



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE

DATE: 21 October 2024

Case No. 32427/2017

In the matter between:

THABO LOVERS DIMAZA

Plaintiff

and

THE MINISTER OF POLICE

First Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Second Defendant

JUDGMENT

WILSON J:

- 1 At the centre of this case is the rape of a thirteen-year old girl, A, which is said to have taken place in tall reeds by a railway line in Windmill Park near Boksburg on 21 August 2016. The plaintiff, Mr. Dimaza, was arrested for that offence. However, his trial could not proceed because, for a period of eight years now, the State has not been able to obtain the DNA analysis of samples

taken from Mr. Dimaza and from A. The DNA analysis will either rule Mr. Dimaza out of suspicion or provide critical evidence against him. Given the lapse of time since the samples were taken, I wonder whether there is still hope that Mr. Dimaza's case will ultimately be dealt with on its merits.

- 2 Mr. Dimaza claims that he was wrongfully arrested for A's rape. He claims damages arising from that arrest against the first defendant, the Minister. Mr. Dimaza initially also pursued the second defendant, the NDPP, for malicious prosecution on the rape charge. That case was formally withdrawn on 19 August 2024. The question before me is accordingly confined to whether Mr. Dimaza was lawfully arrested and detained on suspicion of A's rape. I heard evidence on that question on 8, 9 and 10 October 2024, and argument on 11 October 2024. In my view, Mr. Dimaza was lawfully arrested on suspicion of raping A, and his claim for wrongful arrest must fail. In what follows, I give my reasons for reaching that conclusion.

The evidence

- 3 By agreement, the parties handed up the report of a medical examination performed on A no more than a few hours after she was attacked. The parties agreed that the medical report could be treated as authentic, and that its contents could be accepted as true. The report concluded that A's vagina had been penetrated. It noted that A's vagina was bruised and torn. A was a minor at the time of the attack. She was also mentally challenged. According to the medical report, A was able to express herself at the level of a five-year old. It is accordingly clear, at least on a balance of probabilities, that A could not have consented to vaginal penetration. There can be little doubt that A was

raped on 21 August 2016, and that the offence for which Mr. Dimaza was later arrested was actually committed.

- 4 The first defendant, the Minister, admitted that Mr. Dimaza had been arrested for the offence. That admission having been made, Mr. Malema, who appeared for the Minister, accepted that the Minister bore the onus to justify the arrest and that the Minister had the duty to begin.

T's evidence

- 5 The Minister's first witness was T, who is A's mother. During the morning of 21 August 2016, T was at the home she shared in Windmill Park with her sister, her brother and her three children: A, L and Ad. L came into the house and told T that A had been abducted. T went with L to find A. They asked a nearby vegetable seller whether he had seen A. The vegetable seller pointed them in the direction of a cluster of reeds next to a nearby railway line. T eventually found A close to railway line. A was undressed and crying. She was with a man. The man told T that he had seen another man raping A in the reeds by the railway line. He had gone into the reeds because he had heard A crying. He also said that the man he saw attacking A had run away.
- 6 T says that she then saw a man wearing dark brown trousers and a light brown jacket at some distance. She thought he might have been A's assailant. T then went to a nearby shop. T asked the shopkeeper whether they had seen anyone wearing dark brown trousers and a light brown jacket. The shopkeeper said they had. They identified Mr. Dimaza and gave T his address. T then went to Mr. Dimaza's house and spoke to his mother. Mr. Dimaza's mother said that she had not seen Mr. Dimaza since the day before.

- 7 T then reported the attack on A to the police. T and the police took A to the local hospital and obtained the medical report to which I have already referred. It is common cause that, during the course of the medical examination, forensic samples were taken from A and preserved for later testing.
- 8 T gave a statement to the police, and was then informed that the case docket dealing with the attack on A would be dealt with by Constable Thando Ngwenya. When Mr. Dimaza was finally arrested for A's rape, some six months later, T said that she was present at scene of Mr. Dimaza's arrest with L and A, who identified Mr. Dimaza as the man who had abducted A on 21 August 2016.
- 9 Under cross-examination, it was put to T that Mr. Dimaza was no stranger to her before the day of A's attack. It was later to emerge that Mr. Dimaza was in fact close friends with T's brother – at least until the attack on A. Nothing ultimately turns on this, however. T's evidence of the attack on A was of course hearsay, but T's evidence was not tendered as proof of the attack, or even as proof of who was responsible for it. T's evidence was instead put up to show how a complaint of rape was laid with the police, and how Mr. Dimaza became a person of interest in the subsequent investigation.
- 10 T's statement to the police does not provide the level of detail of the events described that T gave before me. T was unable to explain this discrepancy, save to assert that the police officer who took her statement did not record everything T told them. Critically, however, T's evidence that she was present with L and A when Mr. Dimaza was arrested, and that L and A identified Mr.

