

SOUTH AFRICA / JUDGMENT

Rikhotso v Minister of Safety and Security (CA 203/2019) [2020] ZAE CGHC 84 (4 August 2020)

[2020] ZAE CGHC 84

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J M Roberson, T Malusi

CASE / FILE NUMBER

CA 203/2019

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IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN CAPE
DIVISION, GRAHAMSTOWN)
CASE NO: CA 203/2019

Date heard: 29/06/2020

Date delivered: 04/08/2020
In the matter between
ROOI
RIKHOTSO
Appellant
and
THE
MINISTER OF SAFETY AND SECURITY
Respondent

JUDGMENT

ROBERSON J:

- [1] The appellant appeals against the decision of the Magistrate, Grahamstown, dismissing his claim against the respondent for damages arising from an alleged wrongful arrest and detention carried out by a member of the respondent, acting in the course and scope of his employment.
- [2] The appellant was arrested without a warrant on Friday 1 January 2016 by Warrant Officer John Matroos. There was a dispute about precisely where he was arrested. He was taken from his home in Papamani, Makhanda, to the Joza police station where he was detained until Monday 4 January 2016. On that day he was taken to the magistrate's court but his case was not placed on the court roll and he was released. In pleading that the arrest was justified the respondent relied on s 40
- (1) (b) of the Criminal Procedure Act 51 of 1977 which provides:
- “(1) A peace officer may without warrant arrest any person-*
- (b) *whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;”*
- [3] The schedule 1 offences which the appellant was suspected of committing were two counts of attempted murder. The appellant admitted at the time of his arrest that he had shot two persons and told Matroos that he had acted in self-defence. He was not believed.
- [4] The issue for decision is whether or not Matroos entertained a reasonable suspicion that the appellant had committed attempted murder. This was the focus of argument at the hearing of the appeal. Other allegations of wrongful conduct in the particulars of claim, for example that the appellant was not taken to court as soon as reasonably possible, were not pursued. A great deal of evidence was led at the trial, but it is not necessary to traverse it all in this judgment. The most relevant evidence is what was told by the appellant to Matroos on 1 January 2016, what Matroos observed at the scene of the shooting, and what his thought processes were in deciding to arrest the appellant.
- [5] Although the onus was on the respondent to justify the arrest and detention, and the respondent had the duty to begin, it is useful chronologically first to refer to the evidence of the appellant.
- [6] The appellant is a security official employed at a shopping centre by Beer Properties, Makhanda. He has a licensed firearm and has received training in the use of firearms. On 1 January 2016 he returned home after his night shift and slept. He was awoken by the noise of the door of his house being pushed or banged, and the windows of his house being broken. A brick was also thrown through a window, damaging a cupboard. When he opened his door about four unknown persons were on his premises, two of them at the door. They said that a

certain person must get out of the house but he did not know what they were talking about. One of them said “we are coming back to you”. They also said that he had disturbed them

at his place of work. The appellant’s wife, Mr Lindani Kato and other community members were also present. When the appellant asked what was going on, his wife explained that she had assisted a man who was being assaulted. This person was brought to the appellant’s house but was then taken to his mother. All this happened while the appellant was asleep.

[7] The appellant, his wife and four year old son went back into his house but on thinking about the threat by the four persons to come back, the appellant took his firearm, a 9mm Norico pistol, from his safe, and put it in its holster on his waist. His wife, who had gone out of the house, reported that the people were coming back and were armed with pangas. He indicated that the length of the pangas was about 40 to 50 cm. These people stood at his gate and his wife told him to run away. There were now eight people, seven of whom had pangas and the eighth one had a pick handle. They entered the appellant’s premises and he picked up his child and jumped over the fence, giving his child into the safe care of a neighbour. He ran through other premises but the armed persons chased him and Kato. The appellant could not continue running because his leg was painful from an old injury. One of the persons chasing him was holding his panga in a chopping position. The appellant thought they might catch him because they were close to him and he drew his firearm and cocked it. He heard one of the persons say that he was taking a chance because it was a toy firearm. He shot twice in the air. He denied that he had told Matroos that he had fired two shots into the grass and said that if one does that there is the risk that the shot would hit a stone and would ricochet and hit someone. He also denied that Matroos had asked him where he had fired the warning shots and that he was unable to point out the spot.

[8] The warning shots did not deter his pursuers and one of them came straight at him. The appellant thought that the person was going to strike him with the panga and he decided to shoot, without aiming at any particular part of the person’s body because there was no time to do so. He shot the person once, but the person continued to advance, so he shot him again and the person fell down, and was picked up by his companions. It is important to mention here, for reasons which will become apparent later, that the appellant’s evidence, as interpreted, was “I shot for the second time, then he fell down”. The appellant estimated the distance between him and his assailant as about 2,5 metres when he first shot him, and about 1,5 metres when he shot him the second time. He denied saying to Matroos and to a Captain Zeelie that “I shot the person until

he fell”. He denied speaking to Zeelie at all. He denied saying to the detective who took his statement that he had shot the person until he fell.

