

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA DIVISION, MBOMBELA
(MAIN SEAT)

CASE NO: A33/2021

1. REPORTABLE: ~~YES~~/ NO
2. OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
3. REVISED.

24 APRIL 2022

[SIGNED]

DATE

SIGNATURE

In the matter between:

SENZO THAMSANQA DUBE

Appellant

and

MINISTER OF POLICE

Respondent

JUDGMENT

Coram: Ratshibvumo J et Roelofse AJ

Roelofse AJ:

[1] The appellant instituted an action for unlawful arrest against the respondent in the Regional Division of Mpumalanga at Mbombela. The learned magistrate dismissed the appellant's claim with costs on 11 October 2020¹ after having heard the evidence of the police officer who arrested the appellant and the appellant.

[2] The appellant says that the court *a quo* has misdirected itself in that it erred in law when it ruled that the respondent has discharged the onus upon him on a balance of probabilities that the arrest of the appellant was lawful; erred in law by dismissing the appellant's claim on the ground that the arrest of the appellant by the respondent was based on a reasonable suspicion. For the remainder of the grounds of appeal, the appellant relies on purported factual miss-directions which led to factual findings that were wrong. It is trite that a court of appeal will only interfere in the factual findings of a lower court if the factual findings were affected by material misdirection or if the court of appeal is convinced that the factual findings were wrong. The evidence that was heard by the court *a quo* and the findings it made must therefore be interrogated in order to determine whether there was any material misdirection by the learned magistrate.

The law

¹ The notice of appeal seeks to appeal the entire order and judgment of the court *a quo* dated, according to the notice of appeal, 10 November 2020. The record of the proceedings record that the proceedings were conducted on 11 October 2020 where after judgment was delivered on the same day. I accept that the judgment date is incorrectly reflected in the notice of appeal. Nothing turns on this issue.

[3] An arrest without a warrant is lawful if (a) the arrest was effected by a peace officer; (b) at the time of the arrest the arresting officer had a reasonable belief that the plaintiff had committed a schedule 1 offence.² The defendant has to show that; (c) the arresting officer entertained a suspicion; (d) that the suspicion was reasonable; (e) and that the arresting officer exercised the discretion to arrest properly.³

[4] It was common cause that the appellant was arrested without a warrant by a peace officer. What the respondent had to establish on a balance of probability was that the arresting officer entertained a suspicion that the appellant committed the robbery; that the suspicion rested on reasonable grounds and that the arresting officer has exercised his discretion properly when the appellant was arrested. The onus proving the aforesaid was upon the respondent.

[5] This is what was said in *J E Mahlangu and Another v Minister of Police* [2021] ZACC 10 at para. 31:

‘[31] This approach was affirmed in *Zealand* in which – as in the instant matter – the focus was on detention. There this Court held that:

² Section 40(1)(b) of the Criminal Procedure Act 51 of 1977. Subsections 40(1)(a) and (c) to (q) mentions the other circumstances under which a person may be arrested without a warrant. Those circumstances are not relevant for purposes of this judgment. A schedule 1 offence includes amongst others, robbery.

³ See: *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) with regards to the jurisdictional factors in under (b), (c) and (d). See: *Louw and Another v Minister of Safety and Security and Others* 2006 (2) SACR 178 (T) with regards to the jurisdictional fact under (e). Also see: *Minister of Safety and Security v Swart* (194/11) [2012] ZA SCA 16 (22 March 2012).

“It has long been firmly established in our common law that every interference with physical liberty is prima facie unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification. In *Minister van Wet en Orde v Matshoba*, the Supreme Court of Appeal again affirmed that principle, and then went on to consider exactly what must be averred by an applicant complaining of unlawful detention. In the absence of any significant South African authority, Grosskopf JA found the law concerning the rei vindicatio a useful analogy. The simple averment of the plaintiff’s ownership and the fact that his or her property is held by the defendant was sufficient in such cases. This led that Court to conclude that, since the common law right to personal freedom was far more fundamental than ownership, it must be sufficient for a plaintiff who is in detention simply to plead that he or she is being held by the defendant. The onus of justifying the detention then rests on the defendant. There can be no doubt that this reasoning applies with equal, if not greater, force under the Constitution.”³⁶ (Footnotes omitted.)

[32] It follows that in a claim based on the interference with the constitutional right not to be deprived of one’s physical liberty, all that the plaintiff has to establish is that an interference has occurred. Once this has been established, the deprivation is prima facie unlawful and the defendant bears an onus to prove that there was a justification for the interference.’

[6] Whether the suspicion held by an arresting officer was reasonable was addressed in *Minister of Safety and Security v Magagula* (991/2016) [2017] ZASCA 103 (6 September 2017):

‘[8] In this court it was common cause that the arresting officer was Inspector Nel. The issue to be decided is whether or not Inspector Nel had a reasonable suspicion that the respondent had committed the offence of murder. If he had held such a suspicion then the

arrest would have been lawful by reason of the provisions of section 40(1)(b) of the Criminal Procedure Act 51 of 1977.

[9] In *Shabaan Bin Hussein and Others v Chong Fook Kam & another* it was held that a suspicion ‘in its ordinary meaning is a state of conjecture or surmise where proof is lacking; ‘I suspect but I cannot prove’. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end.

