

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)**

**NOT REPORTABLE
Case no: CA25/2023**

In the matter between:

SINDISO MASWANA

Appellant

and

MINISTER OF POLICE

Respondent

FULL COURT APPEAL JUDGMENT

Govindjee J

Background

[1] The appellant was arrested without a warrant of arrest and charged with robbery some seven months after an incident at the Nozukile Spar in Peddie ('the Spar'). The appellant was employed as a forklift driver at the Spar at the time of the incident. Charges against him were subsequently withdrawn. A damages claim for unlawful arrest and detention was dismissed with costs by the court *a quo*. The grounds of appeal include various challenges regarding the assessment of the evidence presented during trial, particularly the findings that the arresting officer entertained a reasonable suspicion prior to arrest, properly exercised his discretion in proceeding with the arrest and lawfully detained the appellant.

Where and when did the arrest take place?

[2] The appellant was arrested by Sergeant Booi, the investigating officer. Sergeant Booi's involvement with the matter dated back to 1 May 2017. The evidence as to the incident itself was that a security guard was pointed at with a firearm and tied up, prior to three safes being bombed in the store's strong room. The shop was ransacked and cash in the amount of R300 000,00 was taken. During the course of the robbery, police officers situated close to the store had heard the explosions and arrived at the scene. The police exchanged fire with the robbers, who were attempting to escape and one police official was shot. Approximately 35 cartridges were collected inside the Spar after the incident.

[3] Some seven months later, an informer contacted Sergeant Booi and specifically mentioned that a person known as 'Kwalo' was involved in the robbery, explaining that he was employed at the Spar that had been robbed as a 'Hyster' forklift driver. Sergeant Booi therefore proceeded to Peddie to identify 'Kwalo' and talk to him. His enquiries led him to the appellant, as the person who drove the Hyster. Other employees confirmed that the appellant's nickname was 'Kwalo'. The risk manager therefore called the appellant to have a discussion with Sergeant Booi. The appellant did so voluntarily.

[4] Sergeant Booi explained that it was normal practice to interview a person outside their comfort zone, and that no arrest took place at the Spar itself. The court *a quo* accepted that the plaintiff had been arrested in Peddie, and not in East London as maintained by Sergeant Booi. That finding is unchallenged on appeal. The court *a quo* nonetheless accepted the crux of Sergeant Booi's evidence as credible, finding only that he had not been candid in maintaining that the arrest occurred in East London.¹

¹ To quote from the judgment of the court *a quo*: '...he entertained the suspicion at Peddie as a result of which he decided to arrest the plaintiff. The objective facts of this case demonstrate that Booi had reasonable grounds for the suspicion in Peddie hence he decided to arrest the plaintiff. He watched a CCTV camera in Peddie where he saw the plaintiff. He questioned him and was told about Eddie and his visit to Peddie. He saw the step ladder and questioned the plaintiff about it and could not get satisfactory answers. Furthermore, at the pre-trial conference, the defendant agreed that the plaintiff was arrested at Spar after he had made a "confession".'

[5] Sergeant Booï's insistence that the arrest only occurred in East London, coupled with the manner of his testimony, which frustrated the trial court, may easily obfuscate the proper sequence of events. It is apparent that the trial court accepted that the arrest occurred after the appellant was questioned by Sergeant Booï and admitted some knowledge of the incident. The first issue to be determined is whether this was indeed the case, or whether the arrest occurred prior to this interview.

[6] The facts of the matter emerge from various extracts of the record, quoted below. Sergeant Booï's testimony must be considered in its entirety together with the evidence of the appellant.

[7] In response to the question whether the arrest occurred at the Spar in Peddie, Sergeant Booï responded as follows:

'Mr Booï: I spoke with him and when I spoke with him, and I explained to him that the reason for my visit here is to talk to you about the robbery, of which Ms Maswana said to me that he knows about this thing and then I said to him okay, it is fine, I already asked Mr Gronewald to borrow me you for a short time so that we can go and talk about it. This is what happened...Even though he said to me yes I know about this, then I said to him let us go, so at that time it was 50/50, because I needed to know what he was going to say about the actual crime...

Mr Ndamase: Mr Booï, when you were at Spar talking to Maswana, did you suspect that he had committed the crime?

Mr Booï: I said at that point there was nothing ... I told him that I am here because of the robbery that occurred here on this day and so on of which he knew and he appeared to know about everything and I said to him that is fine, then I am already given a permission to go with you ... at that point I did not have a reasonable suspicion ...'

