

SOUTH AFRICA / JUDGMENT

Grahamstown Eastern Cape High Court (CA13/2014) [2014] ZAE CGHC 57 (20 June 2014) [2014] ZAE CGHC 57

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J.M. Roberson, M. Makaula

CASE / FILE NUMBER

CA13/2014

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO: CA13/2014

DATE HEARD: 06/06/2014

DATE DELIVERED: 20/06/2014

In the matter between

THE MINISTER OF POLICE Appellant

vs

CHRISTO LEWIES Respondent

JUDGMENT

ROBERSON J:

- [1] This is an appeal against the judgment of the magistrate Graaff Reinets awarding damages to the respondent for wrongful arrest and detention.
- [2] It is common cause that the respondent was arrested without a warrant on 15 August 2012 at the Graaff Reinets police station by Constable Olwethu Matondolo, on a charge of assault with intent to do grievous bodily harm. He was taken to court the next day and the charge was withdrawn against him.

- [3] In his plea the appellant simply denied that the arrest and detention were unlawful, and did not specifically plead the ground of justification. It became apparent during the trial that the appellant relied on s 40 (1) (b) of the Criminal Procedure Act 51 of 1977 (the Act), in that the arresting officer reasonably suspected that the respondent had committed an offence referred to in Schedule 1 of the Act, the specific offence being assault when a dangerous wound is inflicted.
- [4] Because the focus of the appeal was restricted to whether or not Matondolo, on the information available to her, reasonably suspected the commission of this offence, it is not necessary for the purposes of this judgment to refer to all the evidence led at the trial.
- [5] The events leading up to the arrest were related by Matondolo as follows: on 14 August 2012 she received a docket relating to the commission of the offence of assault with intent to do grievous bodily harm on 11 August 2012. The docket contained an affidavit from the complainant, one Piet Tromp. Matondolo read the affidavit, the relevant portion of which was as follows:

“As I left the house I noticed four males standing outside the house. As I was on my way to the gate I just felt something on the back of my head. As I turned my head to look behind I noticed that it was Christo who had the empty Old Brown Sherry bottle in his hand. I run away from him and ran to Bigger’s house. I fell in front of her yard and just felt how I was kicked. Bigger had asked them why they are beating me while they had invited me for drink. She then informed them that she will contact the police. As she went inside her house I immediately jump up when they ran away from and I ran into someone else yard and ran into Circle Drive when I fell in front of Ouma Gramatjie’s house where I lost my conscious. When I gain conscious I realised that I am in hospital.”

- [6] Matondolo went to Tromp’s home on 14 August 2012 in order to interview him but he was not at home. Her intention was to obtain clarity on his complaint. At 10h00 on 15 August 2012 she interviewed Tromp. She recorded in the police docket diary that he told her that he had been assaulted by the respondent and two others. She discussed the contents of his affidavit with him and he gave her the J88 form which had been completed by Dr. Thozama Ndzingi on 13 August 2012. Under the heading “Clinical findings” the following was recorded in the J88 form:

“Wound on the scalp – no fracture seen. Wound on the left chest at the back. No lung injury seen on X-ray. Patient was observed overnight and discharged the following day.”

Under the heading mental health and emotional status it was recorded that the patient was “in pain”.

Under the heading “Conclusions” the following was recorded: “Superficial wounds. No internal injuries noted”.

- [7] Matondolo considered Tromp’s injuries to be dangerous because they were to his head and because he had lost consciousness and stayed overnight in hospital. She said that head injuries can be serious especially where a bottle is involved, and she also saw for herself that

the head injury, which was stitched, was serious. Tromp had also complained of pain and the doctor had mentioned in the J88 form that Tromp was in pain. With regard to the doctor's conclusion that the wounds were superficial she said she thought that "maybe at a later stage this injury could have done something". She agreed during cross-examination that she could have been wrong in her assessment because the injuries were superficial.

- [8] Not long after 10h00 on 15 August 2012 police members brought the respondent and another person to her office and told her that they believed that she was looking for these two men. When she was told their names she remembered that a case had been opened against them. She fetched the docket and saw that they were the persons who had allegedly assaulted Tromp. She then arrested them, explained their rights, and took their warning statements. According to her note in the docket diary this took place at 10h08. The respondent and the other man were later identified by Tromp as the persons who had assaulted him.
- [9] Dr. Thozama Ndzingi was called as an expert witness. The expert notice stated that he would testify that he had examined Tromp on 13 August 2012 and that Tromp sustained a wound on the scalp and left chest and was observed overnight. The expert notice went on to state:

"The attack and injuries suffered by Piet Tromp that caused him to lose consciousness was (sic) life threatening injuries.

Piet Tromp suffered from a wound to his chest at the back which was a dangerous wound."

- [10] Tromp was admitted to hospital on 11 August 2012 and attended to by other staff at the hospital, not by Dr. Ndzingi. When Dr. Ndzingi saw Tromp on 13 August he saw in Tromp's hospital file the notes of the injuries which had been observed on 11 August. He examined Tromp to verify the findings and completed the J88 form.
- [11] Dr. Ndzingi testified that the head injury was a laceration on the forehead and the chest wound was consistent with one caused by a sharp object. With regard to Tromp's mental condition at the time of admission, he said it was difficult to differentiate

between the effect of alcohol and the head injury, and Tromp was kept at the hospital until the effects of the alcohol had dissipated.

