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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: **A2025-187496**

(1)	REPORTABLE:
(2)	OF INTEREST TO OTHER JUDGES:
(3)	REVISED
_____	_____
DATE	SIGNATURE

In the matter between:

B[...] J[...] K[...]

Applicant

And

MINISTER OF POLICE

Respondent

JUDGMENT

MOTHA J WITH WHOM CRUTCHFIELD J CONCURS.

Introduction

[1] The appeal before us engages the order made by the Regional Court magistrate for the Regional Division of Gauteng held at Roodepoort (“the order”). The order dismissed with costs the appellant’s claim for unlawful arrest and detention against the Minister of Police, the respondent. First, the appellant sought condonation for the late filing of the appeal, and his application was unopposed. In the affidavit

elucidating the six-day delay, the appellant attributed it to the late receipt of the record. I am of the view that the explanation proffered is sufficient; therefore, this application need not unduly detain us, as it is in the interests of justice to grant condonation.

The facts

- [2] This matter involves three family members. The appellant (who is the father); his son who is a victim living with mental illness; and the mother (who is the complainant). It is common cause that, at the time of the incident, the son was residing with his mother and had visited his father from 4 to 7 October 2019. Upon his return from his father's house, his mother said she noticed he was uncomfortable. She asked what bothered him. He informed her that his father had raped him. Disturbed by that information, she took him to a nearby clinic, where he was examined, and she was advised that penetration had occurred.
- [3] Subsequently, she reported the matter to the police and deposed to an affidavit. A police docket was opened against the father, under CAS 153/11/2019. Accompanied by her, the police proceeded to the father's home at 3[...] S[...] Street, Dobsonville, Soweto, on 13 November 2019. The father was arrested and taken to Dobsonville Police Station, where he was detained for three days before being released without appearing in court.

The issues

- [4] Essentially, the question that confronts this court is whether the arresting officer had information to form a reasonable suspicion that the appellant had committed an offence of rape, listed in Schedule 1. Counsel for the appellant submitted that the arresting officer did not comprehend what the doctor wrote in the J88 and that the victim was not present when the appellant was arrested. Consequently, the appellant's arrest and detention were unlawful.

- [5] In furtherance of his argument, the appellant referred to the amended plea of the respondent, which reads:

“The defendant admits that the plaintiff was arrested on 13th of November 2019 on the charge of rape, and the defendant pleads that the victim pointed out the plaintiff as the one who raped him in the presence of the police, the defendant denies the balance of the allegations contained in these paragraphs and the plaintiff is put to the proof thereof.

In the premises, the police officers arrested the plaintiff under section 40 of the CPA in circumstance where they had a suspicion that he had committed a schedule 1 offence, in the circumstances, the plaintiff’s arrest is lawful. To the extent necessary, the defendant pleads that the arrest and detention of the plaintiff is justifiable in terms of section 40 (1) (b) of the Criminal Procedure Act 51 of 1977, read together with section 205 of the Constitution.”

- [6] At this juncture, it is apposite to pause and consider the applicable law.

The law

- [7] Emerging from the dark days of Apartheid, the Constitution of South Africa, 1996 (the Constitution) places great store by the liberty of an individual. Hence, an arrest without a warrant is, *ex facie*, unlawful as it flies in the face of section 12(1) of the Constitution, which reads:

“Everyone has the right to freedom and security of the person which includes the right-

(a) Not to be deprived of freedom arbitrarily or without just cause;...”

- [8] This section mirrors Article 9 of the International Covenant on Civil and Political Rights, which is a multilateral treaty that commits nations to respect the civil and political rights of individuals, including the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and rights to due process and a fair trial.

- [9] Referring to section 12(1) of the Constitution, the court in *Mahlangu and Another v Minister of Police* held¹:

“Unlawful arrest and detention

The prism through which liability for unlawful arrest and detention should be considered is the constitutional right guaranteed in section 12(1) not to be arbitrarily deprived of freedom and security of the person. The right not to be deprived of freedom arbitrarily or without just cause applies to all persons in the Republic. These rights, together with the right to human dignity, are fundamental rights entrenched in the Bill of Rights. The state is required to respect, protect, promote and fulfil these rights, as well as all other fundamental rights. They are also part of the founding values upon which the South African constitutional state is built.

The police, like any other state functionary in the country for that matter, are constrained by the principle of legality imposed by the Constitution and may not exercise any power nor perform any function beyond that conferred upon them by law. That is a basic component of the rule of law and one of the founding values of our Constitution.”