[8] Sergeant Booï added the following during re-examination:

'When I spoke to Mr Sindiso Maswana, being given permission to go with him, we all left, he was not handcuffed M'Lord ... We were walking next to each other into the vehicle and my partner and we went to Peddie SAPS and I could not leave him in the vehicle and I said let us go in ...

[9] The version put on behalf of the appellant was as follows:

‘... on that date of 12 December in 2017 you arrived at Spar and that is where he was arrested. He says from there he was taken to Peddie Police Station. At Peddie Police Station he was interviewed about the robbery at Spar and asked specifically, you came and asked him about the gentleman called Mahoyi, whom he did not know. He says that he told you that he knows nothing about the crime that you are asking him about, the robbery.’

[10] While that may have been his evidence in chief, the court *a quo* correctly determined that the appellant's version, particularly as it emerged during cross-examination, was at odds with the version put on his behalf. There are at least two reasons for this. Firstly, the appellant readily conceded that he had voluntarily agreed to accompany Sergeant Booï for questioning. Sergeant Booï had made this request upon arrival at Spar and, as he testified, there was no real suspicion and no reason to arrest the appellant at that stage. Based on this evidence it cannot be said that the arrest occurred at the Spar prior to any proper interview. The appellant left with Sergeant Booï for questioning voluntarily, Sergeant Booï having indicated that they would proceed ‘to the nearest police station’.

[11] Secondly, the appellant, on his own version, disclosed the following information during the questioning that followed:

‘Mr Mayekiso Did he question you in Peddie, at the Police Station or as you were driving?

Mr Maswana He asked me at Peddie.

Mr Mayekiso And then as he was asking you, *did you mention anything about Eddie*, in your answer to his question?

Mr Maswana *No, I never did so*, he asked me about Mahoyi, then I did not know Mahoyi, then it is then he told me that when I was not knowing Mahoyi, I'll know him because he was taking me to East London.’

...

Mr Mayekiso: ... Then, *this name of Eddie came up from you as Mr Booï was interrogating you* about the pictures that were taken by the camera at

the shop. The name of Eddie came as you were being interrogated by Mr Booie about the pictures that were taken by camera.

Mr Maswana: Yes, *that is correct.*

Mr Mayekiso: At the time in which Mr Booie was interrogating you, were you in East London when he interrogated you about those pictures?

Mr Maswana We were at Peddie.

...

Mr Mayekiso *You told Mr Booie about Eddie whilst you were still at the Peddie Police Station being interrogated.* Is that so?

Mr Maswana Yes.

Mr Mayekiso Did you indicate to Mr Booie, that you suspect that Eddie might have been involved in the housebreaking and robbery that took place at Spar?

Mr Maswana No, I couldn't, M'Lord, because what was shown there, was Eddie being inside of the motor vehicle, nothing indicated that Eddie was there with the intentions of doing burglary at Spar.

Mr Mayekiso After that, you left Peddie with Mr Booie to East London, is that so, sir?

Mr Maswana: Yes, that's correct ... He did not indicate to me that I was taken to East London for interrogation but he said to me that I will tell the truth [in East London] ... *By the time we were going to East London, I was handcuffed and the phone was taken from me ... We lastly talked with each other at Peddie*, when we arrived in East London, he never talked to me again he was just talking with his commander.' (Own emphasis.)

[12] Aspects of Sergeant Booie's recollection of the contents of the interview are extracted, below. For present purposes, considering the evidence of both Sergeant Booie and the plaintiff, what appears to be clear is that the decision to arrest was taken only after the plaintiff, when confronted, indicated at least some knowledge of the events in question. The trial court was accordingly correct in assessing that the arrest occurred after Sergeant Booie's questioning. It must be accepted that this occurred at the Peddie Police Station, and not at the Spar itself.

A reasonable suspicion

[13] The second issue to be determined is whether there could be said to be a reasonable suspicion that the appellant had committed an offence referred to in schedule 1 of the Criminal Procedure Act, 1977, ('the CPA') prior to arrest.

