

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

Case no: CA68/2023

In the matter between:

NKULULEKO TWEBE

Appellant

and

MINISTER OF SAFETY AND SECURITY

1st Respondent

SERGEANT MZUBANZI NDONGENI

2nd Respondent

CONSTABLE SIMPHIWE JAKAVULA

3rd Respondent

APPEAL JUDGMENT

GQAMANA J

[1] This appeal is directed against the dismissal, with costs, of the appellant's claims for damages against the respondents by the magistrate of King William's Town. The undisputed evidence is that on 28 June 2016 at night, the appellant was arrested by the police on charges of possession of dagga and mandrax. He appeared in court the following morning and was released on bail. The charges against him were withdrawn on 30 September 2016, by the prosecutor. Subsequent thereto, he instituted an action against the respondents for unlawful arrest and detention and for assault. Merits and quantum were separated, and the trial proceeded for determination of liability only. At the end of the trial, the magistrate issued the judgment which is the subject of this appeal.

[2] The nub of this appeal is that, the magistrate misdirected herself in finding that the arrest and detention were lawful and that, the appellant failed to prove his claim for assault. It was submitted on behalf of the appellant that, on the face of an invalid search warrant, the magistrate misdirected herself that the arresting officer had entertained a reasonable suspicion that the appellant committed an offence. In respect of the claim for assault, it was submitted that the magistrate misdirected herself in dismissing the claim considering the overwhelming evidence by the appellant, his witnesses and the medical records from Grey hospital which showed that he had difficulties in walking and had sustained visible injuries in his arms and knees.

[3] It was common cause that the appellant was arrested on 26 June 2016 on charges of possession of dagga and mandrax. The respondents' defence was that the arrest and detention was justified in terms of the provisions of section 40 (1)(a), (b) and (h) of the Criminal Procedure Act, 51 of 1977 ("the CPA"). The above provisions empower a peace officer to arrest without warrant any person who commits or attempts to commit an offence in his presence or, whom he reasonably suspects of having committed an offence referred to in schedule 1 (other than escaping) or, who is reasonably suspected of committing or having committed an offence under any law governing the making, supply, possession or conveyance of dependence-producing drugs. In respect of the assault claim, the respondents denied that the appellant was assaulted and that, the injuries he sustained were as a result of assault. Its defence was that the injuries sustained by the appellant were self-inflicted and that he resisted the arrest and reasonable force had to be used to effect the arrest.

[4] The appellant was arrested without a warrant, as such the onus was upon the respondents

to provide legal justification for the arrest.¹ The respondents placed reliance, *inter alia*, on section 40 (1)(a), (b) and (h) of the CPA.

[5] The jurisdictional facts necessary for an arrest under section 40 (1) (a) are the following: (a) the arrestor must be a peace officer; (b) an offence must have been committed or there must have been an attempt to commit an offence and (c) the offence or attempted offence must be committed in his or her presence.

[6] However, for section 40 (1)(b) defence the necessary jurisdictional facts are that: the arrestor must be a peace officer, the arrestor must entertain a suspicion, the suspicion must be that the arrestee committed a schedule 1 offence ²(other than escaping) and the suspicion must rest on reasonable grounds.³ And for purposes of section 40 (1)(h), the reasonable suspicion must be that the arrestee committed an offence under any law governing the making, supply, possession of dependence - producing drugs.

[7] Once the jurisdictional facts are present, a discretion arises whether to arrest or not. The police are not obliged to effect the arrest.⁴ The exercise of the discretion by the arresting officer was not attacked, so it was not an issue upon which the trial court had to decide.

¹ *Zealand v Minister of Justice and Constitutional Development and Another* 2008 (2) SACR 1 (CC), 2008 (4) SA 458, 2008 (6) BCLR 601 (CC).

² The general item in schedule 1, namely, an offence for which imprisonment exceeding six months without an option of a fine may be imposed applies to statutory offences only, not to common law offence. See *Areff v Minister van Polisie* 1977(2) SA 900(A).

³ *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H.

⁴ *Minster of Safety and Security v Sekhoto* 2011 (1) SACR 315(SCA) para [28].

