

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : A290/09

In the appeal between:

LAMBERTUS HENDRIK NIENABER

Appellant

and

THE MINISTER OF SAFETY & SECURITY

Respondent

CORAM: H.M. MUSI, JP *et* MOLEMELA, J *et* MTHEMBU, AJ

JUDGMENT BY: MOLEMELA, J

[1] I have had the benefit of reading the judgment of my brother Musi JP. Although I am in full agreement with his findings and reasoning pertaining to the issue as to who the arresting officer was, I am regrettably and with respect not in agreement with the reasoning and findings pertaining to the two remaining issues, *viz* (i) whether the arresting officer (Inspector Monyane) had a reasonable suspicion that the appellant was the culprit and (ii) whether the appellant's detention was justified in view of the alibi he had provided. In considering these two issues,

regard must be had to the jurisdictional facts which must exist before the power to arrest without a warrant can be invoked, as laid down in the case of **DUNCAN V MINISTER OF LAW AND ORDER 1986(2) SA 805 (A) at 818F-H.**

- [2] The complainant in this matter was interviewed by Insp Monyane and Insp Deyzel, respectively. The complainant's statement was taken down by insp Deyzel as she (insp Deyzel) had previously received training in obtaining statements related to sexual offences. According to insp Deyzel, insp Monyane was present when she was taking down the statement. This was vehemently denied by insp Monyane, who testified that he was not present as he was doing other duties at that stage. Both Inspector Deyzel and Inspector Monyane repeatedly stated that the decision for Inspector Monyane to arrest the suspect, was taken before Inspector Monyane left the police station. According to Inspector Deyzel, this decision was informed by the fact that the suspect's name and address were available from the computer after the complainant had provided them with the registration number letters as well as the colour

of the vehicle of her assailant. I will, at this stage already, express the view that it is dangerous to, without more, assume that the fact that a vehicle that is linked to the commission of an offence is registered in someone's name establishes reasonable grounds to suspect that the owner is the perpetrator of such an offence. Now, the real question here is whether the information at insp Monyane's disposal was sufficient to establish a reasonable suspicion. The salient features of his evidence will provide us with an answer.

[3] Insp Monyane testified as follows:

"I told them [the parents] that if the child said she is able to go and point out the place of the the child said she's able to go and point out the residential place of the culprit, I can just help them to go and arrest the culprit."

It is thus clear that he left the police station with the firm intent of arresting the owner of the vehicle. According to his evidence, he even arranged for backup from Inspector Pretorius before he left the police station. He however later testified that in addition to the above information, the

complainant had also informed him that she would be able to recognise her assailant if she saw him again. He was at pains to explain that he was directed to the appellant's place of residence by the complainant and not on the basis of the information obtained from the computer pertaining to the vehicle's owner.

- [4] It must be borne in mind that it is common cause that the complainant lived in the same neighbourhood as the appellant. Inspector Monyane testified that the complainant lived 50 m away from the appellant's place of residence. He further testified that the complainant informed him that she had passed by her assailant's place of residence several times prior to the incident and that on one occasion he even offered her an amount of R200,00 for sexual favours. The elaborate evidence of how the appellant's place of residence was reached at the instance of the complainant was therefore of no special significance considering that the complainant from the onset claimed to know the person who raped her, indicated that she could actually take the police to his house and actually

happened to live quite close to where he lived. I am of the view that the fact that she knew the registration number of the vehicle and its colour did not strengthen the allegations made against the appellant in any way. In my view, undue weight was attached to this aspect.

- [5] Courts have in the past laid down that an arresting officer must, *inter alia*, consider whether the offence could have been committed in the circumstances alleged and by the person to be arrested. It has also been stated that a reasonable man effecting an arrest will assess the quality of information at his disposal critically and will not accept it lightly or without checking it where it can be checked. See **NKAMBULE V MINISTER OF LAW AND ORDER 1993(1) SA 848 (T); SERIA v MINISTER OF SAFETY AND SECURITY AND OTHERS 2005 (5) SA 130 (C).**

- [6] In response to a question regarding his motivation for arresting the appellant, Inspector Monyane testified that

“..... because at that stage she was in a position to go and arrest the culprit. She was in a position to go and point out the place and she would also be able to show me the place and I was convinced that she is, I was convinced she was raped and she knows very well who is the culprit.” (my underlining for emphasis.)