[14] Sergeant Booi's evidence was that his interview with the appellant lasted approximately an hour. The appellant admitted having knowledge of the robbery prior to its occurrence. He had not reported this information because he was afraid of the men involved. When asked who was responsible, he mentioned the name 'Eddie'. He also explained his connection with Eddie. They were friends, had previously lived together around the Garden Route area and maintained telephonic contact. The appellant told Sergeant Booi that Eddie had made enquiries about his workplace, including where money was kept on site. Eddie wanted 'to come and check the situation himself with his friends'. The appellant tried to explain to Sergeant Booi that he had inadvertently given relevant information about Spar to Eddie. The appellant also told Sergeant Booi that he had joined Eddie and six or seven of Eddie's friends for drinks on the evening in question, and that they proceeded together in the direction of Spar. The appellant specifically pointed out the Spar to Eddie and his friends, before waiting in a nearby shebeen. He heard the loud bang and 'he knew exactly that these guys they are robbing the store. That is what he told me.'

[15] According to Sergeant Booi, this information emerged after the appellant was advised that a source had informed the police about his involvement and questioned about leaving a step ladder outside the store. It was during the course of this questioning, including the appellant's explanation of the extent of his involvement, that Sergeant Booi exercised his discretion to arrest the appellant. He subsequently asked him if he wished to make a formal statement and arranged for Captain Alexander to note the supposed confession. The gist of this evidence is supported by the contents of a written statement made on the day of the arrest, as well as the evidence of Captain Alexander.

[16] Sergeant Booi explained his reason to arrest the appellant as follows:
'When I spoke with him I realised that there are so many things that he could not answer. One, the reason why he left the step ladder there. Two, the time that he left

from his place to show those people at Spar. He still had time to make a phone call, because his manager was staying not far from his house ...So he had ample time to make a call to alert people, the police station was next to him. So at that time I decided that this guy was involved and he is the person that gave out information as he confirmed that. So at that time I decided to place him under arrest.'

[17] He later added the following:

'Why M'Lord, because if we looking to the seriousness of this crime that occurred at Peddie. Two, he had ample time to report the matter before and after the crime, if he was really like scared of this Eddie guy. Three, before he made a confession which was noted down by Captain Alexander then he already told me exactly what he told Captain Alexander. So I had a reason to arrest him.'

[18] The point that what was contained in the so-called confession had already been said to Sergeant Booi was repeated more than once during cross-examination. Sergeant Booi also emphasised the seriousness of the alleged offence in order to explain why other means of bringing the appellant before court were not considered. Sergeant Booi explained that he had not noted all the details of his conversation with the appellant in his statement. This was unnecessary in his view because the appellant was in any event prepared to make a sworn statement pertaining to his involvement.

[19] Although he was mistaken in recalling the arrest to have occurred in East London, he consistently explained that there was no reason for him to arrest the appellant at the Spar itself. Leaving aside the aspect of the place of the arrest, Sergeant Booi's evidence provides a cogent explanation of the sequence of events, and is supported by the contents of the statement made to Captain Alexander the following day. The contents of the statement taken by Captain Alexander were not seriously disputed by the appellant during his testimony. The appellant denied that the statement made to Captain Alexander constituted a confession, but never disputed the contents of that statement, contrary to what was put to Sergeant Booi. That statement supports Sergeant Booi's evidence as to the extent of his interview with the appellant prior to arrest. This despite various details not being included in his written statement at the time.

[20] What emerges from the appellant's responses during cross-examination is that he was not necessarily candid about his own suspicions of Eddie's movements and involvement in the incident during initial questioning at the Peddie Police Station. Considering his own testimony, the appellant named Eddie when talking to Sergeant Booi in Peddie, having been shown pictures seemingly taken by a camera placed at the scene of the crime. At least one of the pictures showed Eddie, a person known to the appellant. On his own version, however, he initially withheld information and did not make a full disclosure about his interactions with Eddie. This appears to have been purely because he assessed the evidence shown to him at the police station as being inconclusive.

[21] This reading of the evidence accords with the crux of the testimony of Sergeant Booi, and the finding of the court *a quo*, that the arrest occurred only after this interaction between Sergeant Booi and the appellant, during which time Sergeant Booi's suspicions were aroused. While Sergeant Booi persistently erred in respect of the place of arrest, this is insufficient on its own to result in the complete disregard of the balance of his evidence, as argued by Mr Kotzé, counsel for the appellant. The totality of the evidence supports the sequence of events that Sergeant Booi attempted to explain. It also accords with the essence of the pleaded case, which differentiates between the 'formal confession' and the statement made to Sergeant Booi, and the pre-trial minute. It may be added that the appellant's lack of candour continued during trial. His initial response during cross-examination was only to refer to Sergeant Booi asking him about Mahoyi, in accordance with the version put on his behalf. In fact, as is apparent from his later testimony, he engaged with Sergeant Booi about Eddie when shown the pictures and was arrested after this interaction when Sergeant Booi suspected that he was withholding information. Sergeant Booi then decided that the appellant should be taken to East London in the hope that he would tell the truth there. The appellant was handcuffed and his phone confiscated.