- [10] With that legal background in mind, police officers may only exercise their power to arrest without a warrant within the boundaries of the law conferred on them by s 40(1) of the Criminal Procedure Act 51 of 1977 (the Act). In terms of section 40(1)(b), which is the law implicated in the pleadings, a peace officer may, without a warrant, arrest any person whom he or she reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.

- [11] It is not in dispute that the arresting officer was a peace officer who arrested the appellant without a warrant for having committed a Schedule 1 offence of rape.

¹ 2021 (2) SACR 595 (CC) at paras 25-26

Moreover, the appellant did not take issue with the arresting officer's exercise of his discretion. As adumbrated earlier, this appeal pivots around whether the arresting officer had the information required to form a reasonable suspicion that the appellant had committed a schedule 1 offence.

[12] When dealing with the reasonableness of an arresting officer's suspicion, the court in the matter of *Biyela v Minister of Police*,² expressed itself in the following terms:

"The question whether a peace officer reasonably suspects a person of having committed an offence within the ambit of s 40(1)(b) is objectively justiciable. It must, at the outset, be emphasised that the suspicion need not be based on information that would subsequently be admissible in a court of law.

The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unparticularized suspicion. It must be based on specific and articulable facts or information. Whether the suspicion was reasonable, under the prevailing circumstances, is determined objectively.

What is required is that the arresting officer must form a reasonable suspicion that a schedule 1 offence has been committed based on credible and trustworthy information. Whether that information would later, in a court of law, be found to be inadmissible is neither here nor there for the determination of whether the arresting officer at the time of arrest harboured a reasonable suspicion that the arrested person committed a schedule 1 offence."

Discussion and analysis

[13] Against this legal background; and to examine the submission that the arrest and detention were unlawful, it is prudent to bifurcate the appellant's submissions into the J88 and the whereabouts of the victim.

The J88 issue

² 2023 (1) SACR 235 (SCA) at paras 33-35

[14] Counsel's submission is that "in further justifying the arrest, the arresting officer said: 'My primary reason for arrest was that I read the J88 and the statement of the complainant.'" As his argument progressed, he asserted that the arresting officer did not understand what was written in the J88.

[15] Building on this point, counsel contended that the arresting officer stated that the doctor wrote that the victim was okay and happy, a statement not contained in the J88. Additionally, he took issue with the arresting officer's testimony that the doctor wrote that even though there was no penetration, that does not exclude rape.

[16] Indeed, those are not the doctor's words in the J88. The doctor wrote the following:

"A 19-year-old male escorted by the mother stated that his father penetrated his anus with his penis at his house at Dobsonville on 4 October 2019 at night."

And paragraph 6, with the handwriting:

Mentally challenged but can relate history calm."

And

"Absence of injuries does not exclude anal penetration."

[17] Taken out of context and viewed in isolation, the doctor's words, "absence of injuries does not exclude anal penetration," can never be construed as meaning: the absence of penetration does not exclude rape, as paraphrased by the arresting officer.

[18] To set a proper context, one can do no better than to refer to the arresting officer's cross-examination:

"MR NEVAKHULA: So, I put to you that you did not have reasonable suspicion to arrest the plaintiff.

COURT: Do you agree?

MR MPFRESENI: I do not agree.

COURT...

MR NEVAKHULA: Okay, let me repeat that question. I put it to you that even though you did not have to have reasonable doubt in respect of guilty, but your reasonable suspicion shall be exercised and justifiable. What do you say?

MR MPFRESENI: That is what I did. When I went to arrest him, I had the J88. I had his statement and I proceeded to arrest him and from there the Court is the one that is going to make a decision.

MR NEVAKHULA: Sir, when you considered on the statement of the child and the J 88, what about the statement of the mother?

MR NEVAKHULA: The mother....[no audible reply] felt the pain as well. That is why she went to open a case at the police station.

COURT: And I remember you testified earlier that when you received the docket, you called the complainant who is the mother.

COURT: And you also read that, her statement. Is that correct?

MR NEVAKHULA: Yes."

[19] In the light of this interaction between the arresting officer and the appellant's legal representative, there cannot be any argument that the arresting officer's reasonable suspicion was based on the victim's (son's) statement, the complainant's (mother's) statement, and the J88.

[20] This necessitates an examination of the statements from the victim and the complainant. The victim's statement in relevant part reads:

"During 2017 I was at home, Dobsonville, at 2[...] house 3[...], ... [indistinct] Street. I was with my father, J[...] K[...], in the house and called me into his bedroom. When I entered in his bedroom, he told me that I must undress my trouser and I refused but he said I must do it otherwise he will beat me. I then undressed my trouser and my underpants and he said I must sleep on top of the bed, facing down and he undressed himself, his trouser and the pants to the knees and he came on top of me and raped me from behind.

