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Case No 38/1985IN THE SUPREME COURT OF SOUTH AFRICAAPPELLATE DIVISION

In the matter between:

PETER JOHN DUNCAN

Appellant

and

THE MINISTER OF LAW AND ORDER FORTHE REPUBLIC OF SOUTH AFRICA

Respondent

CORAM: TRENGOVE, VILJOEN, VAN HEERDEN,
BOSHOF et JACOBS JJA

HEARD: 6 MARCH 1986

DELIVERED: 24 MARCH 1986

JUDGMENT

/VAN HEERDEN JA ...

VAN HEERDEN JA:

With the leave of the court a quo this appeal is directed against the dismissal, with costs, of the appellant's claim for damages against the respondent. In setting out the factual background to the appeal I borrow to a large extent from the lucid summary appearing in the reported judgment of Van Dijkhorst J in the Transvaal Provincial Division (1984 (3) SA 460 (T)).

In the early evening of 15 May 1982 a certain Mr Ruhsmann and his son, who were attending a fête at the Bryanston High School, were attacked by youths apparently under the influence of alcohol or drugs. One bumped into Ruhsmann and another knocked him to the ground. A third youth hit and kicked Ruhsmann's son. The assailants who were unknown to Ruhsmann and his son then left the scene.

As a result of the attack on Ruhsmann his larynx was fractured. The incident was given considerable

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coverage by the media and pressure was brought to bear on the Randburg police to bring the villains to justice.

On 17 June 1982 Detective Warrant Officer Esterhuysen took over the investigation of the matter. On the same day Detective Warrant Officer Bronkhorst received an anonymous telephone call from a young female. She told Bronkhorst that the villains had driven away from the fête in a white Toyota van. She also said that she had recently seen the assailant of Ruhsmann driving that van and that she had then made a note of the registration letters and number, viz GHN 761 T.

Bronkhorst instructed Detective Sergeant Wiid to establish to whom the van belonged. Wiid obtained information that the vehicle had been sold to one Ochse. When Wiid made enquiries from Ochse, a youngster aged 17, he was told that he (Ochse) had in turn sold the van to the appellant's minor son, Noel.

/Ochse ...

Ochse was taken to the Randburg police station and in a statement taken on 18 June 1982 he said, with reference to an alleged conversation with Noel on 30 March 1982:

"During our conversation he mentioned in slang that him and buddies, I presume, had a fight at a fête."

On the previous day, i e, 17 June, Wiid had seen the van in question parked in front of the house in which Noel was living with his parents. He had reported this fact to Bronkhorst and at approximately 9 p m of that day the latter proceeded to the premises. He was accompanied by Wiid and Detective Sergeant Lemmer. He suspected Noel of having been one of the assailants and his intention was to question Noel for the purpose of ascertaining whether the latter had in fact been involved in the assault on Ruhsmann. I shall revert to the events which ensued after the three policemen had

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gained entry to the appellant's home. At this stage it suffices to mention that Bronkhorst eventually arrested Noel and that the latter was taken to the Randburg police station. He was detained for approximately 48 hours until he was released in the early evening of 19 June.

It was that arrest and detention that caused the appellant to institute action against the respondent in the Transvaal Provincial Division. In his capacity as Noel's guardian he claimed damages for alleged unlawful, alternatively malicious, arrest and imprisonment. It is not necessary to analyse the pleadings in any detail. In the respondent's plea the arrest and detention were admitted, as was the allegation that the three policemen had acted within the course and scope of their employment with the respondent. It was denied, however, that they had acted unlawfully or maliciously. At the commencement of the trial it

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was made clear that apart from the question of damages, the only dispute was whether the arrest fell within the ambit of s 40 (1) (b) of the Criminal Procedure Act (51 of 1977).

I revert to the events of the evening of 17 June 1982. There were disputes about what was said by the dramatis personae, but the following findings of the trial judge have not been questioned on appeal:

"After having identified himself and having introduced his colleagues, Bronkhorst entered the Duncan home and went to the bedroom where the plaintiff, Noel's father, had indicated the conversation between Noel and the police should take place. Bronkhorst proceeded to question Noel about the assault on Ruhsmann at the Bryanston High School fête on 15 May 1982. It was made clear to Noel that he was suspected of having been one of the assailants. Noel informed him that he was the owner of the Toyota panel van standing in front of the house. He also informed him that on the day of the fête in the late afternoon he had been at the school with the van, and that he knew about the assault. At this stage the plaintiff intervened and forbade him to say anything further. Noel complied. Bronkhorst thereupon told him that should he refuse to answer he would have no

alternative but to arrest him. Noel persisted in his refusal and was thereupon arrested."

Bronkhorst testified that when he arrested Noel he had already been told by Ochse of the remark made to the latter by Noel which was repeated in Ochse's written statement, and which has been quoted above. It is clear that Bronkhorst's testimony was accepted by the court a quo and it was accordingly held that at the time of the arrest Bronkhorst had inter alia the following information:

a) The anonymous telephone call to the effect that the driver of the Toyota panel van had been one of the assailants.

b) The fact that the van was the property of Noel at the time of the fête.

c) Ochse's statement that Noel had told him that he had been involved in a fight at a fête.

S 40 (1) (b) of the Criminal Procedure Act 51

/of ...

of 1977 ("the present Act") empowers a peace officer to arrest without a warrant any person

"whom he reasonably suspects of having committed an offence referred to in schedule 1, other than the offence of escaping from custody."

It was common cause that Bronkhorst was a peace officer and that the assault on Ruhsmann constituted an offence referred to in schedule 1. It was also common cause that the question whether a peace officer "reasonably suspects" a person of having committed an offence within the ambit of s 40 (1) (b) of the Act is objectively justiciable. And it seems clear that the test is not whether a policeman believes that he has reason to suspect, but whether, on an objective approach, he in fact has reasonable grounds for his suspicion (cf Watson v Commissioner of Customs and Excise 1960 (3) SA 212 (N) 216; R v Van Heerden 1958 (3) SA 150 (T) 152); Wiesner v Molomo 1983 (3) SA 151 (A) 159.

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The first question which arose at the trial, was whether Bronkhorst reasonably suspected Noel of having taken part in the attack on Ruhsmann. This question was answered in the affirmative by the trial court which apparently found it unnecessary to deal with the incidence of the burden of proof. The last, but not the final, word spoken by this Court on the onus in this regard, is to be found in Botha v Lues 1983 (4) SA 496 (A). In that case the court a quo had found that a party who alleges that an arrest was unlawful bears the onus of proving the absence of reasonable grounds for the relevant suspicion when the other party invokes a statutory justification for the arrest such as provided for by the subsection in question. On appeal Corbett JA said (at p 502 A):

"In die omstandighede van die onderhawige saak en, om die redes wat volg, ag ek dit nie nodig om uitsluitel to gee oor hierdie geskil aangaande die ligging van die bewyslas met betrekking tot die regmatigheid van appellant

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se arrestasie nie. In die verbygaan wil ek egter daarop wys dat dit te betwyfel is of die beslissing van die Hof a quo tov die bewyslas met sekere onlangse beslissings van hierdie Hof versoen kan word (sien Mabaso v Felix 1981 (3) SA 865 (A) te 872H-874B; Ramsay v Minister van Polisie en Andere 1981 (4) SA 802 (A) te 807E-F, 817F-818B)."