Detention

[22] Once the appellant had been arrested, and his notice of rights communicated, he was transported to East London for detention. Sergeant Booï's written statement confirms this.² The appellant was charged with business robbery and attempted murder after Sergeant Booï received the so-called confession statement from Captain Alexander.

[23] As for the possibility of releasing the appellant after his arrest, Sergeant Booï explained that the alleged crimes were serious, particularly because firearms and explosives were used, a police official had been shot and a large amount of money taken. A schedule 6 offence was suspected, so that releasing the appellant prior to his first appearance in court would have been inappropriate.

Analysis

[24] Appeal courts are reluctant to upset the factual findings of a trial judge. The authorities confirm that even in drawing inferences the trial court may be in a better position than the appellate court, being more able to estimate what is probable or improbable in relation to the witnesses observed at trial. Sometimes, however, the appellate court may be in as good a position as the trial judge to draw inferences, where they are either drawn from admitted facts or from the facts as found by the trial judge.³ Absent misdirection of fact by the trial judge, the presumption is that his conclusion is correct, an appeal court only reversing it when convinced that it is wrong.⁴ It is trite that an appeal court should not anxiously seek to discover reasons adverse to the conclusions of the trial judge.

² As an aside, the manner of formulation of that statement may also explain Sergeant Booï's persistence that the arrest occurred only in East London.

³ See *Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd and Another* 2002 (4) SA 408 (SCA) para 24: although courts of appeal are slow to disturb findings of credibility they generally have greater liberty to do so where a finding of fact does not essentially depend on the personal impression made by a witness' demeanour but predominantly upon inferences from other facts and upon probabilities. In such a case a court of appeal, with the benefit of an overall conspectus of the full record, may often be in a better position to draw inferences, particularly in regard to secondary facts.

⁴ *R v Dhlumayo and Another* [1948] 2 All SA 566 (A); 1948 (2) SA 677 (A). There may be a misdirection of fact by the trial judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities. The appeal court is then at large to disregard the findings on fact in whole or in part according to the nature of the misdirection and the circumstances of the case, and to come to its own conclusion on the matter.

[25] The evidence that emerged during the cross-examination of the appellant accords with much of the respondent's case. Consequently, the versions of Sergeant Booï and the appellant cannot be said to be irreconcilable in respect of many of the key issues. The location of their main interview is the notable exception, the court *a quo* correctly accepting the appellant's version in this regard.

[26] When considering all the evidence, it cannot be said that the trial court misdirected itself in its assessment of the material facts pertinent to the appellant's arrest and detention. The court *a quo*'s conclusions in respect of the arrest and detention are, therefore, presumed to be correct. In particular, the court *a quo* correctly accepted the crux of the respondent's evidence, leaving aside the issue of the place of the arrest. Although the examples provided by the court *a quo* may be questioned, the learned judge rightly assessed the version of the appellant as leaving much to be desired. In this respect, the impression created during the appellant's evidence-in-chief was that he was arrested on the spot at Spar without reason. His phone was confiscated and he was taken to the Peddie Police Station. There he was asked about Mahoyi, a person unknown to him. He also conveyed the impression that he knew nothing about the incident itself, having simply accompanied Eddie and his friends during a night on the town before becoming separated from them. His version changed drastically, and in material respects, during cross-examination, as indicated above.

[27] Wrongful arrest and detention cases must each be decided on their own facts.⁵ The test is not to be applied in a vacuum. It is subject to the facts and the context, which may be crucial.⁶ The factual context will be provided by matters such as the nature of the crime, the elements thereof, the source and the nature of the information on which the suspicion is said to be based, and its significance in supporting the suspicion entertained by the arresting officer.⁷

⁵ *Minister of Safety and Security v Van Niekerk* 2008 (1) SACR 56 (CC); 2007 (10) BCLR 1102 (CC) paras 17, 20.

