, Worcester for damages suffered as a result of the unlawful arrest and detention. The magistrate dismissed his claim with costs. However, the respondent appealed successfully to the Western Cape High Court (Blignault J and Samela AJ) where he was awarded damages in the amount of R50 000 plus interest and costs. The appellants are appealing to this Court with its leave against the judgment of the court below.

[3] That facts which gave rise to this matter can be summarised as follows: The second appellant, Mr Jonathan Daniëls, is a police constable stationed at De Doorns Police Station. Constable Sonja Nel is his colleague.

On 27 May 2007, whilst doing patrol duties in a police vehicle, they received a radioed report of an accident in the Hex pass. Whilst on their way to the scene of the alleged accident, they came upon the respondent who ran towards them. Using a torch, he stopped them. The time was 03h45. The respondent was a colleague. He asked them to help him as he had driven his vehicle off the road. He asked if they could drive him home so that he could fetch his other van and a rope in order to tow the damaged vehicle back home. The second appellant explained to the respondent that they were on their way to attend to an accident and that they would return to assist him. At this stage, they had not seen his vehicle as it was dark. Whilst proceeding to the place where the accident had allegedly occurred, the second appellant telephoned the officer in the charge office, Inspector Anneke Joubert, and reported to her that they had encountered the respondent who appeared to be under the influence of alcohol.

[4] As they could not find the scene of accident nor the vehicle that they were looking for, they returned to where they had met the respondent. Upon their arrival at the scene, they saw the respondent's van lying about 100 m further into a ditch. According to the second appellant, it appeared as if the respondent had either lost control of the vehicle or miscalculated a bend in the road. He then approached the respondent and told him that he (the respondent) knows what the procedure is when a person has caused an accident whilst under the influence of alcohol. The second appellant then advised the respondent of his rights and tried to arrest him. The respondent resisted and protested that he was not driving the vehicle and further that as could be seen the engine was not running. The respondent became belligerent, used abusive language and refused to submit to the arrest. The second appellant then telephoned the charge office and asked for assistance. Two other police officers came to help, but to no avail. The respondent ultimately gave in after his immediate senior Captain Mashishi had come to the scene. He was then arrested on a suspicion of driving under the influence of intoxicating liquor, whereafter he was taken to a doctor in Worcester for a blood sample to be taken for forensic analysis.

[5] As I have already indicated the charge against the respondent was withdrawn the following day as the result of his blood analysis showed that his blood alcohol level was only 0.04 grams per 100 ml at the time of the incident. He however insisted that the respondent reeked of alcohol when they met him. He also conceded that he did not perform any tests to determine the respondent's state of sobriety.

[6] Constable Nel was on patrol duty with the second appellant on the night in question. To a large extent her evidence is the same as that of the second appellant. She was the driver of the police vehicle. After the respondent had stopped them whilst en route to the scene of an accident, she sensed a mild smell of alcohol when he spoke to them. She could not say whether the respondent was drunk or not. She also confirmed that she knew the respondent before the night in question. She conceded that it was dark so much so that she could not even see the respondent's eyes. As to the condition of the road, she testified that there was a dangerous curve where the respondent's vehicle left the road.

[7] The evidence of Inspector Joubert was not of much value except that she confirmed that she was in charge at the charge office that night. After she received a report, which was radioed in from the second appellant, regarding the allegation that the respondent's vehicle had left the road and that he was under the influence of alcohol, she instructed the second appellant to arrest the respondent for driving under the influence of alcohol.

[8] The respondent testified as follows. He spent the better part of the night (27 May 2007) with his friend, Mr Truter, at Truter's home. Both are police officers. He conceded that they drank some beers (no indication of the exact quantity is given) at Truter's home. The respondent's ten year old son was also present. Later on in the night the respondent decided to head home. As he had been drinking he did not think it was safe for him to drive. He then got one Eben, whom he had used in the past as his informer, to drive him

home. Whilst en route to his home, Eben lost control of the vehicle which veered off the road. Eben fled the scene after the respondent threatened to hit him. The road they traversed has a dangerous curve, no lights, was under construction at the time and had no road markings. After the accident Eben fled the scene. The respondent walked up to the main road to seek help. A patrol vehicle driven by Nel, with the second appellant as her passenger, pulled up after he had waved them down using his torch. He explained his problem to them and they undertook to return and offer him assistance after attending to another accident that had been reported. The respondent denied that he had told them that he had driven his vehicle off the road. Upon their return the two police officers never asked him what had happened. All that the second appellant told him was that he should have known better than to drive a vehicle whilst he was inebriated. The second appellant then tried to arrest him but he resisted. A fierce struggle ensued until he was forced into the police van by the second appellant, one Tokwe and Captain Mashishi.