I did not tell anybody as he said I must not talk to anyone about this because he will kill me and my mother. I then told my mother last week and my mother told the family members.”

[21] In relevant part, the statement of the complainant reads:

“I am an African female age 49,..On 2019-10-04 at about 18:00 Mr. J[...]... came to my house to pick up our son Mr..... Age 19.... is mentally unstable. He went with him to his house at number 3[...] S[...] street ... He was visiting his father for the weekend.

On 2019-10-07 at about 14:00 J[...] brought back our son... I then realize that... was not comfortable but I never asked him anything. ... went to school because he attended night school. When he came back from school at about 17:30 I asked him what was going on.

That is when my son... told me that his father Mr. J[...] has been raping him. He told me that his father put his penis inside his anus and have sex ...”

[22] Armed with these statements, the arresting officer took the victim and the complainant to the doctor and obtained the J88. In view of the victim’s and the mother’s statements, even in the absence of a J88, it would be unsound to suggest that the arresting officer did not have the basis for a reasonable suspicion that an offence of rape, listed in Schedule 1, had been committed. Put differently, it would be a dereliction of duty for an officer to ignore such information.

[23] To put the issue of the J88 to bed, due regard must be accorded to the arresting officer’s evidence in chief, which reads:

“MR MPFRESENI: After obtaining the statement, we then took the child to the doctor at Zamukuhle[?]. Since we deal with rape matters, we normally take the rape victims to Zamukuhle or we take them to Discovery. Those are the only two places that we take the victims to.

MR KAMPA: Is it Zamukuhle and Discovery, or it is the same thing?

MR MPFRESENI: Zamukuhle only.

MR KAMPA: And then, yes, what transpired when you got there?

MR MPFRESENI: And then the doctor examined the child and told us that he was finished. And then thereafter the doctor handed us the J88 and I read the J88 and I noticed that the doctor had written that.

MR KAMPA: And then you can take us through, what is it that you said you saw on the J88?

MR MPFRESENI: And on reading the J88, the doctor said that the child was able to remember everything.

MR KAMPA: Proceed.

MR MPFRESENI: And the doctor also wrote that even though there is no evidence of penetration, that does not exclude rape.

MR KAMPA: Okay, proceed.

MR MPFRESENI: And since we work with these cases, normally the doctor did find that the child is sexually active and the doctor will not be able to see anything. MR KAMPA: I just want to refer on the docket. I just want to provide the witness ... [no audible reply] on the docket I want to refer to page 185 of the document.

MR KAMPA: The statement of the complainant and then EXHIBIT C is the statement by the plaintiff. Yes, Your Worship. I was reading there by the end, with the handwriting:

"A 19-year-old male escorted by the mother stated that his father penetrated his anus with his penis at his house at Dobsonville on 4 October 2019 at night".

And paragraph 6, with the handwriting:

"Mentally challenged but can relate history calm". Is this one of the statements that you were referring to?

MR MPFRESENI: Yes, yes.

MR KAMPA: And it goes there down to say that the conclusions are that no physical injuries noted.

MR MPFRESENI: Yes.

MR KAMPA: And if you move to a further page, it also state there at paragraph 22, conclusions. It says:

"Absence of injuries does not exclude anal penetration".

Do you see that?

MR MPFRESENI: Yes.

MR KAMPA: Is it one of the things that you were mentioning?

MR MPFRESENI: Yes.”

[24] The interaction admits of no debate that the arresting officer took into consideration the contents of the J88. The inelegant paraphrasing of what was said by the doctor does not, in and of itself, render his suspicion unreasonable. When viewed objectively, the concatenation of evidence points to the reasonableness of the arresting officer’s suspicion that an offence of rape, listed in schedule 1, had been committed.

[25] What is more, the standard of a reasonable suspicion is very low. In *casu*, the arresting officer cannot be accused of having acted on a hunch. Hence, I reject the submission that at the time of the appellant’s arrest, the arresting officer lacked credible information to form a reasonable suspicion that the appellant had committed an offence under schedule 1.

The whereabouts of the victim

[26] Counsel submitted that the victim was not present when the appellant was arrested. Yet, the arresting officer was not cross-examined on this aspect. The appellant’s representative simply said:

“MR NEVAKHULA: It will be further the plaintiff’s case that at the time of his arrest, the victim was not present. What do you say about that?

MR MPFRESENI: The victim was present.”