[10] The suspicion of the arresting officer is reasonably held if, on an objective approach, the arresting officer has reasonable grounds for his suspicion.[3] Once the required suspicion exists an arresting officer will be vested with a discretion to arrest, which he must exercise rationally.’ [End notes omitted].

Evidence before the court *a quo*

[7] Lieutenant-Colonel SS Lukhele testified that he attended to a scene where a robbery was committed. A person was arrested at the scene. The person was suspected to have been the driver of a getaway vehicle. The person named the appellant and other persons as co-perpetrators of the robbery. The person said that the appellant was the driver of a second getaway vehicle.

[8] A cellphone was found in the person’s possession. The phone record revealed that there was communication between that person and the appellant on the day of the robbery. Also on the same day, the person took the police to the dwelling where the appellant lived with his parents. The appellant was not home when the police attended the dwelling.

[9] A month later, an informant told Lt-Col. Lukhele that the appellant was back at his residence. Lt-Col. Lukhele activated the tactical response team and went to the appellant's home. Upon arrival at the appellant's dwelling, Lt-Col. Lukhele saw that a window at the back of the dwelling was open and that the appellant was trying to escape through the open window. The appellant's motor vehicle was searched. A pair of gloves and a balaclava were found in the vehicle. Lt-Col. Lukhele testified that the gloves and the balaclava that was found in the appellant's vehicle were the same as those used during the robbery. The appellant tendered information about his involvement in the robbery. The appellant was taken to the Malelane Police Station in order to make a confession. Arrangements were made in order for the appellant to make the confession.

[10] The appellant testified that he was arrested at his residence. The appellant's version is that the police arrested him while he was coming out of his room. The appellant denied that he was arrested while fleeing through his window. The police also searched the appellant's room. The appellant confirmed that the police searched his vehicle but denied that gloves and a balaclava were found in his vehicle. The appellant testified that the matter was subsequently withdrawn against him in court.

[11] Upon this evidence the learned magistrate, amongst other things, found that, by volunteering a confession, the appellant placed himself on the scene of the robbery. The magistrate found that the arresting officer: *'.....cannot be faulted and the arrest, one can only say is based on reasonable grounds.'* The learned magistrate further said as follows: *"I am also satisfied that he is sufficiently linked to the commission of an offence. I am satisfied that the suspicion which was entertained by the arresting officer is based on reasonable grounds. And I am*

satisfied that the plaintiff failed on a balance of probability to prove the case against the Minister of Police on a balance of probability. And based on that finding the Court is satisfied that the action of the plaintiff is supposed to be dismissed.’

Discussion

[12] I should be immediately clear that the appellant’s first ground of appeal that “[T]he court erred in law by ruling that the Respondent discharged the onus upon him, on a balance of probabilities, that the arrest and detention was lawful and therefore justifiable.” is clearly wrong. From the extract of the judgment referred to in the preceding paragraph, is clear that the learned magistrate has found the appellant has failed to prove its case against the respondent on a balance of probability. Does the learned magistrate’s finding which clearly shows that the onus was thought to be on upon the appellant (which is clearly wrong) invalidate the proceedings to such an extent for it being a material misdirection? I think not because, on the evidence, properly considered, the claim had to fail even if the onus was applied correctly.

[13] Lt-Col. Lukhele was given the name of the appellant from a person who was arrested at the scene. A cell phone that was found with the person that was arrested at the scene of the robbery, showed that contact was made with the appellant on the day of the robbery. The person took Lt-Col. Lukhele to the appellant’s residence. When Lt-Col. Lukhele attended to the appellant’s residence, the appellant was not home and only returned a month later. The appellant wanted to escape his arrest. The appellant wanted to offer information over his involvement in the robbery. All of this shows objectively a reasonable suspicion that the appellant was involved in the

robbery. Therefore, there could be no doubt that the appellant's arrest followed from a reasonable suspicion- held by Lt-Col. Lukhele that the appellant was involved in the robbery.

[14] Despite the error committed by the court a quo in placing the onus on the respondent, in my view, the evidence has established each of the requirements for the appellant's arrest to be lawful. The appellant was identified as an accomplice by a person who was arrested at the scene of the robbery. The appellant was not at his residence when the police attended there the same night of the robbery. The police acted upon information that the appellant had returned to his home approximately a month later. The appellant wanted to evade his arrest when he attempted to flee through his bedroom window when the police arrived at his residence. The appellant indicated that he wanted to confess to the commission of the robbery.

[15] Even though the learned magistrate had misdirected himself in finding that the appellant had failed to prove his case, the manner in which the learned magistrate had evaluated the evidence shows no material misdirection and neither am I able to find that the learned magistrate was wrong in dismissing the claim. The outcome was correct.

[16] With regards to the other grounds of appeal which are directed at the factual findings by the learned magistrate, I am not prepared to interfere for the findings of the court a quo was correct.

In the premises, the following order is made:

The appeal is dismissed with costs.



Roelofse AJ

Acting Judge of the High Court

I agree.



Ratshibvumo J

DATE OF HEARING: 25 March 2022

DATE OF JUDGMENT: 25 April 2022

APPEARANCES:

FOR THE APPELLANT: MR. MP MASEKO
INSTRUCTED BY MP MASEKO INC
ATTORNEYS

FOR THE RESPONDENT: NO APPEARANCE