[9] The respondent further testified that, same morning, he was taken to a doctor where a blood sample was taken. He was thereafter detained in a police cell. The respondent described the condition in the cell as inhumane and atrocious eg the toilet was blocked and the smell was putrid. Whilst at the charge office, where there were approximately five police officers, he was taunted and ridiculed by someone asking: 'Who is going to have the privilege to lock up Blackie?'

[10] The following essential facts appear to be common cause:

- (a) The respondent, the second appellant and Nel are all police officers, and known to one another;
- (b) all three of them were stationed at the same police station namely De Doorns;
- (c) the respondent was their senior;
- (d) the relationship between the respondent and the second appellant was stormy (stormagtig);

- (e) on 27 May 2007 both the second appellant and Nel were on patrol duty;
- (f) they were acting as police officers within the scope of their duties under the first appellant;
- (g) they encountered the respondent, whose vehicle had veered off the road and fallen into a ditch;
- (h) the road where the vehicle left the road was dark with no lights, has a dangerous curve, was under construction and had no road markings;
- (i) the respondent stopped them and requested assistance;
- (j) both the second appellant and Nel smelt liquor on the respondent's breath;
- (k) the second appellant then telephoned Inspector Joubert who was in charge at the charge office and reported to her that the respondent's vehicle had gone off the road and that he was under the influence of alcohol;
- (l) subsequently, the second appellant tried to arrest the respondent who in turn resisted;
- (m) the respondent was only subdued and arrested with the help of one Tokwe and Captain Mashishi;
- (n) a blood sample was subsequently drawn from the respondent and sent for analysis;
- (o) the results were a blood alcohol level of 0,04 grams per 100 ml;
- (p) the prosecutor issued a nolle prosequi certificate;
- (q) the respondent was detained for four and a half hours in the police cells; and
- (r) the conditions in the cell were inhumane and horrid.

[11] The issues raised in this appeal are whether, based on the facts known to the second appellant at the time when he observed the respondent at the scene, it can be found that the respondent was the driver of the vehicle that went off the road and whether his suspicion, that the respondent was at the time under the influence of intoxicating liquor, was reasonable.

[12] Counsel for the appellants submitted that the circumstances under which the respondent was arrested justified a reasonable suspicion, amongst

others, that he was the driver of the vehicle that had veered off the road. In fact, counsel argued that this is what the respondent said to both the second appellant and Nel when they enquired what had happened. Counsel argued further that, in absence of any reasonable explanation from the respondent regarding how his vehicle left the road and landed in a ditch, it was reasonable for the second appellant to conclude that it was due to the respondent's drunken state. Therefore, the conclusion is that the second appellant was justified in arresting the respondent as he harboured a reasonable suspicion that the respondent drove the vehicle whilst he was under the influence of alcohol.

[13] On the other hand, Mr Nortier for the respondent argued that the mere fact that the respondent's vehicle had veered off the road and that he smelt of alcohol is not sufficient proof that he was under the influence of alcohol when he drove the vehicle and further that the cause of the accident was as a result of his intake of alcohol. Mr Nortier submitted that by failing to make proper enquiries as to how the respondent's vehicle had left the road, the court is left with no evidence but mere doubt, suspicion and pure speculation. He further argued that such an occurrence can be caused by a variety of factors other than drunkenness. It is common cause in this case that the road on which the vehicle in question was travelling was dark with no lights and has a dangerous curve. In addition there were road constructions with no road markings to alert road-users of any possible danger.

[14] Concerning the smell of alcohol, Mr Nortier submitted that the mere fact that the respondent smelt of alcohol does not necessarily mean that his mental faculties and ability to drive a vehicle was so seriously affected that he was not fit to drive. He contended that because none of the two police officers witnessed the respondent driving the vehicle they could not testify regarding the manner in which the vehicle was driven. In addition he submitted that the police officers should have made more enquiries to determine the respondent's level of drunkenness. He suggested that the police could have

asked him to stand on one leg, asked him to walk, spoken to him to determine if his speech was slurred or they could have checked if his eyes were bloodshot. In the absence of such further indications of drunkenness, Mr Nortier argued that the mere evidence of the smell of alcohol alone is hardly sufficient to sustain an inference of drunkenness.