For reasons which will appear, it is once again unnecessary to decide the question of the burden of proof in regard to the existence or absence of reasonable grounds for suspicion. I shall therefore assume in favour of the appellant that that onus rested on the respondent. I may point out, however, that the decision of this Court in S v Swanepoel 1985 (1) SA 576 (A), appears to represent a formidable obstacle in the way of a contention that the arrestee bears the burden of proof. I should also mention at this stage that, as will be shown hereunder, the onus in question is not the only one which is relevant for the purposes of this appeal.

It would appear that in the court a quo counsel

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for the appellant did not argue that if Bronkhorst indeed had the information set out in (a) to (c) above at his disposal when arresting Noel, he yet would not have had reasonable grounds for suspecting Noel of complicity in the attack on Ruhsmann. Nor was such an argument advanced before this Court. And if regard is also had to Noel's admissions that he had attended the fête and had knowledge of the assault, and the appellant's instruction that Noel should refrain from answering any further questions, the postulated contention would indeed have been untenable.

The judgment of the trial court deals mainly with a submission based upon the judgment in Tsose v Minister of Justice and Others 1951 (3) SA 10 (A). In this Court, however, counsel for the appellant made a direct frontal assault on the trial court's finding in regard to (c) above. In order to appreciate the nature of the argument it is necessary to refer to certain features of the evidence in more detail than did

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the trial court.

Wiid denied that he arrested Ochse. He said that Ochse willingly accompanied him to the police station when requested to do so for the purpose of verifying Ochse's alibi. During cross-examination Wiid was asked whether Ochse had told him of the remark made by Noel about the fight at the fête. He answered in the affirmative but was rather vague. He said that Ochse referred to that remark "[w]hen I put him in the office with ... Bronkhorst." Almost immediately afterwards he said: "It was in ... Bronkhorst's office, and I think it was on the way to the police station." Later he appeared to testify that the information in question was furnished in the police car on the way to the police station; that he told Bronkhorst what Ochse had said, and that the latter then repeated Noel's remark to Bronkhorst.

Ochse, who was called by the respondent, was

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extremely vague about what was said when Wiid first spoke to him and also about subsequent conversations. He could not remember that Noel had in fact made the remark which appears in his written statement but said that that statement was true. He referred to an interrogation by Esterhuyse and at the very end of his cross-examination the following question was put to him:

"And it was with Esterhuyse and Wiid that you had spoken before [i.e., before he had made his written statement], nobody else?"

The answer was:

"It was only - yes, and it was only with Esterhuyse that I did the statement."

Bronkhorst denied that Wiid had told him of Noel's remark. He said that that information was conveyed to him by Ochse after the latter had been brought to the police station but before Noel was arrested.

In the light of the above contradictions counsel

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for the appellant submitted that it cannot be accepted that Bronkhorst was informed of the remark in question prior to Noel's arrest. I do not agree. Although the trial court did not specifically comment on the demeanour of the witnesses, it is clear that it accepted Bronkhorst's version of his conversation with Ochse. And a reading of the testimony of Bronkhorst, on the one hand, and of that of Ochse and Wiid, on the other hand, leaves little room for doubt that Bronkhorst was a much better witness than either Ochse or Wiid. Moreover, there is not necessarily a conflict between the version of Bronkhorst and that of Ochse. When the former, who was not the investigating officer, was asked whether he had interrogated Ochse, he answered:

"Ek en Ochse se geselskap was eintlik meer op 'n vriendskaplike basis. Ek kan miskien aan u noem ek het sy vertroue probeer wen op daardie stadium. Hy het saam met my koffie gedrink en ons het gesit en gesels en toe het ons oor die voertuig en oor alles gesels en mnr. Esterhuysen het hom later, die

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ondersoekbeampste, by my kantoor kom neem."

It was during this conversation, so Bronkhorst testified, that he learned of Noel's remark.

Ochse was not specifically asked whether he had had a conversation with Bronkhorst. Hence, when he gave the reply which has been quoted above, he may well have thought that the question related only to police officers who had interrogated him, as distinguished from an officer with whom he may have had an amicable discussion over a cup of coffee.

But, said counsel for the appellant, there are undisputed facts which point strongly towards the probability that Bronkhorst was not told of the alleged remark by Noel. The strongest pointer, so it was contended, is that Noel was not one of the criminals who had assaulted Ruhsmann. Hence there is no reason why Noel should have falsely told Ochse that he and some "buddies" had a fight at a fête. Ochse, therefore, probably made

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it up and it is unlikely that he would have done so before Esterhuyse brought pressure to bear on him.

In my view there is an obvious flaw in this line of reasoning for the simple reason that according to Ochse's written statement Noel did not give any particulars about the "fight". Nor did Noel refer to the Bryanston fête as distinguished from any other fête. The fact, if it is one, that Noel was not one of Ruhsman's assailants, consequently does not militate against the possibility that Noel might have been involved in some form of scrap at another fête. But apart from this consideration, I do not find it improbable that when subsequent to Wiid's initial questioning Bronkhorst sought to gain Ochse's confidence, he may have fictionalised in order to allay suspicions against him.

Counsel for the appellant also submitted that Wiid's version that he did not arrest Ochse and that the latter pointed out the appellant's home to him, should

be disbelieved. All that need be said is that the question whether Wiid is to be believed on those points, has no relevance to the issues in this appeal.

In sum: There is no reason for disturbing the trial court's findings in regard to the information at the disposal of Bronkhorst at the time of Noel's arrest.

I turn then to the main contention advanced by counsel for the appellant in this Court as well as in the court a quo. Before dealing with the point of law involved, it is necessary to refer briefly to the factual basis for the contention. Although Bronkhorst considered that there were ample grounds for suspecting Noel of complicity in the attack on Ruhsmann, he conceded by implication that further evidence had to be obtained for a successful prosecution on a charge of assault with intent to do grievous bodily harm. He also conceded that the object of the arrest was to establish if Noel had in fact been involved in the

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assault. He said that had he been the investigating officer, he would have arranged an identification parade. It can be accepted, however, that he also contemplated that Noel would be questioned whilst in custody.

In the light of Bronkhorst's concessions counsel for the appellant submitted that the arrest was unlawful. It is beyond dispute, so it was claimed on the strength of Tsose's case, supra, that the object of an arrest of a suspect is to ensure his attendance in court in answer to a charge. And since Noel was not arrested with that object in mind, so the submission concluded, the arrest was tainted with illegality.

In MacDonald v Kumalo 1927 EDL 293, 301, Graham JP iterated that

"the object of the arrest of an accused person is to ensure his attendance in Court in answer to a charge, and not to punish him for an offence of which he has not been convicted."