- [9] Another person with a panga approached him from the side and said that the appellant should shoot him as well. He was about 1, 5 metres away. The appellant shot him, aiming at his feet. The appellant said that he did not shoot to kill. It is common cause that the first person was shot twice in the stomach and the second person was shot in the leg. The one who was shot in the leg ran away, as did the rest of the group.
- [10] The appellant went home and he and his wife both telephoned the police, initially without success. When the appellant eventually got through to the police, he told the person who answered that he had been attacked and had shot his attackers. When the police arrived, one of whom was Matroos, he handed over his firearm and showed them his licence. Matroos told him that he

would take him to Joza police station to make a statement, and would bring him back home. Prior to accompanying Matroos he was not asked to point out any particular spot. The appellant was taken to the police station and Matroos asked him where he would stay if he was released. The appellant told him he had a room in town provided by his employer, where he could stay until the trouble had died down.

- [11] The appellant gave Matroos a full account of what happened that evening, from the time the people arrived at his house until the time he shot his attackers. Matroos then spoke with another police official who had arrived at the station,[1] whereafter he told the appellant that he was going to charge him with attempted murder. The appellant expressed his concern to Matroos about his wife and child, because they were not protected and the persons who had chased him might return. He had brought with him the keys for the room in town, as well as money, because Matroos had told him he would not detain him. He expected that he would be taken back to his home to collect his wife and child and then be brought to the room in town, where they could all stay for their protection.
- [12] The appellant was then taken to a cell where he was detained with others who were drunk. There were eight of them in the cell. A person using the toilet in the cell was visible to others. The mattresses and blankets were dirty and some mattresses had bloodstains. His jacket was stolen. He cried, thinking that his assailants might return and kill his wife and child, because they had not managed to kill him. The next day his wife visited him and he cried when he saw her. She had brought him food but was not allowed to give it to him. On Monday 4 January 2016 he was taken to the court cells but he did not appear in court and was released in the afternoon.
- [13] The appellant's wife, Ms Phumeza Ntshokoma, confirmed the appellant's evidence that Matroos said he would bring him back home after they had been to the police station.

- [14] Matroos testified that on 1 January 2016 he was called out in connection with a shooting incident in Papamani. When he and his partner arrived there, other police members and members of the community told him that two persons had been shot. He saw that one of these persons had been shot in the stomach and the other in the leg. They were crying and he could see that they were in pain. There were about 50 members of the community in the vicinity, many of whom were angry and making a noise.
- [15] One of the police officers there told Matroos that the wounded men had wanted to attack the appellant, and pointed out the appellant's house to him. On entering the appellant's house, he asked who the suspect was and the appellant answered that he was the suspect. The appellant's wife and child were present. The appellant was sober and not aggressive, and gave his full co-operation. He told Matroos that he was a security officer. Matroos asked the appellant for his firearm and if he had a licence for it. The appellant produced his licence.
- [16] The appellant told Matroos that certain persons who had robbed others had approached him and broken the windows of his house. Matroos saw the broken windows. The appellant said that he had left the house and handed over his child to a woman. According to Matroos this was when the persons had approached the appellant. The appellant went on to tell Matroos that he had taken out his firearm and gone through the fence to another yard but the persons continued to approach. The appellant shot two warning shots in the grass. A person with a panga approached and the appellant shot him twice until he fell. According to Matroos these words indicated that the appellant had made sure that the person fell, and that there was intent ("opset"). Matroos deduced from these words that if the person had not fallen, the appellant would have carried on firing until the person fell. The appellant also told him that a third person had continued moving forward and he had shot him in the leg. The appellant said that he was afraid the friends of these persons he had shot would return and might hurt him and his family. The appellant pointed out persons in the crowd to Matroos who were pointing at the appellant as if they were intent on getting hold of him ("dit is amper ons gaan jou kry"). He pointed out to Matroos the place where he had fired the warning

shots but Matroos could not see anything there.

- [17] Matroos said that during his 24 years of service he had often felt threatened to the extent that he had to draw his firearm. In most cases people who had threatened him would retreat and if he fired a warning shot they would scream and run away. In his view the appellant's account was not credible and the appellant had not acted within the bounds of self-defence. He formed this opinion after he saw the two wounded men and did not know if they would survive. The wounds they had suffered were life threatening. When he was asked in cross-examination if it was just and fair to detain the appellant, given his account of what had happened to him, Matroos replied that this was the appellant's version. When he arrived on the scene, there were two wounded persons, one of whom could have died. There were two sides to the incident and it was for the court to decide, not him. In his opinion the circumstances under which the shooting had occurred justified a charge of attempted

murder. When it was put to him that it was not necessary to have arrested the appellant, he said he could not just rely on the appellant's version and it was not in his power to decide if a crime had been committed. He could not just accept a person's word and let him go.