[8] It was not in dispute that the arresting officer was a peace officer as defined in section 1 of the CPA. The unlawfulness of the appellant's arrest was pinned to the second requirement under section 40 (1)(b) that, the arresting officer did not entertain reasonable suspicion. The test on reasonable suspicion was succinctly summarised in *Mabona v Minister of Law and Order*⁵ that, the section requires suspicion, not certainty. Such suspicion must be based on solid grounds. Otherwise, it is flighty or arbitrary and not reasonable. There must be evidence that the arresting officer formed a suspicion which is objectively sustainable.

[9] To discharge the onus the respondents led the following evidence. That on the night in question the second and third respondents were requested by members of Central Intelligence Group (CIG) for assistance to search the appellant's shack. The CIG are undercover police agents. The second and third respondents were briefed by the members of the CIG and were informed that the appellant was suspected to be in possession of drugs and an illegal firearm. Further the second and third respondents were informed that the CIG had received reliable information from a protected informer that the appellant was in possession of drugs and an illegal firearm. The respondents were also provided with a search warrant, authorising to search the appellant and his shack. The first and second respondents, together with the CIG members proceeded to the appellant's shack to execute the search warrant.

[10] Upon arrival at the appellant's shack, the police knocked at the door and identified themselves, but were met with deaf silence. Upon forced entrance, they found three African males, and they searched them but found nothing in their possession. The two aforementioned policemen proceeded to search the shack and found the appellant hiding under a sponge mattress. As they approached the appellant, he gashed out and fled and in that process he injured himself. The CIG members chased and apprehended him on the street. The CIG members called for assistance and the

⁵ 1988 (2) SA 654 (SE) at 658H.

second respondent went outside to assist them. The second respondent searched the appellant and found a plastic with mandrax in his pocket. After few minutes the police came inside the shack with the appellant, and they showed him a search warrant. They searched his shack and found dagga. He was arrested and charged for possession of dagga an mandrax.

[11] Insofar as the claim for assault is concerned, the police testified that the appellant njured himself as he gashed out of his shack fleeing. Further he resisted the arrest and reasonable force had to be used to effect the arrest. The appellant was handcuffed and placed at the back of the police van and taken to the police station. At the police station he complained of body pains (on his shoulder and head) and was taken to Dimbaza clinic. From there he was detained at the police station until he appeared in court the next morning.

[12] The appellant testified for his case and also called his two sisters as his witnesses. His evidence was that he was inside his shack alone playing music, suddenly he had a bang sounding like a corrugated zinc falling. Before that, he did not hear any knock on the door. As he was still looking, he saw men standing next to him. Those men did not introduce themselves as police. He was handcuffed and arrested inside his shack for unknown reason. He was also assaulted, he was pulled outside by unknown men who were not in police uniform and was dragged by his dreadlocks on the tarmac outside. As a result, he sustained serious injuries. He was arrested and taken to the police van. He denied that he was showed a search warrant. He also denied that mandrax were found in his possession. However, he admitted that dagga was found in his shack but, proffered an excuse that he was using it for religious purposes. He testified that the police decided to lay false charges against him.

[13] His two sisters also testified, and both gave evidence on how they observed the appellant in pain the following morning after he was released from custody. They testified that the appellant could not ambulate to the extent that they had to use a wheelchair at the hospital. Further their evidence was that he was even unable to

urinate, his face was swollen, his tooth was broken and had bruises. At Grey hospital, he was examined by the doctor, and it was found that he was injured on his arms and knees.

[14] At the conclusion of the trial, the magistrate dismissed with costs both claims. In her judgment she found that the search warrant was invalid and mentioned that the appellant's claim was not premised on the validity of the search warrant, but rather on the unlawfulness of the arrest and detention. I must pause and mention that the requirements for a valid search warrant are authoritatively set out by the Constitutional Court⁶ as follows:

‘[55]. A valid warrant is one that, in a reasonably intelligible manner:

(a) states the statutory provision in terms of which it is issued;

(b) identifies the searcher;

(c) clearly mentions the authority it confers upon the searcher;

(d) identifies the person, the container or premises to be searched;

(e) described the article to be searched for or seized, with sufficient particularity;
and

(f) specifies the offence which triggered the criminal investigation and names the suspected offender.”