Having referred to this dictum in Tsose's case,

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Schreiner JA went on to say (at p 17):

"There is, however, no reason to doubt the correctness of the proposition stated by GRAHAM, J.P., if it is properly understood. If the object of the arrest, though professedly to bring the arrested person before the court, is really not such, but is to frighten or harass him and so induce him to act in a way desired by the arrestor, without his appearing in court, the arrest is, no doubt, unlawful. But if the object of the arrestor is to bring the arrested person before the court in order that he may be prosecuted to conviction and so may be led to cease to contravene the law the arrest is not rendered illegal because the arrestor's motive is to frighten or harass the arrested person into desisting from his illegal conduct. An arrest is not unlawful because the arrestor intends and states that he intends to go on arresting the arrested person till he stops contravening the law if the intention always is after arrest to bring the arrested person duly to prosecution."

Counsel did not refer to a further decision of this Court in which Muller JA expressed approval of certain observations of the trial court relating to an argument based on Tsose's case. In Minister van die Suid-Afrikaanse Polisie en 'n Ander v Kraatz en 'n Ander

1973 (3) SA 490 (A) 508, Muller JA said:

"Ek is dit heeltemal eens met Regter HOEXTER dat die bevoegdheid om 'n lasbrief aan te vra, kragtens art. 28 (1) van die Strafprosesordonnansie, verleen is alleen vir 'n bepaalde doel, nl., om die persoon teen wie die lasbrief uitgereik word, na arrestasie, op 'n aanklag van 'n misdryf voor 'n regterlike beampste te laat bring-(art. 33 van genoemde Ordonnansie). Ek stem ook met die geleerde Regter saam dat, waar 'n persoon 'n lasbrief aanvra met die voorwendsel dat dit vir die gemagtigde doel verkry word, terwyl hy in werklikheid nie bedoel om dit vir daardie doel aan te wend nie, maar wel vir 'n ander, ongeoorloofde, doel hy mala fide en dus in fraudem legis optree."

With reference to the above contention of counsel for the appellant as expounded in the court a quo, Van Dijkhorst J said that there is strong support for that contention in the judgment of this Court in Tsose's case. Yet he found against the appellant. His reasons for doing so may be summarised as follows:

When Tsose's case was decided sections 26 and 27 of the Criminal Procedure and Evidence Act (31 of 1917)

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as amended regulated arrest without a warrant by peace officers. Under s 33 of that Act it was trite law that where a person was arrested on suspicion of having committed an offence, he had to be brought before a court without delay; otherwise he had to be released. In s 50 of the present Act the words "as soon as possible" have, however, been omitted. In terms of that section the police may now lawfully detain an arrested person for at least 48 hours before bringing him before a court or releasing him. The injunction that he shall be brought before a judicial officer as soon as possible has been omitted and so has the further injunction that he shall be charged with an offence. These omissions are significant and cannot be ascribed to a mere oversight on the part of the legislature. Hence an arrest made under s 40 (1) (b) of the present Act is not unlawful where the arrestor entertains the required reasonable suspicion but intends to make further

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enquiries after the arrest before finally deciding whether to proceed with a prosecution, provided it is the intention throughout to comply with s 50 of the Act. That was indeed Bronkhorst's intention and it is irrelevant that the overriding purpose of the arrest was to afford the police an opportunity to question Noel or to put him on an identification parade.

The contention of counsel for the appellant under consideration, as formulated in his heads of argument in this Court, was in the main concerned with the inferences drawn by the court a quo from the differences between the wording of s 50 of the present Act and that of s 33 of Act 31 of 1917 as it read when Tsose's case was decided. (I shall refer to the latter Act as the old Act and to s 33 as it read subsequent to the amendment of the original section by s 5 (a) of Act 46 of 1935.) It was submitted that the court a quo erred in finding that the legislature intended to

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change the law as expounded in Tsose's case. For reasons which will appear, I find it unnecessary to consider in any detail the reason for or the effect of the legislative rephrasing of s 33 of the old Act. In my view the appeal would have failed even if it were to be decided under that section as it read in 1951.

It appears to me that the contention in question is based on a misconception as to the true import of the reasoning of Schreiner JA in Tsose's case. It may, however, be conducive to clarify if, before setting out my reasons for this view, the basis on which an apparently lawful arrest may yet be held to be unlawful, is considered.

The so-called jurisdictional facts which must exist before the power conferred by s 40 (1) (b) of the present Act may be invoked, are as follows:

- 1) The arrestor must be a peace officer.
- 2) He must entertain a suspicion.

/3) ...

- 3) It must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act (other than one particular offence).
- 4) That suspicion must rest on reasonable grounds.

If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, i e, he may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power (cf Holgate-Mohammed v Duke (1984) 1 All E R 1054 (HL) 1057). No doubt the discretion must be properly exercised. But the grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed. Whether every improper application of a discretion conferred by the subsection will render an arrest unlawful, need not be considered because it does not arise

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in this case. All that need be said for the purposes of the point under consideration is that an exercise of the discretion in question will be clearly unlawful if the arrestor knowingly invokes the power to arrest for a purpose not contemplated by the legislator. But in such a case, as is generally the rule where the exercise of a discretion is questioned, the onus to establish the improper object of the arrestor will rest on the arrestee (cf Divisional Commissioner of S A Police, Witwatersrand Area, and Others v S A Associated Newspapers Ltd and Another 1966 (2) SA 502 (A) 512; Groenewald v Minister van Justisie 1973 (3) SA 877 (A) 884).

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It is, I apprehend, on the above approach that Schreiner JA, in Tsose's case said that if the object of an arrest, though professedly to bring the arrestee before a court, is not really such, the arrest is unlawful. But in that case Schreiner JA was focussing attention on the distinction between the object of bringing the arrestee before the court and an object "to frighten or harass him and so induce him to act in a way desired by the arrestor." The learned judge did not attempt to analyse the concept of an object relating to an appearance of the arrestee in court, and certainly said nothing to indicate that he was of the opinion that if it is the arrestor's object to bring the arrestee to justice provided further evidence can be obtained the underlined qualification renders the arrest unlawful even if the arrestor has no other, ulterior motive. Nor do the dicta of Graham JP in MacDonald's case, supra, and of Muller JA in Kraatz's case, supra

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lend support to a contention that a purpose as qualified above is objectionable.

In terms of s 33 (1) of the old Act, a person arrested without a warrant could be detained until a warrant for his further detention upon a criminal charge was obtained or until he was released "by reason that no charge [was] to be brought against him", provided that unless so released the arrested person had as soon as possible to be brought before a judicial officer upon such a charge. The underlined words clearly did not rule out any further investigation before the arrestee was either released or brought before a judicial officer. For instance, if a person had been arrested in the late afternoon he could be questioned or even be put on an identification parade before it would be possible to cause him to appear in court. And when brought before a judicial officer, the case against the arrestee could have been remanded in order to enable the police to

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complete their investigation.

In the light of these considerations there is no warrant for holding that the legislature did not contemplate further investigation subsequent to the arrest of a suspect. Indeed, it must have contemplated that such investigation could lead either to the arrestee's release from detention or his prosecution on a criminal charge. I say so not only because of the wording of s 33 (1) but also because s 26 provided, as does s 40 of the present Act, for arrest without a warrant on reasonable grounds for the required suspicion. Now, as was said by Lord Devlin in Shaaban Bin Hussien and Others v Chong Fook Kam and Another (1969) 3 All E R 1627, 1630 (PC):

"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."

/S 26 ...