Dimaza as the man who had abducted A, was not challenged in cross-examination.

Sergeant Nhlapo's evidence

- 11 By the time she gave evidence before me, Constable Ngwenya's rank and name had changed to Sergeant Nhlapo. Sergeant Nhlapo became a police officer on 12 January 2009. At the time of the attack on A, she was a Constable in the South African Police Service's family violence, child protection and sexual offences unit at Brakpan. The docket in A's case was assigned to her on 22 August 2016. At that stage the docket consisted of the medical report, the statement T gave to the police and a document confirming that a sample had been taken from A for the purposes of DNA analysis.
- 12 On receipt of the docket, Sergeant Nhlapo went to T's house. She interviewed A in T's presence, and then separately interviewed L. A told Sergeant Nhlapo that a man had taken her to the railway tracks. A said that she did not want to go with the man, but that he had pulled her along. When they got to the railway tracks, A said that the man undressed her and then "took out the thing he uses to pee". He then put the thing into her "flower" which Sergeant Nhlapo understood to mean A's vagina. A said that this was very painful and that she started screaming and crying when the man penetrated her.
- 13 L told Sergeant Nhlapo that she had been playing with A near a local tuckshop. She saw a man talking to A. L had seen the man before. L said that the man promised to buy A a cellphone. A said that she did not want one. The man then started to drag A away. L returned home to tell her mother, T, what had happened.

- 14 A then took Sergeant Nhlapo to the scene of the rape. A became upset and confused at the scene, and was unable to provide much information of any use.
- 15 Later on in the week immediately following A's rape – Sergeant Nhlapo said that it must have been on Thursday 25 or Friday 26 August 2016 – T took Sergeant Nhlapo to Mr. Dimaza's house. Sergeant Nhlapo wanted to interview Mr. Dimaza under warning, but had no intention of arresting him at that time. On this first occasion Sergeant Nhlapo went to Mr. Dimaza's house, there was no-one home. Later, during the first week of September 2016, Sergeant Nhlapo went again with T to Mr. Dimaza's house with the intention of interviewing him under warning. Sergeant Nhlapo said that she could not access the property, but that, from the front gate, she saw a man T identified as Mr. Dimaza running away through the back of the property. Sergeant Nhlapo said that she made several further efforts to locate Mr. Dimaza in the weeks that followed, but that she was unsuccessful.
- 16 Finally, on 20 February 2017, Sergeant Nhlapo joined a squad of police officers undertaking a special operation to locate suspects in long outstanding cases who had not yet been interviewed or apprehended by the police. They arrived at Mr. Dimaza's house during the evening. Sergeant Nhlapo was accompanied by T, L and A. Mr. Dimaza was at home and let the police in. Both L and A identified Mr. Dimaza as the man who had pulled A away from the tuckshop on 21 August 2016.
- 17 Sergeant Nhlapo then arrested Mr. Dimaza on suspicion of raping A. There is a dispute about whether Mr. Dimaza was read his rights – Sergeant Nhlapo

says he was, Mr. Dimaza said he was not – but I do not think that the dispute matters. There was no dispute that Mr. Dimaza was later informed of his rights at the police station. Mr. Dimaza admitted in his evidence that he was given a receipt-like document that constituted notice of his rights.

18 Mr. Dimaza was taken to Dawn Park police station and then moved either to Boksburg or Brakpan – Sergeant Nhlapo could not remember which. Mr. Dimaza was brought before a Magistrate on the morning of 22 February 2017, when his matter was postponed for the consideration of bail. Mr. Dimaza was eventually released on bail of R5000.

19 Sergeant Nhlapo's version was left substantially unchallenged in cross-examination. Importantly, it was not suggested that Sergeant Nhlapo did not see a man fleeing from Mr. Dimaza's house when she visited in early September 2016. Nor was it suggested that she had any reason to disbelieve T's identification of that man as Mr. Dimaza. Nor was there any challenge to Sergeant Nhlapo's evidence that she took A and L to Mr. Dimaza's house, and that they identified him as A's assailant just before Sergeant Nhlapo arrested him.

20 Mr. Mhlanga, who appeared for Mr. Dimaza, did, however, elicit a version about why the prosecution of Mr. Dimaza was ultimately discontinued. Sergeant Nhlapo said that the control prosecutor was unwilling to proceed without a match between the DNA samples taken from A after her rape and from Mr. Dimaza after his arrest. Those samples were sent for analysis but have, to date, not been returned. T was dissatisfied with this, and pressed for the prosecution to proceed regardless. The control prosecutor then formally

declined to prosecute, and Mr. Dimaza's prosecution was removed from the roll. He was, however, warned that the prosecution could be re-enrolled if the DNA evidence ever became available and incriminated him.

