

SOUTH AFRICA / JUDGMENT

Minister of Police v Abrahams (CA14/2019) [2019] ZAECHGC 79 (20 August 2019) [2019] ZAECHGC 79

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Griffiths, Smith, Rugunanan

CASE / FILE NUMBER

CA14/2019

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION:GRAHAMSTOWN

CASE NO. CA 14/2019

In the matter between:

MINISTER OF POLICE

Appellant

and

LIONEL ABRAHAM ABRAHAMS

Respondent

FULL BENCH APPEAL JUDGMENT

GRIFFITHS, J.

- [1] The respondent was arrested by employees of the Appellant on 8 January 2013 at Loeri, Eastern Cape, and detained for a period of approximately 24 hours. The charges were subsequently withdrawn. Regarding this as an unlawful intrusion on his liberty, he successfully sued the appellant and was awarded damages by the High Court, Port Elizabeth, in the sum of R120 000.00. The appellant has come before us on appeal against this award having been duly granted the requisite leave by the trial court.[2] By way of a notice filed with this court on 02 July 2019 the respondent abandoned R60 000.00 of the amount awarded. In the appellant's heads of argument, and again in argument before us, the appellant accepted the amount effectively thereby tendered, save for the question of costs.

- [3] Attracting an onus, the appellant admitted the arrest and detention at the hands of his employees but pleaded that the provisions of section 40(1)(b) of the Criminal Procedure Act[1] applied. This subsection came into play, so it was pleaded, because the arresting officer harboured a reasonable suspicion that the respondent had committed the offence of housebreaking and theft which fell within the ambit of Schedule 1 to the Act.[4] Most, if not all, of the facts of this matter were common cause before the trial court. The appellant's employees were called upon to investigate a housebreaking which occurred on the night of 26 - 27 November 2012 at the house of one Mr Dries Meyer during the course of which a hunting rifle (described as a 7mm Mauser Rifle) was stolen. Shortly thereafter the commander of the detective branch at Thornhill police station, one Bradley, received information from informants to the effect that the appellant (who was also known as "Tonsie") had attempted to sell what was referred to as a hunting rifle to one Felix, a tavern owner in the Village. Bradley immediately issued instructions inter alia to obtain a statement from Felix and for the arrest of the respondent.
- [5] Subsequently a statement was indeed taken from Felix by Bradley which, according to Bradley, accorded with the information he had already received. The effect of the statement was that the respondent had, a few days after the theft, gone to Felix's shop with a hunting rifle that he wished to sell. He had the rifle in his possession which he held openly. Felix was however not interested.
- [6] Bradley suspected the respondent because Loeri is a small town, its inhabitants are generally known to him, theft of a firearm is an unusual occurrence and no other similar case had been reported. Furthermore, the respondent had been implicated in other matters and, although he lived in the town, he often travelled to Port Elizabeth.
- [7] The actual arrest of the respondent was effected by one Sergeant Serfontein. Before doing so she discussed the matter with the investigating officer and Bradley. She was made aware of the existence of Felix's statement in which regard she testified as follows:
- "Can you tell the court what information did you have before you arrested him – – Ja, before I arrested him there was this statement under oath, I know about the statement under oath that Tonsie wanted to sell this firearm, the stolen rifle specific of Dries Meyer at some... the person who gave the statement, at that person's place. I know for a fact about that statement and that is the information on which I also acted upon."*
- [8] At the time of arresting the respondent at his house, the respondent spoke to Serfontein. In this regard she testified
- "Yes, he just said that he did not break in at Dries's house and that the firearm that he has got is a winbuku (airgun) that he is trying to sell."*
- [9] The respondent did not at that stage mention that someone else had tried to sell a firearm to him.

[10] It was the respondent's case that before his arrest no one had come to look for him. On the day of the arrest, he had informed Serfontein that he knew nothing about a housebreaking and theft of a firearm but had mentioned that he owned a pellet gun which he used to scare goats and cattle from his yard. At the police station, he made a statement in which he alleged that one Tiens had approached him and had asked whether he wished to purchase a hunting rifle. Denying that he had tried to sell a hunting rifle to Felix, he said that he had been to that tavern at some stage carrying his pellet gun.

[11] The court a quo, in concluding that the appellant had not established on a preponderance of probabilities that the arrest was lawful, restricted its assessment as to whether or not there existed a reasonable suspicion as to whether the respondent had committed a schedule one offence to the time period prior to Bradley issuing his instruction to arrest. It seems to me, however, that in view of the

delay of approximately one month after the instruction was given in arresting the respondent, the court ought to have looked at all the available information to assess whether or not, at the time of the arrest, the suspicion was indeed reasonable.

[12] As indicated, the appellant relies on the provisions of section 40(1)(b) of the Criminal Procedure Act which reads as follows:

"(1) A peace officer may without warrant arrest any person-

(a).....

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;"

[13] The approach to be adopted in considering whether or not the suspicion is reasonable was succinctly set out by Jones J. in the oft quoted matter of *Mabona and Another v Minister of Safety and Security and Others*[2] as follows:

"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."