[15] The respondent alleged that it was Eben who was driving his van when it veered off the road. The second appellant denied that the respondent ever mentioned Eben to him. However, on the other hand Nel testified that the respondent's son told her that it was his father who was driving. Nel confirmed that the respondent told her about Eben. It should be clear that as the respondent never said anything to the second appellant about Eben, he could not have formed a suspicion that the respondent was lying about who drove the vehicle in an attempt to avoid being arrested for drunken driving.

[16] Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 provides that:

'40 Arrest by peace officer without warrant

(1) ... A peace officer may without warrant arrest any person—

(b) whom he reasonably suspects of having committed an offence referred in Schedule 1, other than the offence of escaping from lawful custody.'

[17] It should be clear from s 40(1)(b) that the following are the essential jurisdictional facts which have to be present to justify an arrest without a warrant:

- (a) the arresting officer must be a peace officer;
- (b) the arresting officer must entertain a suspicion;
- (c) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and
- (d) the suspicion must be based on reasonable grounds.

See *Duncan v Minister of Law & Order* 1986 (2) SA 805 (A) at 818G-H; *Minister of Safety & Security v Sekhoto & another* 2011 (1) SACR 315 (SCA)

para 6.

The real dispute in this case revolves around the question whether the requirements of paragraph (d) above relating to the reasonableness of the suspicion, have been met.

[18] Based on the facts of this case the key question that merits consideration, is whether the mere smell of alcohol was sufficient to give rise to a reasonable suspicion on part of the second appellant that the respondent was under the influence of intoxicating liquor and that for that reason he could not drive a vehicle.

[19] It is well-established that the onus rests on the arresting officer to prove the lawfulness of the arrest. This is so because as Rabie CJ stated in *Minister of Law & Order & others v Hurley & another* 1986 (3) SA 568 (A) at 589E-F: 'An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the *onus* of proving that his action was justified in law.'

[20] It is furthermore trite that the reasonableness of the suspicion of any arresting officer acting under s 40(1)(b) must be approached objectively. The question is whether any reasonable person, confronted with the same set of facts, would form a suspicion that a person has committed a Schedule 1 offence. *M v Minister of Safety & Security* 2009 (2) SACR 291 (GSJ).

[21] At the risk of repetition the only evidence on which the second appellant decided to arrest the respondent, is the fact that he smelt of alcohol and that his vehicle had left the road and landed in a ditch. There is no evidence that the respondent was unsteady on his feet, that his speech was slurred, that he could not walk in a straight line or that his eyes were bloodshot. These are the well-known indications of a person who is under the

influence of alcohol.

[22] On the contrary, the respondent behaved like a person in full control of his faculties. When he saw their vehicle he ran towards them and stopped them. He used a torch light to flag them down. Furthermore, when the respondent requested that they drive him to his home to fetch his other van, he spoke in a friendly and coherent manner. All these actions indicated that the respondent was in full control of his senses.

[23] To my mind to conclude that the respondent was under the influence of alcohol based on the mere fact that he smelt lightly of alcohol, is more of a quantum leap in logic. It follows in my view that the second appellant's suspicion was not based on reasonable grounds and therefore that the respondent's arrest and detention were unlawful.

[24] I now wish to deal with quantum. This matter has serious aggravating features. The respondent is a police officer, a sergeant of some 16 years' standing, with both the second appellant and Nel being his subordinates. They were all stationed at the same police station. The manner in which he was physically manhandled and thrown into the police van was truly demeaning. This happened in front of his son and his commanding officer. Whilst at the charge office, he was taunted and ridiculed in the presence of junior officers. The fact that some police officers were asking who was going to have the privilege of taking the respondent to the cells makes the whole arrest and detention even more demeaning. Clearly his dignity and reputation was gravely impaired. He spent four and a half hours in detention for no good reason. I am unable to find any misdirection in the award made by the court below which warrants any interference by this Court.

[25] In the circumstances the appeal is dismissed with costs.

L O Bosielo
Judge of Appeal

APPEARANCES:

For Appellant:

A Schippers SC (with him S O'Brien)

Instructed by:
State Attorney, Cape Town
State Attorney, Bloemfontein

For Respondent:

LR Nortier

Instructed by:
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