Now, I wonder what convinced Inspector Monyane that the complainant was raped. There was evidence to the effect that the 15 year old complainant’s parents had, for the two days and nights during which she was missing, not reported her as missing as they had decided that they would rather wait for her to give an explanation concerning her absence on her return. Significantly, at the time that Inspector Monyane was purportedly convinced that the rape had taken place, the complainant had no visible physical injuries and had not even been taken for any medical examination. I am of the view that a suspicion of commission of schedule 1 offences based only on the afore-mentioned facts is simply not objectively sustainable. See **BENTLEY AND ANOTHER V MC PHERSON 1999 (3) SA 854 (EC)**. I accordingly disagree with my brother’s conclusion that there was “no doubt” that serious schedule 1

offences had been committed.

- [7] Inspector Monyane testified that the complainant's statement was taken down by Inspector Deyzel because she has received training in taking down statements related to sexual offences, yet he did not bother to read the statement taken by Inspector Deyzel before effecting the arrest. If he had done so, he would have picked up that the complainant estimated the appellant's age as 30 years, when he was in fact 58 years old. This valuable piece of information would no doubt have alerted him to the possibility of a mistaken identity. This is especially so when regard is paid to the fact that the appellant shared his home with his adult son who also happened to have access to the appellant's vehicle. As an aside, I will mention that both the appellant's and his son's DNA was forensically analysed and the results were negative. I state this quite mindful of the fact that the latter aspect is not a factor to be taken into account when assessing the reasonableness of insp Monyane's suspicion.

- [8] With regards to the discretion to arrest, it has indeed been held in a plethora of cases that where the circumstances do not justify the more drastic method of arrest, then the arrest would be unlawful. See **RALEKWA v MINISTER OF SAFETY AND SECURITY 2004 (1) SACR 131 (T)**. In the case of **MINISTER OF SAFETY AND SECURITY v SEKHOTO AND ANOTHER 2010 (1) SACR 388 (FB)** at 401 the full bench of this division had the following to say:

“Because deprivation of freedom is *prima facie* unlawful, there has never been doubt that the burden to prove lawful arrest in a court of law is on the defendant (arrestor) the arrestor bears the onus of proving that the arrest was justified in law The next question relates to the stage of arrest. When effecting an arrest, a police official must make basic enquiries to ensure that constitutional rights will not be infringed by an arrest. ... That entails, at the stage before arrest, to make enquiries whether arrest is necessary and whether the arrest will infringe upon the arrestees’ constitutional rights.” (my underlining for emphasis).

- [9] I would respectfully align myself with the view expressed in that case. After all, questioning a suspect before arresting him / her is not an onerous task and does not prejudice the

administration of justice in any way. Where the police are of the view that the most appropriate method of bringing a suspect before the courts is by way of an arrest, as opposed to a notice, summons or warning, they are in any event not compelled to effect the arrest without a warrant. They could still opt for obtaining a warrant of arrest as contemplated in section 43 of the Criminal Procedure Act 51 of 1977, instead of arresting such a suspect without an warrant. It is interesting to note that even in the pre-constitutional era, Schreiner, JA remarked as follows in the case of **TSOSE V MINISTER OF JUSTICE AND OTHERS 1951(3) SA 10 (A) H:**

“...What I have said must not be understood as conveying approval of the use of arrest where there is no urgency and the person to be charged has a fixed and known address; in such cases it is generally desirable that a summons should be used.”

- [10] In **OLIVIER V MINISTER OF SAFETY AND SECURITY AND ANOTHER 2009(3) SA 434 at 435 F** Horn J remarked as follows: “I am of the view that the time has arrived to state as a matter of law that, even if a crime which is listed in Schedule 1 of Act 51 of 1977 has allegedly been committed, and even if the arresting office believes on reasonable grounds that such a crime has indeed been committed, this in itself does not justify an arrest forthwith. An arrest, being as drastic an invasion of personal liberty as it is, must still be justifiable

according to the demands of the Bill of Rights”.

In the same case, the court remarked as follows on p 445 at paragraph F: “There is no doubt in my mind that a trained policeman would have little difficulty in assessing a situation like this, to decide when an arrest without a warrant would be proper and when not- this without having to make a value judgment.”