- 21 Sergeant Nhlapo was an impressive witness. Her evidence was clear and internally consistent. She engaged reasonably and patiently with Mr. Mhlanga's repeated attempts to get her to concede that she had no legal basis to arrest Mr. Dimaza. At one stage, Mr. Mhlanga's cross-examination sought to press the point that Sergeant Nhlapo's decision to arrest Mr. Dimaza was tainted by her inability to identify the exact provision of the Criminal Procedure Act 51 of 1977 under which she acted to carry out the arrest. Sergeant Nhlapo addressed that and other similarly argumentative and unhelpful lines of cross-examination with admirable patience.

Mr. Dimaza's evidence

- 22 Mr. Dimaza said that the first time he heard of A's rape was when he returned from work on a Saturday in October 2016. He said that his mother had told him that a crowd of people had come to the home he shared with her and threatened to beat him up, because he is a rapist. Mr. Dimaza said that he immediately approached these neighbours and challenged them to lay a complaint against him with the police.
- 23 Although he did not expressly say so, it seems from the evidence that among the crowd of people who had visited Mr. Dimaza's home was T herself, along with her brother, who was, by all accounts, very friendly with Mr. Dimaza until A's rape.

- 24 Mr. Dimaza also gave background information about his occupation as a fitter of security systems, and about the family with whom he shared a home. Other than that, Mr. Dimaza's account of the events leading up to his arrest differed from the evidence presented on the Minister's behalf in only three material respects.
- 25 The first point of difference was that he denied ever having sought to avoid Sergeant Nhlapo when she came to interview him under warning. The second point of difference was Mr. Dimaza's assertion that, at the time Sergeant Nhlapo said that she visited his home, there was no fence or gate built around it. On this basis, it was later contended that Sergeant Nhlapo could not have been standing outside the front gate when she observed a man she believed to be Mr. Dimaza escaping through the back of the property. The third point of difference was that Mr. Dimaza denied that either T, A or L were present at his arrest. They could not, accordingly, have identified him as T's assailant. As I have already pointed out, none of these points of difference was put to the Minister's witnesses. Their contrary evidence was unchallenged in cross-examination.
- 26 Substantially for this reason, I reject Mr. Dimaza's evidence insofar as it is inconsistent with that of Sergeant Nhlapo. However, I am also driven to reject Mr. Dimaza's evidence for two further reasons. The first is the very high quality of Sergeant Nhlapo's evidence, to which I have already adverted. The second is the fragmented and sometimes evasive nature of Mr. Dimaza's evidence. Mr. Dimaza's attitude on the stand was strangely placid for a man who had been accused of raping a mentally challenged minor. His approach was simply

that the police had to make out the case that he was responsible, and that they had failed to do so.

27 That is, of course, a perfectly acceptable stance for a criminal defendant to take. It is also substantially for the Minister to demonstrate the lawfulness of Mr. Dimaza's arrest, and not for Mr. Dimaza to demonstrate its unlawfulness. However, Mr. Dimaza claimed to be free of any reasonable suspicion of A's rape. Evaluated in light of Sergeant Nhlapo's evidence of the facts necessary to ground the reasonableness of that suspicion, Mr. Dimaza's approach was far too sanguine. Mr. Dimaza offered no exculpatory evidence whatsoever. I accept that he was under no obligation to prove his innocence before me, but in the face of a *prima facie* reliable eyewitness identification of him as the assailant, I think he had to do more than he did to demonstrate that Sergeant Nhlapo was not merely wrong, but unreasonable, in suspecting him. Mr. Dimaza did not suggest that Sergeant Nhlapo knew of facts that rendered her decision to arrest him unreasonable. Nor did he suggest that such facts, though not known to her, would have been discovered had Sergeant Nhlapo acted with reasonable care.

The lawfulness of the arrest

28 Mr. Dimaza was arrested without a warrant on the authority of section 40 (1) (b) of the Criminal Procedure Act. It is trite that an arrest without a warrant under this section is lawful if and only if the arrestor is a peace officer; the arrestor entertains a suspicion; that suspicion is that the arrestee has committed an offence identified in Schedule 1 of the Act; and that suspicion rests on reasonable grounds (see *Duncan v Minister of Law and Order* 1986

(2) SA 805 (A) at 818G – H). In an action for wrongful arrest, the onus of establishing these requirements rests on the Minister.