⁶ *Ibid.*

⁷ *Minister of Police v Dunjana and Others* [2023] 1 All SA 180 (ECG) ('*Dunjana*') para 18. In *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (E) ('*Mabona*'), the reasonableness of the suspicion of the arresting officer was determined in the context of the fact that

Was there a reasonable suspicion?

[28] A suspicion, by definition, means the absence of certainty.⁸ In its ordinary meaning it is a state of conjecture or surmise where proof is lacking. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage.⁹

[29] An arrestor's grounds for suspicion must be reasonable from an objective point of view.¹⁰ The circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable person to form the suspicion that the arrestee had committed a first schedule offence.¹¹ The reasonableness requirement extends inter alia to the reliability or accuracy of the information upon which an arrest is founded, including the quality and ambit thereof.¹²

[30] It has also been held that '[t]he standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unparticularised suspicion. It must be based on specific and articulable facts or information ... [and] based on credible and trustworthy information.'¹³

[31] The SCA has cited the following paragraph of the judgment of Jones J, in this division, with approval:¹⁴

the source of the information, on which the officer based his suspicion, was an anonymous informer – a fact that would have caused a reasonable police officer to be more cautious.

⁸ *Dunjana* above n 7 para 17.

⁹ *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) ('*Duncan*') at 819I; *Minister of Law and Order v Kader* 1991 (1) SA 41 (A) at 50H; *Powell NO and Others v Van der Merwe NO and Others* 2005 (5) SA 62 (SCA) ('*Powell NO*') para 37, citing *Shabaan Bin Hussien & Others v Chong Kam & Another* [1969] 3 All ER 1626 (PC) at 1630C–D.

¹⁰ *Duncan* above n 9 at 814D–F. The suspicion need not be based on information that would subsequently be admissible in a court of law: *Biyela v The Minister of Police* [2022] ZASCA 36 ('*Biyela*') para 33.

¹¹ *Mananga and Others v Minister of Police* [2021] ZASCA 71 ('*Mananga*') para 20.

¹² *Biyela* above n 10 paras 23, 24.

¹³ *Biyela* above n 10 paras 34, 35. A suspicion might be reasonable even if there is insufficient evidence for a prima facie case against the arrestee: *Duncan* above n 9 at 819I – 820B.

¹⁴ *Mabona* above n 7 at 658E–H as cited in *Brits v Minister of Police and Another* [2021] ZASCA 161 para 20.

'The test of whether a suspicion is reasonably entertained within the meaning of s 40(1)(b) is objective ... Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of [the schedule 1 offence] ... It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based on solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.'

(References omitted).

[32] This does not imply that the quality of the information upon which the arrestor acts must be analysed and assessed and that acting on the information, the quality of which has not been subjected to scrutiny, will render an arrest unlawful.¹⁵ The reasonable person is the person of ordinary intelligence, knowledge and prudence. A mistake of fact is not reasonable if it is due to lack of such knowledge and intelligence as is possessed by an ordinary person, or if it is due to such carelessness, inattention and so forth, as an ordinary person would not have exhibited.¹⁶

[33] Police officers are required to have regard to the facts and circumstances at their disposal and, where reasonably possible, to satisfy themselves of the merits thereof.¹⁷ If, in a particular case, the quality of the information at the disposal of the police officer is so tenuous or conflicting that it cannot objectively sustain a suspicion

¹⁵ *Dunjana* above n 7 para 21.

¹⁶ *R v Mbombela* 1933 AD 269 at 272.

¹⁷ *Mananga* above n 11 para 16.

as envisaged in s 40(1)(b), the police officer may first have to make further enquiries before an arrest is effected.¹⁸ The focus of the enquiry is the information at the disposal of the arresting officer, which information is to be measured against the standard of reasonableness, as opposed to the reasonableness of the conduct of the police officer concerned.¹⁹

[34] Applying these considerations to the facts at hand, and bearing in mind the various reasons advanced by Sergeant Booï for effecting the arrest, quoted above, I am of the view that there were objectively reasonable grounds to suspect the appellant of committing a schedule 1 offence. While mindful that the section authorises drastic, invasive action, Sergeant Booï's suspicion cannot be said to be 'far-fetched, misguided or patently mistaken'.²⁰ It was based on a range of specific and articulable facts. Crucially, the information relied upon included significant details conveyed by the appellant himself. The fact that that information may not constitute an actual confession is, in these circumstances and for purposes of this enquiry, immaterial. The section only requires suspicion on solid grounds, and not certainty as to guilt. On the probabilities, Sergeant Booï's suspicion was reasonably entertained. A reasonable person in possession of similar information would have considered there to be sufficient grounds to suspect that the appellant had committed a schedule 1 offence.