S 26 of the old Act therefore authorised arrest without a warrant in circumstances where the peace officer, although entertaining a reasonable suspicion, knew that proof in order to make out a prima facie case was lacking. Hence, if s 26 and s 33 of the old Act are read together, it must clearly have been intended that further investigation, inter alia, by means of questioning of the suspect, could follow on an arrest. Were it otherwise, s 31 (1) would no doubt have provided that the power to arrest without a warrant could only be exercised if there were reasonable grounds for believing in the existence of a prima facie case against the arrestee.

S 50 (1) of the present Act leaves even more scope for further investigation prior to an appearance in court. For an arrestee may now be detained for at least 48 hours before being brought before a court. I therefore share the view of Van Dijkhorst J that an

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arrest without warrant is not unlawful merely because the arrestor intends to make further investigation before deciding whether to release the arrestee or to proceed with a prosecution as contemplated by s 50 (1).

If the object of the arrestor is to do just that, it cannot be said that he acted with an extraneous or ulterior purpose such as Schreiner JA had in mind in Tsose's case. But that was also the law under the old Act.

Put negatively, an arrest is unlawful if the arrestor has no intention of bringing the arrestee before a court. And in the case of a private or so called citizen's arrest in terms of s 42 of the new Act the test is whether or not it was the arrestor's primary object to hand the arrestee over to the police for further steps in terms of s 50. That, I conceive, is what was intended to be conveyed by dicta such as that the object of the private arrestor must be "om hom [i e the arrestee] voor die gereg te bring":

Wiesner v Molomo supra, at p 158 E, and Macu v Du Toit en 'n Ander 1983 (4) SA 629 (A) 645 G.

Counsel for the appellant was constrained to concede that as a matter of logic his contention, if sound, must lead to the following results:

(1) A policeman exercises his discretion to arrest a suspect, who is on the point of fleeing the country, with the object of carrying out further investigation before bringing the suspect to justice. The result: the arrest is unlawful.

(2) The object of the arrestor is to bring the suspect before a court, but to obtain, through the prosecutor, a remand so that further investigation may take place. The result: the arrest is lawful merely because in the contemplation of the arrestor the investigation will not precede an appearance in court.

In my view the above concessions clearly

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underline the untenability of the contention under consideration.

Counsel for the appellant also conceded that in English law it is lawful to arrest for the purpose of questioning the arrestee, and that this is so even if the arrestor appreciates that a conviction cannot be obtained in the absence of further evidence such as a confession: Holgate-Mohammed v Duke (1984) 1 All E R 1054 (HL). In that case it was held that an arrest was not unlawful merely because it was in the contemplation of the police officer that there was a greater likelihood of the suspect responding truthfully to questions concerning a crime if questioned under arrest at a police station than if, without an arrest, questions were to be put to him at his own home.

Counsel submitted, however, that the difference between the legal position in South Africa, as contended

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for by him, and English law revolves around the duty of an English police officer to form a conclusion as to the existence or otherwise of prima facie proof of the arrestee's guilt. It is clear, however, from the decision in Duke's case that that duty does not relate to the time of the arrest, but to the period of detention prior to bringing the arrestee to justice or releasing him, as the case may be. It is only when a policeman in England has subsequent to the arrest, but whilst the arrestee is still lawfully detained, reached the conclusion that prima facie proof of the arrested person's guilt is unlikely to be discovered by further investigation that it is his duty to release him from custody: Duke's case, at p 1058 b. But a South African policeman is under a similar duty. Although not spelled out in so many words in s 50 of the new Act, it is clearly implied that an arrestee must be released if no charge is to be brought against him, and if the conclusion is reached that a prima

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facie case cannot be established, he will obviously not be charged in court. Hence, for the purposes of the contention under consideration, the applicable statutory provisions in England do not differ materially from those of s 26 read with s 33 of the old Act, and s 40 (1) (b) read with s 50 of the present Act.

But counsel for the appellant had a second string to his bow. It was tied to the following dictum in the judgment of the Court of Appeal in Mohammed-Holgate v Duke (1983) 3 All E R 526 (CA) 533:

"... if the purpose of the constable had been to subject the suspect to improper questioning or improper pressure during the contemplated period which would follow the arrest which would be occupied by the questioning, ... that would be an impure motive which could not be relied on, but that is tantamount, in my judgment, to saying that the officer was not acting bona fide ..."

The first leg of the submission was that Bronkhorst was not entitled to arrest Noel for the purpose of questioning him since rule 4 of the Judge's

/Rules ...

Rules restricts the authority of the police to interrogate a suspect subsequent to his arrest (see Hiemstra, *Suid-Afrikaanse Strafprosesreg*, third ed, p 472). The short answer to this argument is that those rules do not have the force of law, and are at most domestic regulations for the guidance of the police force: R v Kuzwayo 1949 (3) SA 761 (A) 767. Thus, a statement made by an accused to a police officer in the course of an interrogation after the former's arrest, is not inadmissible merely because of a transgression of rule 4: R v Holtzhausen 1947 (1) SA 567 (A) 569. And since such an interrogation is not unlawful, an arrest is not illegal merely because one of the objects of the arrestor is to interrogate the arrestee in a manner contrary to the injunctions of the said Rules.

The second leg of the submission is that any questioning of Noel subsequent to his arrest would have been improper because he had intimated an election

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to remain silent. In this regard counsel relied on the following passage appearing in the judgment of Williamson J in S v Mpetha and Others (2) 1983

(1) SA 576 (C) 598:

"Once the person being interviewed is cautioned and then indicates that he does not want to say anything it is in my opinion improper to direct further questions to him. If he answers these further questions the irresistible inference is that his earlier expressed decision to say nothing has been made to crumble by the pressures of the situation in which he then finds himself. All the more is this the case where a youngster in detention is confronted by policemen who appear to pay no heed at all to his clearly expressed choice." (My underlining.)

It seems to me that when using the underlined words Williamson J pitched his assessment of the probative effect of intransigent questioning too high. No doubt such an inference may be drawn from all the circumstances, one being the interrogation of the person concerned in conflict with his election to remain silent, but I do not think that the inference is irresistible

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merely because of the interviewer's persistent attitude. Be that as it may, and assuming, without deciding, that the above quoted dictum in Duke's case (CA) also reflects our law, I do not think that Bronkhorst intended that Noel should be questioned in an improper manner. The reason why Noel did not answer further questions immediately prior to his arrest, was that the appellant had instructed him not to do so. The probabilities are that Bronkhorst believed that Noel would voluntarily respond to questioning when removed from the dominating presence of his father. And I fail to see how the questioning envisaged by Bronkhorst can be regarded as improper. I should make it clear, however, that I refrain from expressing an opinion on the question whether an arrest would be unlawful if the only further investigation contemplated by the arrestor is the questioning of a suspect who has made it clear that under no circumstances will he respond to

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any questions.

The appeal is dismissed with costs, including the costs of the appellant's application for condonation of the late lodging of the notice of appeal which was granted during the hearing of the appeal.