29 Once these requirements are present, however, the arresting officer retains a residual discretion, which must be rationally exercised in good faith. The onus of establishing that the arrest was wrongful because of a failure to exercise that discretion, or a failure to exercise the discretion rationally and in good faith, rests on Mr. Dimaza (*Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 (SCA) (“*Sekhoto*”), paragraph 47). In the case of serious crimes, such as those listed in Schedule 1 of the Act, it will rarely, if ever, be irrational or in bad faith to arrest a suspect for the sole purpose of bringing them before court (*Sekhoto*, paragraph 44).

30 It is common ground that Sergeant Nhlapo was a peace officer when she arrested Mr. Dimaza, and that she entertained a suspicion that Mr. Dimaza had committed A’s rape. Rape is an offence listed in Schedule 1 of the Act. Accordingly, the only points of dispute between the parties were whether Sergeant Nhlapo reasonably suspected Mr. Dimaza of having committed the rape, and whether, notwithstanding the reasonableness of her suspicion, she properly exercised her residual discretion not to arrest Mr. Dimaza.

31 On the evidence, Sergeant Nhlapo was plainly reasonable to have suspected that Mr. Dimaza was A’s assailant. He had already been identified as a potential suspect in T’s statement to the police. L and A both identified Mr. Dimaza as A’s assailant at the point of his arrest. There was no evidence of any other fact known to Sergeant Nhlapo at the time she arrested him that would have excluded the reasonableness of her suspicion that Mr. Dimaza

was the culprit. On the facts of this case, L's identification of Mr. Dimaza was plainly enough to ground a reasonable suspicion that he was A's assailant.

32 Mr. Mhlanga argued that the delay between Sergeant Nhlapo first being informed that Mr. Dimaza was a potential suspect and her decision to arrest him rendered the arrest unlawful. I do not agree. In the first place, Sergeant Nhlapo explained much of that delay. She tried on at least two occasions to interview Mr. Dimaza under warning. On the second occasion she sought an interview, she formed the reasonable belief that Mr. Dimaza was attempting to evade her. Sergeant Nhlapo said that she made several further attempts to interview Mr. Dimaza under warning, but it seems to me that she would have been justified in arresting Mr. Dimaza from the moment she reasonably suspected he was trying to evade her.

33 Mr. Mhlanga attempted to cast doubt on this evidence, because T had said that she had no contact with the police between making her complaint and identifying Mr. Dimaza at the scene of his arrest. T could not, therefore, have identified the man fleeing from Mr. Dimaza's house as Mr. Dimaza himself. On her own version, T was not there at the time. Apart from the fact that this proposition was not put to Sergeant Nhlapo in cross-examination, it is improbable that Sergeant Nhlapo lied or was mistaken when she said she visited Mr. Dimaza's house with T. Given the very high level of reliability of Sergeant Nhlapo's evidence overall, it is more likely than not that T simply forgot, or neglected to mention, that she had taken Sergeant Nhlapo to Mr. Dimaza's house.

34 Secondly, and in any event, the evidence was that Mr. Dimaza was arrested only once L and A identified him as A's assailant. It seems to me that this identification is what prompted the arrest. In other words, had L and A not identified Mr. Dimaza as A's assailant shortly before his arrest, then he would not have been arrested. There was no delay at all between L and A telling Sergeant Nhlapo that Mr. Dimaza was A's assailant and Sergeant Nhlapo arresting him.

35 For all these reasons, Mr Dimaza's arrest was lawful. Other than the alleged unlawfulness of the arrest, there was no basis laid to challenge the lawfulness of Mr. Dimaza's subsequent detention. The claim for unlawful arrest and detention must accordingly fail.

Order

36 It would be wrong to move on from this case without observing that the delay in obtaining the DNA evidence that may exculpate Mr. Dimaza is, on its face, unjustifiable. Although the Minister plainly had sufficient reason to arrest Mr. Dimaza, and although Mr. Dimaza could have been prosecuted on the evidence available to the Minister at the point of Mr. Dimaza's arrest, the NDPP was entitled to decline to press the case against Mr. Dimaza without the benefit of the DNA evidence.

37 But the State's failure to produce that evidence has left this case in limbo for eight years. That situation is wholly unacceptable. The delay in obtaining the DNA evidence and in either pursuing or finally discontinuing Mr. Dimaza's prosecution severely undermines public confidence in the justice system. It also leaves A and her family with little hope that A's assailant, whomever that

might be, will ultimately be held accountable for the appalling crime that triggered these proceedings.

38 The plaintiff's claim is dismissed with costs.



S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 21 October 2024.

HEARD ON: 8, 9, 10 and 11 October 2024

DECIDED ON: 21 October 2024

For the Plaintiff: T Mhlanga
Instructed by Nkosi Nkosana Inc

For the First Defendant: JMV Malema
Instructed by the State Attorney