[27] More was expected from the appellant on this aspect, especially if regard is had to the arresting officer’s evidence in chief and testimony under cross-examination. Addressing this issue, he said the following in his evidence in chief:

“MR KAMPA: Whose address is that that you are visiting?

MR MPFRESENI: The suspect. The suspect's address.

MR KAMPA: The plaintiff in this matter?

MR MPFRESENI: Yes. On our arrival we discovered that the gate was locked.

MR KAMPA: Proceed.

MR MPFRESENI: And outside the yard then I recognised a certain woman and we introduced ourselves as police and we asked that she will come and open the gate and she did so. We entered with the victim and the victim's mother and went inside the house.

MR KAMPA: Proceed.

MR MPFRESENI: And then I met up with an African male inside the house and introduced ourselves as a police working for SAPS.

MR KAMPA: Proceed.

MR MPFRESENI: Then the victim pointed out the suspect as the person who raped him.”

[28] Further, under cross-examination, he said:

“MR MPFRESENI: Your Worship, I went there to arrest the suspect. I was not alone. I do not know the suspect. I never know the house of the suspect. I was with the mother of the victim and the victim. The victim, he was the one who pointed out the house and then the gate was locked and then the female, African female, unlocked the gate and then we get inside. I was not alone. I was not alone when I got there to arrest. I cannot arrest the person without the victim or the complainant.

MR NEVAKHULA: But sir, maybe you consider that this person is someone who was mentally incapable. Then should be, with someone with your experience ... [intervenes]

COURT: But he already replied to that question and his answer to that is that it does not mean that because the victim is a said to be a person with a mental challenge, that he should not arrest. That is his response to that.

MR NEVAKHULA: Your Worship, as the Court pleases, Your Worship. I do not have any further questions.

COURT: Re-examination?”

[29] It is unmeritorious to raise this issue when it was not fully canvassed in the court *a quo*. To me, this issue is a red herring, since it is common cause that the complainant, the mother, accompanied the arresting officer on 13 November 2019.

[30] Even if we accept that there was contestation on this issue, this court, as a court of appeal, has been cautioned against simply riding roughshod over the factual and credibility findings of the court *a quo*. Since the court *a quo* had the benefit of seeing, hearing and evaluating the evidence of the witnesses, it is in a better position to arrive at credibility findings.³ Like all legal rules, this too has limitations. The trial court found the respondents' (defendants') testimony satisfactory and clear. However, the same cannot be said of the plaintiff's witness, as it found that the evidence of the "plaintiff's sister-in-law was of a poor quality."⁴

[31] Finally, our courts have more than once pronounced on how to deal with mutually destructive versions. It would serve no useful purpose to restate the trite principles as enunciated in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA and Others*⁵

[32] The court *a quo* grappled with the issue before this court, as illustrated at paragraph 24 of the judgment, where the court *a quo* said:

"The fundamental issue to be decided by this court on the available evidence is whether the arresting officer arrested and detained the plaintiff, based on a reasonable suspicion that he committed the offence (Rape) listed in schedule 1."

[33] The court *a quo*'s findings that remain undisturbed are:

"The testimony by the arresting officer, objectively assessed, to the extent that the docket content as confirmed by the mother and Tseko informed his decision to arrest is convincing. It cannot rightfully be argued on the prevailing facts that evidence available to the arresting officer at the time of arrest fell short of reasonable grounds for suspicion that the plaintiff committed the alleged offense.

³ In *R v Dhlumayo* 1948 (2) SA 677 (A) the Appeal Court stated at p706:

"The trial Judge has advantages - which the appellate court cannot have - in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked."

⁴ Court *a quo* judgment at para 28

⁵ 2003 (1) SA 11 (SCA) at para 5

I find that there was nothing more for the police to do other than to bring the plaintiff before a court of law.”⁶

[34] To disturb the findings of the court *a quo*, the court of appeal must arrive at the conclusion that there was a misdirection (on fact or law) or that the trial court’s conclusion on the facts was clearly wrong. In *casu*, one searches in vain for such a conclusion. Absent such a finding, the appeal stands to be dismissed.

Costs

[35] It is trite that costs follow the result. Since this matter was not defended, we will make no costs order.

Order

[36] In the result, I make the following order:

1. The appeal is dismissed.

MP MOTHIA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

APPEARANCES:

Date of Hearing: 22 April 2026

Date of Judgment: 18 May 2026

For Appellant I: Adv Nemukula

Instructed by Lethlage Attorneys

⁶ Court *a quo* judgment at para 31

For First to Fourth Respondents:

Instructed by:

The State Attorney