H.J.O. VAN HEERDEN JA

TRENGOVE JA

VILJOEN JA

BOSHOFF JA

JACOBS JA

CONCUR

IN THE SUPREME COURT OF SOUTH AFRICA
APPELLATE DIVISION

In the matter between:

PETER JOHN DUNCAN

Appellant

and

THE MINISTER OF LAW AND ORDER FOR
THE REPUBLIC OF SOUTH AFRICA

Respondent

CORAM: TRENGOVE, VILJOEN, VAN HEERDEN,
BOSHOFF et JACOBS JJA

HEARD: 6 MARCH 1986

DELIVERED: 24 MARCH 1986

JUDGMENT

/VAN HEERDEN JA ...

VAN HEERDEN JA:

With the leave of the court a quo this appeal is directed against the dismissal, with costs, of the appellant's claim for damages against the respondent.

In setting out the factual background to the appeal I borrow to a large extent from the lucid summary appearing in the reported judgment of Van Dijkhorst J in the Transvaal Provincial Division (1984 (3) SA 460 (T)).

In the early evening of 15 May 1982 a certain Mr Ruhsmann and his son, who were attending a fête at the Bryanston High School, were attacked by youths apparently under the influence of alcohol or drugs. One bumped into Ruhsmann and another knocked him to the ground. A third youth hit and kicked Ruhsmann's son. The assailants who were unknown to Ruhsmann and his son then left the scene.

As a result of the attack on Ruhsmann his larynx was fractured. The incident was given considerable

/coverage ...

coverage by the media and pressure was brought to bear on the Randburg police to bring the villains to justice.

On 17 June 1982 Detective Warrant Officer Esterhuyse took over the investigation of the matter. On the same day Detective Warrant Officer Bronkhorst received an anonymous telephone call from a young female. She told Bronkhorst that the villains had driven away from the fête in a white Toyota van. She also said that she had recently seen the assailant of Ruhsmann driving that van and that she had then made a note of the registration letters and number, viz GHN 761 T.

Bronkhorst instructed Detective Sergeant Wiid to establish to whom the van belonged. Wiid obtained information that the vehicle had been sold to one Ochse. When Wiid made enquiries from Ochse, a youngster aged 17, he was told that he (Ochse) had in turn sold the van to the appellant's minor son, Noel.

/Ochse ...

Ochse was taken to the Randburg police station and in a statement taken on 18 June 1982 he said, with reference to an alleged conversation with Noel on 30 March 1982:

"During our conversation he mentioned in slang that him and buddies, I presume, had a fight at a fête."

On the previous day, i e, 17 June, Wiid had seen the van in question parked in front of the house in which Noel was living with his parents. He had reported this fact to Bronkhorst and at approximately 9 p m of that day the latter proceeded to the premises. He was accompanied by Wiid and Detective Sergeant Lemmer. He suspected Noel of having been one of the assailants and his intention was to question Noel for the purpose of ascertaining whether the latter had in fact been involved in the assault on Ruhsmann. I shall revert to the events which ensued after the three policemen had

/gained ...

gained entry to the appellant's home. - At this stage it suffices to mention that Bronkhorst eventually arrested Noel and that the latter was taken to the Randburg police station. He was detained for approximately 48 hours until he was released in the early evening of 19 June.

It was that arrest and detention that caused the appellant to institute action against the respondent in the Transvaal Provincial Division. In his capacity as Noel's guardian he claimed damages for alleged unlawful, alternatively malicious, arrest and imprisonment. It is not necessary to analyse the pleadings in any detail. In the respondent's plea the arrest and detention were admitted, as was the allegation that the three policemen had acted within the course and scope of their employment with the respondent. It was denied, however, that they had acted unlawfully or maliciously. At the commencement of the trial it

/was ...

was made clear that apart from the question of damages, the only dispute was whether the arrest fell within the ambit of s 40 (1) (b) of the Criminal Procedure Act (51 of 1977).

I revert to the events of the evening of 17 June 1982. There were disputes about what was said by the dramatis personae, but the following findings of the trial judge have not been questioned on appeal:

"After having identified himself and having introduced his colleagues, Bronkhorst entered the Duncan home and went to the bedroom where the plaintiff, Noel's father, had indicated the conversation between Noel and the police should take place. Bronkhorst proceeded to question Noel about the assault on Ruhsmann at the Bryanston High School fête on 15 May 1982. It was made clear to Noel that he was suspected of having been one of the assailants. Noel informed him that he was the owner of the Toyota panel van standing in front of the house. He also informed him that on the day of the fête in the late afternoon he had been at the school with the van, and that he knew about the assault. At this stage the plaintiff intervened and forbade him to say anything further. Noel complied. Bronkhorst thereupon told him that should he refuse to answer he would have no

alternative but to arrest him., Noel persisted in his refusal and was thereupon arrested."

Bronkhorst testified that when he arrested Noel he had already been told by Ochse of the remark made to the latter by Noel which was repeated in Ochse's written statement, and which has been quoted above. It is clear that Bronkhorst's testimony was accepted by the court a quo and it was accordingly held that at the time of the arrest Bronkhorst had inter alia the following information:

a) The anonymous telephone call to the effect that the driver of the Toyota panel van had been one of the assailants.

b) The fact that the van was the property of Noel at the time of the fête.

c) Ochse's statement that Noel had told him that he had been involved in a fight at a fête.

S 40 (1) (b) of the Criminal Procedure Act 51

/of ...

of 1977 ("the present Act") empowers a peace officer to arrest without a warrant any person

"whom he reasonably suspects of having committed an offence referred to in schedule 1, other than the offence of escaping from custody."

It was common cause that Bronkhorst was a peace officer and that the assault on Ruhsmann constituted an offence referred to in schedule 1. It was also common cause that the question whether a peace officer "reasonably suspects" a person of having committed an offence within the ambit of s 40 (1) (b) of the Act is objectively justiciable. And it seems clear that the test is not whether a policeman believes that he has reason to suspect, but whether, on an objective approach, he in fact has reasonable grounds for his suspicion (cf Watson v Commissioner of Customs and Excise 1960 (3) SA 212 (N) 216; R v Van Heerden 1958 (3) SA 150 (T) 152); Wiesner v Molomo 1983 (3) SA 151 (A) 159.

/The ...

The first question which arose at the trial, was whether Bronkhorst reasonably suspected Noel of having taken part in the attack on Ruhsmann. This question was answered in the affirmative by the trial court which apparently found it unnecessary to deal with the incidence of the burden of proof. The last, but not the final, word spoken by this Court on the onus in this regard, is to be found in Botha v Lues 1983 (4) SA 496 (A). In that case the court a quo had found that a party who alleges that an arrest was unlawful bears the onus of proving the absence of reasonable grounds for the relevant suspicion when the other party invokes a statutory justification for the arrest such as provided for by the subsection in question. On appeal Corbett JA said (at p 502 A):

"In die omstandighede van die onderhawige saak en, om die redes wat volg, ag ek dit nie nodig om uitsluitel to gee oor hierdie geskil aangaande die ligging van die bewyslas met betrekking tot die regmatigheid van appellant

/se ...

se arrestasie nie. In die verbygaan wil ek egter daarop wys dat dit te betwyfel is of die beslissing van die Hof a quo tov die bewyslas met sekere onlangse beslissings van hierdie Hof versoen kan word (sien Mabaso v Felix 1981 (3) SA 865 (A) te 872H-874B; Ramsay v Minister van Polisie en Andere 1981 (4) SA 802 (A) te 807E-F, 817F-818B)."