- [18] After Matroos explained the appellant's rights, he told him he was taking him into custody. He did not ask any other person at the scene for their version of events.
- [19] Matroos denied that he had told the appellant that he would take him home after taking his statement. He said the police were not allowed to release someone who had been arrested. It is the duty of the detectives to investigate further, charge a suspect, and ensure that he appears in court. He agreed that the appellant was not a flight risk. Matroos also agreed that the appellant had expressed concern about his family and Matroos told him that they would visit his wife. He took money from the appellant and gave it to the appellant's wife. He told the appellant's wife not to sleep at home that night

and to sleep at a neighbour's home in case the persons returned. Matroos denied that the appellant told him that he

had a room in town and wanted to fetch his family so that they could stay there. He agreed that the appellant had given him keys.

- [20] At the police station it occurred to Matroos that he would prefer to keep the appellant in custody because he was concerned about his and his family's safety. The people at the scene were angry and unruly ("oproerig") and they might have injured the appellant if he had been released.
- [21] Captain Zeelie arrived at the police station and said that the appellant should be kept in custody for his own safety and also said that a crime had been committed. Matroos denied that it was at that stage that he decided to arrest the appellant. While Matroos was at the police station, people came to lay complaints of assault against the men who had been shot by the appellant.
- [22] In his statement for the police docket, Matroos did not refer to what he had been told by the appellant. He merely stated that after proceeding to the appellant's house, he found the appellant there and that the appellant said he had called the police. The appellant handed him his firearm and licence and admitted that he had shot the two men. Matroos then explained the appellant's rights and arrested the appellant for attempted murder.
- [23] Captain Zeelie testified. I do not intend to deal in any detail with his evidence. He was not the arresting officer. On 1 January 2016 he was the duty officer at Joza and Grahamstown police stations. He said that he attended the scene of the shooting and saw the two wounded men. He thought that the one who was shot in the stomach might not survive. He also said he was present at the police station when Matroos arrived with the appellant. Zeelie introduced himself to the appellant and the appellant gave him an account of what happened that evening, much along the lines of the account the appellant gave to Matroos. Zeelie also seemed to find it significant that, according to him, the appellant told him he had

shot the person in the stomach until he fell (“hy het hom in die maag geskiet totdat hy val”). He said that if you shoot someone to save your life and you shoot that person twice in the stomach, then you have the intention to injure that person seriously and not just to stop him. Zeelie, like Matroos, said that in his experience when he drew his firearm people retreated and if he fired a warning shot people ran away. He was also of the opinion that the appellant had exceeded the bounds of self-defence. He agreed during cross-examination that when a warning shot is fired some people will run but others will not.

[24] Zeelie told the appellant that he had already been arrested and that he would be detained pending further investigation and that nothing would happen to him while in the cells.

[25] As indicated at the outset, the issue is whether or not Matroos, as the arresting officer, entertained a reasonable suspicion. There were some disputes of fact which are not really necessary to resolve, because much rests on Matroos’ evidence concerning his suspicion that a schedule 1 offence had been committed (or seemingly in this case his firm conclusion that a crime had been committed because he took it upon himself to reject the appellant’s version of self-defence, as did Zeelie). What he was told by the appellant is substantially common cause. However I do express the view that the appellant’s evidence

that he was told he would be taken home after giving a statement is the more probable version. Why else would he have taken the keys to the room in town and money with him when he accompanied Matroos? Why, if Matroos had arrested him at his home, did he not then and there make arrangements for the protection of his wife and child? Matroos confirmed that the appellant had keys and money. I also think it more probable that the appellant only gave Matroos his account of events when they were at the police station, and that he was not taken to point out the place where he had fired the warning shots. Matroos’ statement for the police docket supports this probability. In those circumstances the appellant’s evidence that it was only after Matroos spoke to Zeelie that he told the appellant that he was detaining him, is also the more probable. Nevertheless Matroos remained the arresting officer, wherever the arrest took place, and was required to form a reasonable suspicion that a schedule 1 offence had been committed before arresting the appellant.

[26] In *Mabona and Another v Minister of Law and Order and Others* 1988

(2) SA 654 (SE) at 658E-H, Jones J, in dealing with the requirement of a reasonable suspicion in s 40 (1) (b) of the CPA, 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.”