Was the discretion exercised properly?

[35] The arresting officer nonetheless enjoys a discretion whether to arrest a person, to be exercised in an objectively rational and non-arbitrary way.²¹ A court will not interfere with the result of the exercise of a discretion that has been bona fide exercised or expressed, the arresting officer duly and honestly applying themselves

¹⁸ *Dunjana* above n 7 para 20. A resultant finding that the police officer could not reasonably have formed a suspicion, as required, is because the information at his disposal was insufficient to sustain such a suspicion, and not because there was a failure to investigate information given by an arrestee.

¹⁹ *Dunjana* above n 7 para 21.

²⁰ *Powell NO* above n 9 para 38.

²¹ The objective enquiry is to determine whether the decision was rationally related to the purpose for which the power was given: *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte Application of the President of the RSA* 2000 (2) SA 674; 2000 (3) BCLR 241 (CC) paras 85–86 as cited in *The Minister of Safety and Security v Sekhoto and Another* [2010] ZASCA 141 ('*Sekhoto*') para 36.

to the question left to their discretion.²² Even a discretion exercised in a manner deemed sub-optimal by the court will not breach the standard:

‘A number of choices may be open ... all of which may fall within the range of rationality. The standard is not perfection, or even the optimum, judged from the vantage of hindsight and so long as the discretion is exercised within this range, the standard is not breached.’²³

[36] The factors to be weighed in exercising the discretion must be gleaned from a consideration of the CPA as a whole, including consideration that an arrest is one step in the process of bringing a suspect to justice, rather than isolated focus on s 40.²⁴

[37] Although the purpose of arrest is to bring the suspect to trial, the arrestor’s role in that process is limited. In cases of serious crime, including those crimes listed in schedule 1, a peace officer could seldom be criticised for arresting a suspect for that purpose.²⁵ Again, the enquiry is fact specific and it is neither prudent nor practical to formulate a general rule.²⁶

[38] Considering these principles, the plaintiff has failed to prove that the discretion was exercised in an improper manner.²⁷ In particular, and as explained by Sergeant Booi, the seriousness of the offences in question justified the exercise of discretion to proceed to arrest the appellant without a warrant. The court *a quo* cannot be criticised for arriving at this conclusion.

The detention

²² *Shidiack v Union Government (Minister of the Interior)* 1912 AD 642 at 651–652, as cited in *Sekhoto* above n 21 paras 34–36.

²³ *Sekhoto* above n 21 para 39.

²⁴ *Sekhoto* above n 21 para 40 and following.

²⁵ *Sekhoto* above n 21 para 44: ‘It is sufficient to say that the mere nature of the offences of which the respondents were suspected in this case – which ordinarily attract sentences of imprisonment and are capable of attracting sentences of imprisonment for 15 years – clearly justified their arrest for the purpose of enabling a court to exercise its discretion as to whether they should be detained or released and if so on what conditions, pending their trial.’

²⁶ *MR v Minister of Safety and Security* 2016 (2) SACR 540 (CC) para 42.

²⁷ *Duncan* above n 9 at 819B–D; *Sekhoto* above n 21 para 49. Also see *Banda v Minister of Police* NO [2021] JOL 50674 (ECG) para 51 and following.

[39] The circumstances under which an arrested person may be released from custody before their first court appearance are circumscribed by the CPA. Various sections fetter the discretion of the police and render it extremely difficult for the police to grant bail in terms of s 59 of the CPA, considering the listing of the alleged offences in question as scheduled offences. Sergeant Booi's testimony in respect of detention accords with this. Again, the emphasis placed on the seriousness of the alleged offences was not misplaced. That being the case, I am satisfied that the respondent also discharged the onus resting on them to justify the appellant's detention,²⁸ so that the appeal must be dismissed.

Costs

[40] The case turns on the facts and there is no impediment to costs following the result.

Order

[41] The appeal is dismissed with costs.

A GOVINDJEE
JUDGE OF THE HIGH COURT

I agree.

J G A LAING
JUDGE OF THE HIGH COURT

I agree.

M S DUNYWA
ACTING JUDGE OF THE HIGH COURT

²⁸ See *Banda* above n 27 para 61 and following.

Heard: 25 March 2024

Delivered: 16 April 2024

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