For reasons which will appear, it is once again unnecessary to decide the question of the burden of proof in regard to the existence or absence of reasonable grounds for suspicion. I shall therefore assume in favour of the appellant that that onus rested on the respondent. I may point out, however, that the decision of this Court in S v Swanepoel 1985 (1) SA 576 (A), appears to represent a formidable obstacle in the way of a contention that the arrestee bears the burden of proof. I should also mention at this stage that, as will be shown hereunder, the onus in question is not the only one which is relevant for the purposes of this appeal.

It would appear that in the court a quo counsel

/for ...

for the appellant did not argue that if Bronkhorst indeed had the information set out in (a) to (c) above at his disposal when arresting Noel, he yet would not have had reasonable grounds for suspecting Noel of complicity in the attack on Ruhsmann. Nor was such an argument advanced before this Court. And if regard is also had to Noel's admissions that he had attended the fête and had knowledge of the assault, and the appellant's instruction that Noel should refrain from answering any further questions, the postulated contention would indeed have been untenable.

The judgment of the trial court deals mainly with a submission based upon the judgment in Tsose v Minister of Justice and Others 1951 (3) SA 10 (A). In this Court, however, counsel for the appellant made a direct frontal assault on the trial court's finding in regard to (c) above. In order to appreciate the nature of the argument it is necessary to refer to certain features of the evidence in more detail than did

/the ...

the trial court.

Wiid denied that he arrested Ochse. He said that Ochse willingly accompanied him to the police station when requested to do so for the purpose of verifying Ochse's alibi. During cross-examination Wiid was asked whether Ochse had told him of the remark made by Noel about the fight at the fête. He answered in the affirmative but was rather vague. He said that Ochse referred to that remark "[w]hen I put him in the office with ... Bronkhorst." Almost immediately afterwards he said: "It was in ... Bronkhorst's office, and I think it was on the way to the police station." Later he appeared to testify that the information in question was furnished in the police car on the way to the police station; that he told Bronkhorst what Ochse had said, and that the latter then repeated Noel's remark to Bronkhorst.

Ochse, who was called by the respondent, was

/extremely ...

extremely vague about what was said when Wiid first spoke to him and also about subsequent conversations. He could not remember that Noel had in fact made the remark which appears in his written statement but said that that statement was true. He referred to an interrogation by Esterhuyse and at the very end of his cross-examination the following question was put to him:

"And it was with Esterhuyse and Wiid that you had spoken before [i e, before he had made his written statement], nobody else?"

The answer was:

"It was only - yes, and it was only with Esterhuyse that I did the statement."

Bronkhorst denied that Wiid had told him of Noel's remark. He said that that information was conveyed to him by Ochse after the latter had been brought to the police station but before Noel was arrested.

In the light of the above contradictions counsel

/for ...

for the appellant submitted that it cannot be accepted that Bronkhorst was informed of the remark in question prior to Noel's arrest. I do not agree. Although the trial court did not specifically comment on the demeanour of the witnesses, it is clear that it accepted Bronkhorst's version of his conversation with Ochse. And a reading of the testimony of Bronkhorst, on the one hand, and of that of Ochse and Wiid, on the other hand, leaves little room for doubt that Bronkhorst was a much better witness than either Ochse or Wiid. Moreover, there is not necessarily a conflict between the version of Bronkhorst and that of Ochse. When the former, who was not the investigating officer, was asked whether he had interrogated Ochse, he answered:

"Ek en Ochse se geselskap was eintlik meer op 'n vriendskaplike basis. Ek kan miskien aan u noem ek het sy vertrouwe probeer wen op daardie stadium. Hy het saam met my koffie gedrink en ons het gesit en gesels en toe het ons oor die voertuig en oor alles gesels en mnr. Esterhuyse het hom later, die

/ondersoekbeampste ...

ondersoekbeampte, by my kantoor kom neem."

It was during this conversation, so Bronkhorst testified, that he learned of Noel's remark.

Ochse was not specifically asked whether he had had a conversation with Bronkhorst. Hence, when he gave the reply which has been quoted above, he may well have thought that the question related only to police officers who had interrogated him, as distinguished from an officer with whom he may have had an amicable discussion over a cup of coffee.

But, said counsel for the appellant, there are undisputed facts which point strongly towards the probability that Bronkhorst was not told of the alleged remark by Noel. The strongest pointer, so it was contended, is that Noel was not one of the criminals who had assaulted Ruhsmann. Hence there is no reason why Noel should have falsely told Ochse that he and some "buddies" had a fight at a fête. Ochse, therefore, probably made

/it ...

it up and it is unlikely that he would have done so before Esterhuyse brought pressure to bear on him.

In my view there is an obvious flaw in this line of reasoning for the simple reason that according to Ochse's written statement Noel did not give any particulars about the "fight". Nor did Noel refer to the Bryanston fête as distinguished from any other fête. The fact, if it is one, that Noel was not one of Ruhsmann's assailants, consequently does not militate against the possibility that Noel might have been involved in some form of scrap at another fête. But apart from this consideration, I do not find it improbable that when subsequent to Wiid's initial questioning Bronkhorst sought to gain Ochse's confidence, he may have fictionalised in order to allay suspicions against him.

Counsel for the appellant also submitted that Wiid's version that he did not arrest Ochse and that the latter pointed out the appellant's home to him, should

be disbelieved. All that need be said is that the question whether Wiid is to be believed on those points, has no relevance to the issues in this appeal.

In sum: There is no reason for disturbing the trial court's findings in regard to the information at the disposal of Bronkhorst at the time of Noel's arrest.

I turn then to the main contention advanced by counsel for the appellant in this Court as well as in the court a quo. Before dealing with the point of law involved, it is necessary to refer briefly to the factual basis for the contention. Although Bronkhorst considered that there were ample grounds for suspecting Noel of complicity in the attack on Ruhsmann, he conceded by implication that further evidence had to be obtained for a successful prosecution on a charge of assault with intent to do grievous bodily harm. He also conceded that the object of the arrest was to establish if Noel had in fact been involved in the

/assault ...

assault. He said that had he been the investigating officer, he would have arranged an identification parade. It can be accepted, however, that he also contemplated that Noel would be questioned whilst in custody.

In the light of Bronkhorst's concessions counsel for the appellant submitted that the arrest was unlawful. It is beyond dispute, so it was claimed on the strength of Tsose's case, supra, that the object of an arrest of a suspect is to ensure his attendance in court in answer to a charge. And since Noel was not arrested with that object in mind, so the submission concluded, the arrest was tainted with illegality.

In MacDonald v Kumalo 1927 EDL 293, 301, Graham

JP iterated that

"the object of the arrest of an accused person is to ensure his attendance in Court in answer to a charge, and not to punish him for an offence of which he has not been convicted."

Having referred to this dictum in Tsose's case,

/Schreiner ...