[15] The appellant takes issue with the magistrate's findings that his claim was not premised on the validity of the search warrant. Counsel for the appellant submitted to us that, the unlawful arrest and detention claim was based on the fact that the police members intentionally and maliciously came to the appellant's house at night and in contravention of the search warrant which was in their possession and entered his house while sleeping. In advancing that argument, counsel submitted that the unlawfulness of the police actions was to enter the appellant's house without

⁶ In Minister of Safety and Security v Van der Merwe and Others 2011 (5) SA 61 (CC) para [55].

authorisation at night in contrast to the search warrant. The argument was that the appellant's claim is that, *"if not for the unlawful conduct of the SAPS in terms of the search warrant, they would not have attended upon his house at night and cause to arrest him."*

[16] This argument is artificially impressive, but it is not borne out of the facts and the case pleaded in the particulars of claim. The appellant's case as pleaded was that:

"10. The Second and third Defendants' conduct together with that of other members who were with them was wrongful, unlawful and malicious in that they broke open the Plaintiff's door and arrested the Plaintiff without a warrant of arrest and they had no reason or probable cause for suspecting that the Plaintiff had committed any offence and acted with the intention to injure the Plaintiff's dignity."

[17] In answer to the above, the respondents pleaded that:

"10. The defendants deny the allegations contained in this paragraph and in amplification of such denial the defendants aver that:

10.1. The defendants, particularly the second and third defendants are peace officers entitled under section 40 of the Criminal Procedure Act 51 of 1977 (the CPA) to effect an arrest of the plaintiff without a warrant, on the grounds that a peace officer may arrest any person, inter alia:

10.1.1 grants a peace officer to arrest a person without a warrant who commits or attempts to commit a crime in his presence (section 40 (1) (a)) and whom he reasonably suspects of having committed an offence referred to in Schedule 1 (sec. 40(1)(b));

10.1.2 the arrest of the plaintiff was in terms of section 40(1) (a) and section 40 (1)(b);

10.1.3 the second and third defendants were in addition to harbouring a reasonable suspicion provided with a search warrant, as issued in terms

of section 21 of the CPA by a commissioned police officer, who is a justice of peace under the provisions of the Justices of the Peace and Commissions of Oaths Act 16 of 1963.....”

[18] Further at the commencement of trial, the respondents moved for an amendment to incorporate section 40 (1)(h) as an additional defence against the appellant’s claim for unlawful arrest and detention. Such amendment was unopposed by the appellant and the magistrate granted it.

[19] It is clear from the pleadings and the evidence that, the appellant’s cause of action was not premised on the lawfulness of the search warrant, but it was a claim based on unlawful arrest and detention. In any event it would not be in accordance with the principle set out in *Minister of Police v Foutie and Another*⁷ to hold the respondents liable for damages based on a claim for unlawful arrest and detention simply because of a finding that the search warrant was invalid.

[20] In respect of the unlawful arrest and detention claim the magistrate assessed all the circumstances preceding the appellant’s arrest.

[21] It is evident from the record with regard to both the reasons for the arrest and the injuries sustained by the appellant that, there were two irreconcilable versions. In resolving such factual issues, the magistrate evaluated the evidence, considered the probabilities and on an overall assessment of the evidence concluded that the respondents’ evidence was to be preferred.

⁷ (CA 59/2020) [2021] ZAECGHC 26 (9 March 2021) para [36].

[22] It is trite that the appeal court would be slow to interfere with factual findings by a trial court based on careful assessment of the credibility of witnesses and the probabilities of their respective versions.⁸ Regard being had to the totality of the evidence, the respondents' version as to the reason for the appellant's arrest is the more probable one. As indicated above, the evidence of the two policemen was that, they were briefed by the CIG members that they had received reliable information from a protected informer that the appellant was in possession of drugs and an illegal firearm. In addition, the second and third respondents were provided with a search warrant authorising that the appellant and his shack be searched. They were fully briefed on the investigation against the appellant. Upon arrival at the appellant's shack, they knocked from the door and announced themselves as police. The appellant did not open the door. Upon forced entry they found the appellant hiding. As they approached him, he gashed out and fled. When the CIG members apprehended him outside, the second respondent searched him and found a plastic of mandrax in his pocket. Inside his shack the police also found dagga. With all this evidence there is no room to criticise the factual findings by the magistrate.