[11] In the case of **MINISTER OF SAFETY AND SECURITY v SEKHOTO AND ANOTHER**, *supra*, it was reiterated that in assessing the lawfulness of an arrest made without a warrant, the enquiry entails *inter alia* considering whether the arrestor appreciated that an arresting officer had a discretion to arrest without a warrant or not and whether he indeed applied such a discretion. *In casu*, it is not evident that Inspector Monyane was aware of this discretion, let alone him applying the discretion concerned.

[12] In the case of **LOUW AND ANOTHER v MINISTER OF SAFETY AND SECURITY AND OTHERS 2006 (2) SACR 178 (T)** at 184 b – c it was held that an arresting officer must investigate explanations offered by the suspect. *In casu* Inspector Monyane did not make any enquiries whatsoever

from the appellant. It was not disputed that immediately after the appellant was pointed out by the complainant, the appellant's constitutional rights were explained to him by insp Pretorius and he was then placed under arrest without any enquiries being directed to him. Shortly after the appellant's arrest, he was questioned by Inspector Deyzel and Captain Strydom. He informed them that he was impotent and even provided them with the name of his medical practitioner for verification of that fact. He informed them that he was at his place of employment when the incident allegedly took place. He provided them with the name of his supervisor and a colleague who gave him a lift to the workplace. The two people concerned were contacted and despite their verification of the appellant's alibi, he was detained.

- [13] Having examined the conduct of the police officers during the incident, I am not persuaded that any suspicion that Inspector Monyane or his colleagues had, rested on reasonable grounds. Even if I am wrong in arriving at this conclusion, this does not detract from the fact that the evidence does not show that insp

Monyane applied his discretion as to the method of bringing the appellant to court, i.e. whether to arrest the appellant or not. He hastily decided to arrest him forthwith. In my view, there was no justification for that action. With respect, I cannot agree with my brother that the information at Monyane's disposal marked the appellant as a danger to society. He was a man of a fairly advanced age with fixed employment and a known place of abode. He gave the police his full co-operation. Given the facts of this case, I find that insp Monyane's conduct does not pass constitutional muster. I am fortified in this view by the guidelines set out in the cases that I have already alluded to. In my view, the circumstances of this case did not justify the appellant's arrest. The arrest was therefore unlawful.

- [14] Subsequent to the arrest, Inspector Deyzel and Captain Strydom had a duty to apply their minds to the appellant's detention and the circumstances relating thereto. (See **MVU V MINISTER OF SAFETY AND SECURITY & ANOTHER 2009(6) SA 82 (SG)**). The appellant offered them an explanation and although they verified it, they rejected it. In my view, this

rejection of his explanation was not reasonable under the circumstances. I would therefore find that the appellant's detention was also unlawful. See **MINISTER OF JUSTICE AND ANOTHER V HOFMEYER 1993 (3) SA 131(A); TOBANI V MINISTER OF CORRECTIONAL SERVICES [2000] ALL SA 318 (SE);**

- [15] With regards to quantum, it is trite law that the impact of the arrest and detention on the arrestee, the duration and nature thereof, as well as the awards in comparable cases are factors that have a bearing on damages. I have taken into account the inconvenience, humiliation, pain and suffering that a single night of incarceration caused the appellant. He was arrested in full view of his neighbours and in the presence of his wife, children and friends. I must also take into consideration that his detention was only overnight. Being mindful of the remarks made by the court in the case of **MINISTER OF SAFETY AND SECURITY V SEYMOUR 2006 (6) 320 (SCA)**, I am of the view that a fair and equitable amount of compensation for the appellant's deprivation of liberty arising from his unlawful arrest

and detention is an amount of R50 000.00.

[16] Having considered all the aforementioned circumstances, I would make the following order:

- 1. The appeal is upheld with costs.**
- 2. The order of the court *a quo* is set aside and replaced with the following:**
 - 2.1 The defendant is ordered to pay the sum of R50 000,00 as damages for unlawful arrest and detention.**
 - 2.2 The defendant is ordered to pay interest on the aforesaid amount *a tempore morae*.**
 - 2.3 The defendant is ordered to pay the costs of this action.**

M.B. MOLEMELA, J

On behalf of appellant:

Adv. N. Snellenburg
Instructed by:
Rosendorff Reitz Barry
BLOEMFONTEIN

On behalf of respondent:

Adv. M.R. Madlanga SC

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/sp