Schreiner JA went on to say (at p 17):

"There is, however, no reason to doubt the correctness of the proposition stated by GRAHAM, J.P., if it is properly understood. If the object of the arrest, though professedly to bring the arrested person before the court, is really not such, but is to frighten or harass him and so induce him to act in a way desired by the arrestor, without his appearing in court, the arrest is, no doubt, unlawful. But if the object of the arrestor is to bring the arrested person before the court in order that he may be prosecuted to conviction and so may be led to cease to contravene the law the arrest is not rendered illegal because the arrestor's motive is to frighten or harass the arrested person into desisting from his illegal conduct. An arrest is not unlawful because the arrestor intends and states that he intends to go on arresting the arrested person till he stops contravening the law if the intention always is after arrest to bring the arrested person duly to prosecution."

Counsel did not refer to a further decision of this Court in which Muller JA expressed approval of certain observations of the trial court relating to an argument based on Tsose's case. In Minister van die Suid-Afrikaanse Polisie en n Ander v Kraatz en n Ander

1973 (3) SA 490 (A) 508, Muller JA said:

"Ek is dit heeltemal eens met Regter HOEXTER dat die bevoegdheid om 'n lasbrief aan te vra, kragtens art. 28 (1) van die Strafprosesordonnansie, verleen is alleen vir 'n bepaalde doel, nl., om die persoon teen wie die lasbrief uitgereik word, na arrestasie, op 'n aanklag van 'n misdryf voor 'n regterlike beampte te laat bring-(art. 33 van genoemde Ordonnansie). Ek stem ook met die geleerde Regter saam dat, waar 'n persoon 'n lasbrief aanvra met die voorwendsel dat dit vir die gemagtigde doel verkry word, terwyl hy in werklikheid nie bedoel om dit vir daardie doel aan te wend nie, maar wel vir 'n ander, ongeoorloofde, doel hy mala fide en dus in fraudem legis optree."

With reference to the above contention of counsel for the appellant as expounded in the court a quo, Van Dijkhorst J said that there is strong support for that contention in the judgment of this Court in Tsose's case. Yet he found against the appellant. His reasons for doing so may be summarised as follows:

When Tsose's case was decided sections 26 and 27 of the Criminal Procedure and Evidence Act (31 of 1917)

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as amended regulated arrest without a warrant by peace officers. Under s 33 of that Act it was trite law that where a person was arrested on suspicion of having committed an offence, he had to be brought before a court without delay; otherwise he had to be released. In s 50 of the present Act the words "as soon as possible" have, however, been omitted. In terms of that section the police may now lawfully detain an arrested person for at least 48 hours before bringing him before a court or releasing him. The injunction that he shall be brought before a judicial officer as soon as possible has been omitted and so has the further injunction that he shall be charged with an offence. These omissions are significant and cannot be ascribed to a mere oversight on the part of the legislature. Hence an arrest made under s 40 (1) (b) of the present Act is not unlawful where the arrestor entertains the required reasonable suspicion but intends to make further

/enquiries ...

enquiries after the arrest before finally deciding whether to proceed with a prosecution, provided it is the intention throughout to comply with s 50 of the Act. That was indeed Bronkhorst's intention and it is irrelevant that the overriding purpose of the arrest was to afford the police an opportunity to question Noel or to put him on an identification parade.

The contention of counsel for the appellant under consideration, as formulated in his heads of argument in this Court, was in the main concerned with the inferences drawn by the court a quo from the differences between the wording of s 50 of the present Act and that of s 33 of Act 31 of 1917 as it read when Tsose's case was decided. (I shall refer to the latter Act as the old Act and to s 33 as it read subsequent to the amendment of the original section by s 5 (a) of Act 46 of 1935.) It was submitted that the court a quo erred in finding that the legislature intended to

/change ...

change the law as expounded in Tsose's case. For reasons which will appear, I find it unnecessary to consider in any detail the reason for or the effect of the legislative rephrasing of s 33 of the old Act. In my view the appeal would have failed even if it were to be decided under that section as it read in 1951.

It appears to me that the contention in question is based on a misconception as to the true import of the reasoning of Schreiner JA in Tsose's case. It may, however, be conducive to clarify if, before setting out my reasons for this view, the basis on which an apparently lawful arrest may yet be held to be unlawful, is considered.

The so-called jurisdictional facts which must exist before the power conferred by s 40 (1) (b) of the present Act may be invoked, are as follows:

- 1) The arrestor must be a peace officer.
- 2) He must entertain a suspicion.

/3) ...

3) It must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act (other than one particular offence).

4) That suspicion must rest on reasonable grounds.

If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, i e, he may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power (cf Holgate-Mohammed v Duke (1984) 1 All E R 1054 (HL) 1057). No doubt the discretion must be properly exercised. But the grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed. Whether every improper application of a discretion conferred by the subsection will render an arrest unlawful, need not be considered because it does not arise

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in this case. All that need be said for the purposes of the point under consideration is that an exercise of the discretion in question will be clearly unlawful if the arrestor knowingly invokes the power to arrest for a purpose not contemplated by the legislator. But in such a case, as is generally the rule where the exercise of a discretion is questioned, the onus to establish the improper object of the arrestor will rest on the arrestee (cf Divisional Commissioner of S A Police, Witwatersrand Area, and Others v S A Associated Newspapers Ltd and Another 1966 (2) SA 502 (A) 512; Groenewald v Minister van Justisie 1973 (3) SA 877 (A) 884).

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It is, I apprehend, on the above approach that Schreiner JA, in Tsose's case said that if the object of an arrest, though professedly to bring the arrestee before a court, is not really such, the arrest is unlawful. But in that case Schreiner JA was focussing attention on the distinction between the object of bringing the arrestee before the court and an object "to frighten or harass him and so induce him to act in a way desired by the arrestor." The learned judge did not attempt to analyse the concept of an object relating to an appearance of the arrestee in court, and certainly said nothing to indicate that he was of the opinion that if it is the arrestor's object to bring the arrestee to justice provided further evidence can be obtained the underlined qualification renders the arrest unlawful even if the arrestor has no other, ulterior motive. Nor do the dicta of Graham JP in MacDonald's case, supra, and of Muller JA in Kraatz's case, supra

/lend

lend support to a contention that a purpose as qualified above is objectionable.

In terms of s 33 (1) of the old Act, a person arrested without a warrant could be detained until a warrant for his further detention upon a criminal charge was obtained or until he was released "by reason that no charge [was] to be brought against him", provided that unless so released the arrested person had as soon as possible to be brought before a judicial officer upon such a charge. The underlined words clearly did not rule out any further investigation before the arrestee was either released or brought before a judicial officer. For instance, if a person had been arrested in the late afternoon he could be questioned or even be put on an identification parade before it would be possible to cause him to appear in court. And when brought before a judicial officer, the case against the arrestee could have been remanded in order to enable the police to

/complete ...

complete their investigation.

In the light of these considerations there is no warrant for holding that the legislature did not contemplate further investigation subsequent to the arrest of a suspect. Indeed, it must have contemplated that such investigation could lead either to the arrestee's release from detention or his prosecution on a criminal charge. I say so not only because of the wording of s 33 (1) but also because s 26 provided, as does s 40 of the present Act, for arrest without a warrant on reasonable grounds for the required suspicion. Now, as was said by Lord Devlin in Shaaban Bin Hussien and Others v Chong Fook Kam and Another (1969) 3 All E R 1627, 1630 (PC):

"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."

/S 26 ...