[23] Ms Burger, counsel for the appellant argued that the police did not entertain a reasonable suspicion that a schedule 1 offence was committed. The general item on the definition of schedule 1 offences include, any offence which a sentence of six months or more may be imposed without an option of fine. Possession of mandrax and possession of dagga falls within that definition. Further the argument advanced on behalf of the appellant lost sight that the respondents also placed reliance on section 40 (1)(h) as one of the legal justifications for the arrest. That section empowers the police to arrest any person who is reasonably suspected of committing or of having committed an offence under any law governing, *inter alia*, possession of dependence-producing drugs. Possession of mandrax is an offence in terms of the Drugs and Drug Trafficking Act 140 of 1992. Possession of dagga too is prohibited by section 4 (b) of the Drugs Act

⁸ S v Monyane 2008 (1) SACR 543 (SCA) para [15]. See also R v Dhlumayo 1948 (2) SA 677 (A) at 706.

subject to the exception set out in *Minister of Justice and Constitutional Development and others v Prince and others*⁹ . At the time of the appellant's arrest possession of dagga was completely prohibited.

[24] Ms Burger also argued that the magistrate erred in her findings that the police acted on reasonable suspicion. The argument was that because the search warrant was invalid, there was no objective basis for the police to enter and search the appellant's home and invade his right to privacy. In a case such as this one, a balance needs to be found between the protection of liberty and right to privacy on one hand and the avoidance of unnecessary restrictions on the police in the execution of their duties. The evidence shows that the police had reliable information that the appellant was in possession of drugs and an illegal firearm, acting on that information and armed with a search warrant, the police visited the appellant's shack. On their arrival at his shack, they knocked on the door and introduced themselves as police. The appellant did not open even though he was inside his shack. The police could hear and observe that there were people inside. Upon forced entry, the police found three unknown males and on continuation of their search, the same police found the appellant hiding. When the police approached him, he fled. These two policemen were in full uniform. When he fled that strengthen the police's suspicion. As he fled, he injured himself. When the CIG members chased and apprehended him, he resisted. Upon being searched mandrax were found in his possession. On further search dagga was found inside his shack. Considering all these objective facts the magistrate was correct in her findings that the respondents met all the jurisdictional facts set out in section 40 (1)(b) of the CPA.

[25] Insofar as the claim for the assault, the onus was upon the appellant to prove it. The magistrate accepted that there were two mutually destructive versions and she approached same in the similar manner as indicated above. Based on probabilities she found the appellant and his witnesses to be unreliable. The magistrate considered the

⁹ 2018 (6) SA 393 (CC). This judgment was delivered after the appellant's arrest.

respondents' version to be the more probable one. It was the respondents' evidence that the appellant resisted the arrest and reasonable force had to be used to effect the arrest as sanctioned in section 49(2) of the CPA. Ms Burger was constrained to concede that there was no agreement reached between the parties regarding the status of the medical records. There was no evidence to support the appellant's claim that the injuries as reflected in the J88 were consistent with his allegations or, that such injuries were inconsistent to the respondents' version. The onus was upon the appellant to prove his claim and in the circumstances, I agree with the magistrate that the appellant failed to discharge such onus.

[26] For all the above reasons the appeal ought to fail. There are no reasons why the costs should not follow the results.

[26] In the result, the appeal is dismissed with costs.

N GQAMANA
JUDGE OF THE HIGH COURT

I agree

B HARTLE
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Appellant:	<i>Adv L Burger</i>
Instructed by:	Messrs Luvuyo Solvern Attorneys East London.

Counsel for the Respondent:	<i>Adv L van Vuuren</i>
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Instructed by: State Attorney
East London.

Date heard on: 7 June 2024

Delivered on: 25 June 2024