- [27] The information which Matroos possessed was the appellant’s account which clearly indicated that he had been under a serious attack by more than one armed person. It had been so bad that he had to flee his home and place his young child with someone else for safety. Matroos saw the broken windows of the appellant’s house, and described the people at the scene as angry, loud and unruly. Matroos appears to have accepted that the appellant had been under attack and had to defend himself. He had no information to the contrary. In my view, with that information, a reasonable man in Matroos’ position would not have considered that there were sufficient grounds for suspecting the commission of attempted murder. His professed further thought process, namely that people would have run away, either when the appellant drew his firearm or fired warning shots, was in my view not objectively reasonable, and was subjective and arbitrary. Zeelie conceded that in some such instances people do not run away. It must be remembered that Matroos had information that the appellant had been under attack by more than one person and he knew that the appellant did not have the authority of a police officer. Although a security officer, he was at the scene a civilian, protecting himself and his family.
- [28] I think it is telling that Matroos said that there were two sides to the matter and it was for the court to decide. However he had only heard one side and did not investigate further. The side he heard, an account of self-defence, was supported by what he observed and heard at the scene: broken windows, and an angry and threatening crowd.
- [29] The injury to the person who was shot in the stomach also seems to have been a weighty factor. Matroos said that he formed the view that the appellant had exceeded the bounds of self-defence because he saw the wounded men and did not know if they would survive. In other words, because there was a serious injury inflicted, the bounds of self-defence must have been exceeded. The seriousness of the injuries, particularly the stomach injuries, appear to have been considered as an independent factor unrelated to the account given to Matroos by the appellant, in which case the appellant’s version was not properly considered or weighed.
- [30] Matroos’ opinion in this regard also relates to his opinion that there was intent on the part of the appellant. Firstly a successful defence of self-defence means that there is intent but the conduct is not unlawful. Secondly in my view much too much was made by Matroos and

Zeelie about the appellant's alleged statement that he shot the man until he fell, and that this meant there was intent. Even if the appellant did say that, it is in my view not reasonable to infer from such statement, as Matroos did, that the appellant would have continued firing until the person fell, in other words, he was not just defending himself but wanted to injure the man more than was necessary. I do not know how one can draw such an inference when the person was so close to the appellant and was wielding a life threatening weapon. It must also be remembered that the appellant's first language is Xitsonga although he appears to have testified in isiXhosa. He understood English to some extent and he spoke to Matroos and Zeelie in English. The investigating officer who took his statement must have translated it into English. To say that you shot someone until they fell could equally mean, as was interpreted during the appellant's evidence that "I shot for the second time then he fell down". The words must also be seen in the context of the appellant's evidence that after he shot the person the first time, the person continued to advance. In my view the inference Matroos drew from these words and the consequent rejection of self-defence was subjective and irrational.

[31] In her judgment the magistrate found that Matroos had good and sufficient grounds for suspecting that the plaintiff had given a version of events which was not entirely credible. She referred to Matroos' view based on his years of experience, which was supported by Zeelie. For the above reasons I respectfully disagree with the magistrate's finding.

[32] I therefore conclude that the respondent failed to justify the arrest and detention of the appellant.

[33] The appellant was detained for about 68 hours, part of that period spent in the court cells. Regardless of where he was arrested, he must have experienced shock and dismay at being arrested, when he was the person who had responsibly called the police after suffering a frightening experience, and had co-operated fully. He must have been in anguish that first night, not knowing if his wife and child were safe. His wife testified that when she visited him on the Saturday he cried when he saw her. He was in a cell with drunk people where there was no privacy when using the toilet and the bedding was unhygienic. His jacket was stolen. We were referred to a number of awards by counsel. I have considered the awards in those and other matters, as well as their particular circumstances. Counsel for the appellant submitted that an appropriate award was R140 000.00

and counsel for the respondent did not disagree. I am of the view that in all the circumstances it is an appropriate award.

Interest should run from the date of the magistrate's judgment.

[34] The following order will issue:

[34.1] The appeal succeeds with costs.

[34.2] The order of the magistrate dismissing the appellant's claim with costs is set aside and substituted with the following order:

"Judgment is granted in favour of the plaintiff for payment of R140 000.00, interest thereon at the legal rate from 29 March 2019 to date of payment, and costs of the action, including the costs of counsel."

J M ROBERSON

JUDGE OF THE HIGH COURT

MALUSI J

I agree

T MALUSI

Appearances (via Webex)

Appellant: Adv M du Toit, instructed by N N Dullabh & Co, Makhanda.

Respondent: Adv G Gajaar, instructed by Zilwa Attorneys, Makhanda.

[1] This would have been Captain Zeelie.

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Prepared on 10 October 2026 · Esheria