- [14] It has been argued before us that the court a quo was wrong in concluding that the suspicion harboured by Bradley was not reasonable in all the circumstances. It has been argued that the court ought to have taken a broader approach and in particular ought to have taken into account events which occurred subsequent to his instruction to arrest. With this latter submission I agree. However, it is again common cause that the only further relevant evidence which came to hand thereafter was the statement by Felix. Bradley's evidence was to the effect that the statement accorded entirely with the evidence he had earlier received from the informants. Accordingly, the assessment by the court a quo as to the reasonableness of the suspicion remains much the same save to the extent that one has the statement of Felix to critically analyse.
- [15] The question arises as to whether or not it can be said that the statement made by Felix was sufficient, objectively speaking, to raise a reasonable suspicion that it was indeed the respondent who stole the hunting rifle during the course of the housebreaking?
- [16] Of critical importance in my view is that in his statement Felix spoke of the fact that the respondent had openly approached him bearing a "hunting rifle". It is a subtle, but important, distinction between saying that the respondent had been in possession of "the complainant's hunting rifle" and saying that he had been in possession of "a hunting rifle". No interrogation whatsoever appears to have been made by Bradley, or indeed by anyone else, as to what indeed was meant by Felix when he spoke of a hunting rifle. It is well-known that modern pellet guns or air rifles can, at a glance, look remarkably like a powerful hunting rifle. Similarly, such an airgun can often be described as a hunting rifle as it is used for shooting birds and geese. There was no suggestion that Felix examined the rifle and determined that it was indeed a high-powered hunting rifle or a Mauser 7mm rifle.
- [17] It is the words "hunting rifle" which are critical in this matter. Bradley relied on the fact that a hunting rifle had been stolen, that no similar offence had been reported and that the town is a small one with a low population. In the circumstances, he reasoned that it was unlikely that the "hunting rifle" presented to Felix could have been anything other than the Mauser 7mm hunting rifle stolen a few days before from Meyer. Had it indeed been a high-powered hunting rifle approximating to such a Mauser, this might well have elevated his suspicion to a reasonable one. However, in my view, without any further interrogation as to precisely what this hunting rifle was or whether it indeed was a hunting rifle or a pellet gun (bearing in mind that it was the respondent's case that he possessed a pellet gun which he had, at some stage, taken with him to Felix's Tavern) the suspicion could not have been so elevated. After all:

"It is expected of a reasonable person to analyse and weigh the quantity of information available critically and only thereafter, and having checked what can be checked, will he form a mature suspicion that will justify on arrest."[3]

- [18] This theme was, unfortunately, perpetuated when Serfontein gleaned what she believed to be relevant information from Bradley and the investigating officer shortly before she arrested the respondent. Her evidence was to the effect that she did not read Felix's statement but understood that such statement made under oath reflected that the respondent wanted to sell the specific rifle stolen from Meyer to Felix. As already alluded to, this was not at all accurate. Perhaps, had she read the statement made by Felix and realized that Felix did not refer specifically to Meyer's hunting rifle, she might have questioned Felix further on this matter in order to ascertain whether or not the rifle he saw had features which would have sustained a reasonable inference that it was indeed the stolen rifle.
- [19] Accordingly, it is my view that whilst the trial court may have unduly restricted itself as to the timeframe, its ultimate assessment as to the reasonableness of the suspicion was indeed correct. In coming to this conclusion[4], it is necessary to mention that the courts ought to be careful of taking an armchair approach to such matters and should bear in mind the difficulties under which the police often work. I have, indeed, borne this in mind in reaching this conclusion but, as stated in Mbona, have also to bear in mind that should the suspicion not be reasonable the arrest will result in an invasion of private rights and personal liberty.
- [20] Having reached this conclusion, the parties were ad idem that the appeal should succeed only to the extent that the quantum of damages is to be reduced to R60,000 and that the appellant should pay the costs up to and including the date when the notice of abandonment was delivered, namely 2 July 2019.
- [21] Accordingly, I propose the following order:
1. The appeal against the quantum of damages awarded succeeds;
 2. Paragraph one of the order of the court a quo dated 18 October 2018 is substituted with the following:
"1. The defendant is to pay the plaintiff the sum of R60,000 as and for damages arising from the plaintiff's unlawful arrest and detention on 8 January 2013."
 3. The appellant is to pay the costs of this appeal up to and including 2 July 2019.

R E GRIFFITHS

JUDGE OF THE HIGH COURT

SMITH, J.

: I agree

RUGUNANAN, A.J. : I agree

ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR APPELLANT : Mr Gqamana SC

: with Mrs Zietsman

INSTRUCTED BY : Mabece

Tilana Inc.

COUNSEL FOR RESPONDENT : Mrs Du Toit

INSTRUCTED BY : N

N Dullah & Co.

HEARD ON : 30

JULY 2019

DELIVERED ON : 20 AUGUST 2019

[1] No. 51 of 1977

[2] 1988

(2) SA 654 (SE) at 658F-H

[3] Per Lowe J in Minister of Police v Dhali 2019 JDR 0310 (ECG)

[4] Likewise, in doing so, I am fully cognisant of the meaning attributed to the word ‘suspicion’ within the context of s40(1)(b) of the Act: Duncan v Minister of Law and Order 1984 (3) SA 460 (T) at 465H – 466B; Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 819G - 819J

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