S 26 of the old Act therefore authorised arrest without a warrant in circumstances where the peace officer, although entertaining a reasonable suspicion, knew that proof in order to make out a prima facie case was lacking. Hence, if s 26 and s 33 of the old Act are read together, it must clearly have been intended that further investigation, inter alia, by means of questioning of the suspect, could follow on an arrest. Were it otherwise, s 31 (1) would no doubt have provided that the power to arrest without a warrant could only be exercised if there were reasonable grounds for believing in the existence of a prima facie case against the arrestee.

S 50 (1) of the present Act leaves even more scope for further investigation prior to an appearance in court. For an arrestee may now be detained for at least 48 hours before being brought before a court. I therefore share the view of Van Dijkhorst J that an

/arrest ...

arrest without warrant is not unlawful merely because the arrestor intends to make further investigation before deciding whether to release the arrestee or to proceed with a prosecution as contemplated by s 50 (1).

If the object of the arrestor is to do just that, it cannot be said that he acted with an extraneous or ulterior purpose such as Schreiner JA had in mind in Tsose's case. But that was also the law under the old Act.

Put negatively, an arrest is unlawful if the arrestor has no intention of bringing the arrestee before a court. And in the case of a private or so called citizen's arrest in terms of s 42 of the new Act the test is whether or not it was the arrestor's primary object to hand the arrestee over to the police for further steps in terms of s 50. That, I conceive, is what was intended to be conveyed by dicta such as that the object of the private arrestor must be "om hom [i e the arrestee] voor die gereg te bring":

Wiesner v Molomo supra, at p 158 E, and Macu v Du Toit en 'n Ander 1983 (4) SA 629 (A) 645 G.

Counsel for the appellant was constrained to concede that as a matter of logic his contention, if sound, must lead to the following results:

(1) A policeman exercises his discretion to arrest a suspect, who is on the point of fleeing the country, with the object of carrying out further investigation before bringing the suspect to justice. The result: the arrest is unlawful.

(2) The object of the arrestor is to bring the suspect before a court, but to obtain, through the prosecutor, a remand so that further investigation may take place. The result: the arrest is lawful merely because in the contemplation of the arrestor the investigation will not precede an appearance in court.

In my view the above concessions clearly

/underline ...

underline the untenability of the contention under consideration.

Counsel for the appellant also conceded that in English law it is lawful to arrest for the purpose of questioning the arrestee, and that this is so even if the arrestor appreciates that a conviction cannot be obtained in the absence of further evidence such as a confession: Holgate-Mohammed v Duke (1984) 1 All E R 1054 (HL). In that case it was held that an arrest was not unlawful merely because it was in the contemplation of the police officer that there was a greater likelihood of the suspect responding truthfully to questions concerning a crime if questioned under arrest at a police station than if, without an arrest, questions were to be put to him at his own home.

Counsel submitted, however, that the difference between the legal position in South Africa, as contended

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for by him, and English law revolves around the duty of an English police officer to form a conclusion as to the existence or otherwise of prima facie proof of the arrestee's guilt. It is clear, however, from the decision in Duke's case that that duty does not relate to the time of the arrest, but to the period of detention prior to bringing the arrestee to justice or releasing him, as the case may be. It is only when a policeman in England has subsequent to the arrest, but whilst the arrestee is still lawfully detained, reached the conclusion that prima facie proof of the arrested person's guilt is unlikely to be discovered by further investigation that it is his duty to release him from custody: Duke's case, at p 1058 b. But a South African policeman is under a similar duty. Although not spelled out in so many words in s 50 of the new Act, it is clearly implied that an arrestee must be released if no charge is to be brought against him, and if the conclusion is reached that a prima

/facie ...

facie case cannot be established, he will obviously not be charged in court. Hence, for the purposes of the contention under consideration, the applicable statutory provisions in England do not differ materially from those of s 26 read with s 33 of the old Act, and s 40 (1) (b) read with s 50 of the present Act.

But counsel for the appellant had a second string to his bow. It was tied to the following dictum in the judgment of the Court of Appeal in Mohammed-Holgate v Duke (1983) 3 All E R 526 (CA) 533:

"... if the purpose of the constable had been to subject the suspect to improper questioning or improper pressure during the contemplated period which would follow the arrest which would be occupied by the questioning, ... that would be an impure motive which could not be relied on, but that is tantamount, in my judgment, to saying that the officer was not acting bona fide ..."

The first leg of the submission was that Bronkhorst was not entitled to arrest Noel for the purpose of questioning him since rule 4 of the Judge's

/Rules ...

Rules restricts the authority of the police to interrogate a suspect subsequent to his arrest (see Hiemstra, Suid-Afrikaanse Strafprosesreg, third ed, p 472). The short answer to this argument is that those rules do not have the force of law, and are at most domestic regulations for the guidance of the police force: R v Kuzwayo 1949 (3) SA 761 (A) 767. Thus, a statement made by an accused to a police officer in the course of an interrogation after the former's arrest, is not inadmissible merely because of a transgression of rule 4: R v Holtzhausen 1947 (1) SA 567 (A) 569. And since such an interrogation is not unlawful, an arrest is not illegal merely because one of the objects of the arrestor is to interrogate the arrestee in a manner contrary to the injunctions of the said Rules.

The second leg of the submission is that any questioning of Noel subsequent to his arrest would have been improper because he had intimated an election

/to ...

to remain silent. In this regard counsel relied on the following passage appearing in the judgment of Williamson J in S v Mpetha and Others (2) 1983

(1) SA 576 (C) 598:

"Once the person being interviewed is cautioned and then indicates that he does not want to say anything it is in my opinion improper to direct further questions to him. If he answers these further questions the irresistible inference is that his earlier expressed decision to say nothing has been made to crumble by the pressures of the situation in which he then finds himself. All the more is this the case where a youngster in detention is confronted by policemen who appear to pay no heed at all to his clearly expressed choice." (My underlining.)

It seems to me that when using the underlined words Williamson J pitched his assessment of the probative effect of intransigent questioning too high. No doubt such an inference may be drawn from all the circumstances, one being the interrogation of the person concerned in conflict with his election to remain silent, but I do not think that the inference is irresistible

/merely ...

merely because of the interviewer's persistent attitude. Be that as it may, and assuming, without deciding, that the above quoted dictum in Duke's case (CA) also reflects our law, I do not think that Bronkhorst intended that Noel should be questioned in an improper manner. The reason why Noel did not answer further questions immediately prior to his arrest, was that the appellant had instructed him not to do so. The probabilities are that Bronkhorst believed that Noel would voluntarily respond to questioning when removed from the dominating presence of his father. And I fail to see how the questioning envisaged by Bronkhorst can be regarded as improper. I should make it clear, however, that I refrain from expressing an opinion on the question whether an arrest would be unlawful if the only further investigation contemplated by the arrestor is the questioning of a suspect who has made it clear that under no circumstances will he respond to

/any ...

any questions.

The appeal is dismissed with costs, including the costs of the appellant's application for condonation of the late lodging of the notice of appeal which was granted during the hearing of the appeal.

H.J.O. VAN HEERDEN JA

TRENGOVE JA

VILJOEN JA

BOSHOF JA

JACOBS JA

CONCUR