Tromp was under observation at the hospital and did not lose consciousness while there. Because Tromp had said he did not

know how he got to the hospital it was concluded that he must have lost consciousness at some stage. Tromp did not tell Dr.

Ndzingi that he had lost consciousness. According to Dr. Ndzingi it was possible that the loss of consciousness was a result

of a blow to the head. It is also possible that an injury which causes loss of consciousness or loss of memory could damage the brain and might even cause death. The fact that the doctor kept Tromp overnight meant that the doctor was worried about something. The chest wound was also

potentially life-threatening and accordingly X-rays were taken to find out if there were internal injuries and Tromp was observed for twelve hours. Tromp was discharged the next morning because “everything was found to be fine”. When Tromp was released there was nothing wrong with him.

[12] S 40 (1) (b) of the Act was considered by Jones J in *Mabona v Minister of Law and Order* 1988 (2) SA 654 (SE) at 658E-I where he said the following:

“The test of whether a suspicion is reasonably entertained within the meaning of s 40(1)(b) is objective (S v Nel and Another 1980

(4) SA 28 (E) at 33H). Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.”

[13] In *Rex v Jones* 1952

(1) SA 327 (EDLD) the appellant had been arrested without a warrant on suspicion of having committed “assault in which a dangerous wound is inflicted”[1]. The court found that the arresting officer was justified in suspecting that the appellant had committed an assault but found that it had not been established that he had reasonable grounds for suspecting that a dangerous wound had been inflicted in the assault. At 332D-F Jennett J said the following:

“The expression “dangerous wound” is not easy to define. One may well ask, “Is a serious wound always a dangerous

wound?” A minor wound may be dangerous because of the extra possibility it creates for septic infection. Then however it is not the wound which causes the danger but the sepsis.

It seems to me that by a dangerous wound is meant one which itself is likely to endanger life or the use of a limb or organ. The officer effecting the arrest has only to have reasonable grounds for suspecting that such a wound has been inflicted.”

See also *Bobbert v Minister of Law and Order* 1990 (1) SACR 404 (C) at 409 e-h.

- [14] In the present matter, the magistrate found, correctly in my view, that Matondolo reasonably suspected that the respondent had inflicted Tromp's injuries. However he concluded that Matondolo did not have grounds to believe that the wounds were dangerous.
- [15] In my view none of the information available to Matondolo concerning Tromp's injuries, namely his affidavit, what he told her and what she observed when she interviewed him, and the contents of the J88 form, constituted "solid grounds" for suspecting that Tromp had suffered injuries which endangered his life or his use of a limb or organ. Although loss of consciousness was mentioned in Tromp's affidavit, by the time she interviewed him nearly four days had passed since he was injured and he had been discharged from hospital the morning after the injuries were inflicted. The scalp wound which she observed and Tromp's complaint of pain would not in themselves appear to be symptoms of life threatening injuries. Most importantly, even if Matondolo thought that head injuries are inherently dangerous, she was aware of the conclusion in the J88 form that the wounds were superficial. It was not for her to go beyond the doctor's expert conclusion and speculate that something more serious might develop in the future. One could even go so far as to say that on the information available to her the injuries did not even qualify as serious, let alone dangerous. Further, in my view Dr. Ndzingi's evidence was of no assistance and in fact contrary to the contents of the expert notice, in which it was stated that he would testify that the wounds

were life threatening. Such a statement was completely at odds with his conclusion in the J88 form that the wounds were superficial

and his evidence that when Tromp was discharged from hospital there was nothing wrong with him. The effect of his evidence was that in theory head wounds and chest wounds are potentially fatal but he could not sustain such a conclusion in the case of Tromp, whom he personally examined two days after the injuries were inflicted. Dr. Ndzingi's evidence also played no part in Matondolo's decision to arrest and could not be taken into account *ex post facto*.

- [16] In the result I conclude that a reasonable person in Matondolo's position would not have considered that there were sufficient grounds for suspecting that the respondent had committed an assault involving the infliction of a dangerous wound. The appellant therefore failed to discharge the onus of proving that respondent's arrest was justified and the magistrate correctly gave judgment in favour of the plaintiff.

- [17] One aspect of the trial requires comment. The respondent's attorney addressed Matondolo several times during cross-examination

as "my dear". In my view this was an inappropriate and disrespectful way to address her, especially in the context of court proceedings, and should not have been allowed.

- [18] The appeal is dismissed with costs.

J.M. ROBERSON

JUDGE OF THE HIGH COURT

I agree,

M. MAKULA

Appearing on behalf of Appellant: Adv. K. Watt

Instructed by: Whitesides Attorneys, Grahamstown

Appearing on behalf of Respondent: Adv. J. Koekemoer

Instructed by: Nolte Smit Inc, Grahamstown

- [1] S 26 of the Criminal Procedure and Evidence Act 31 of 1917 provided that a peace officer was authorised to arrest without a warrant a person whom he had reasonable grounds to suspect had committed an offence mentioned in the First Schedule to that Act. One of the offences in the schedule was “assault in which a dangerous wound is inflicted”.

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