

SOUTH AFRICA / JUDGMENT

Scheepers v Minister of Police (A2023/118653) [2024] ZAGPJHC 1116; 2025 (1) SACR 437 (GJ) (1 November 2024) [2024] ZAGPJHC 1116

COURT

South Gauteng High Court, Johannesburg

BEFORE

E Raubenheimer, G Malindi

CASE / FILE NUMBER

A2023/118653

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

CASE NO: A2023/118653

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

1 November 2024

In the matter between

QUINTON THEUNIS SCHEEPERS Appellant And THE MINISTER OF POLICE Respondent

JUDGMENT

The Court:

Summary

Arrest: possession of drugs; possession of ammunition

Arrest: arrest as last resort in non-serious offences; arresting police officer's discretion to grant "police bail";

Detention: detention before first appearance in court; discretion of designated prosecutor in terms of section 59A to consider release on bail before the first court appearance

Held: The arrest of a suspect should be for purposes of securing her or his appearance at court. If an appearance can be achieved without an arrest, it should not be effected. If a suspect is unlikely to abscond the law and Standing Orders of the South African Police Service require that a police officer of the appropriate rank considers the suspect's release on bail instead of detention until the first appearance at court. An arrest and further detention pending the first appearance at court is unlawful if the police officer of the appropriate rank is not consulted by the arresting officer in the circumstances. If the police officers have considered the issue but believe otherwise, the suspect must be advised that he or she may approach designated prosecutor to make representations for release before the first appearance.

Order

[1] In this matter we make the following order:

1. The arrest and detention of the appellant by the employees of the defendant was unlawful.
2. The appellant is entitled to payment of damages as may be proven by the appellant.
3. The Respondent shall pay the cost of suit on the scale as between party and party.

[2] The reasons for the order follow below.

Introduction

[3] The appellant is appealing the judgment by the magistrate that the subsequent detention of the appellant after arrest was lawful. The judgment was delivered on 12 November 2023.

[4] The appellant was arrested by members of the South African Police Service (SAPS) without a warrant in terms of section (40)(1)(h) of the Criminal Procedure Act (CPA), Act 51 of 1977, after receiving information during a crime prevention operation that he was dealing in drugs.

[5] Acting on the information the police officers entered the building where the appellant was residing, searched his room and found 1 mandrax pill and 3 live rounds of 9mm ammunition and an amount of cash.

[6] The appellant explained to the arresting officer that the drugs are used for his personal use, the rounds of ammunition was found amongst the scrap metal that was delivered to his scrap metal business and the cash is cash he received from the sale of scrap metal.

[7] He was arrested on Thursday 6 February 2020 at approximately 06:30.

[8] After his arrest he was transported to the Randfontein police station where he was processed and detained until Monday 10 February 2020, when he was taken to court and released on bail of R1000.00.

[9] The case was later struck off the roll and the prosecution of the appellant did not proceed.

[10] He was detained under extremely filthy and unhealthy conditions.

The grounds of appeal

[11] The grounds of appeal were that the magistrate erred in:

11.1 finding that the appellant's detention was lawful;

11.2 accepting the version of the arresting officer and his failure to release the appellant on bail;

11.3 finding that bail could only be granted in court and ignoring the principles laid down in section 59A of the Criminal Procedure Act, Act 51 of 1977 which provides for prosecutorial bail;

11.4 finding that possession of mandrax does not fall under a schedule 7 offence and that the prosecutor could not consider bail for such offence'

11.5 finding that possession of ammunition falls under schedule 7 of the Criminal Procedure Act, Act 51 of 1977;

11.6 not giving proper consideration of the Constitution of 1996, the Criminal Procedure Act, Act 51 of 1977 and the South African police Service Act, Act 68 of 1995 on the following basis:

11.6.1 The Constitution accords everyone the right to freedom and security of person, which includes the right not to be deprived of freedom

arbitrarily or without just cause;

11.6.2 Section 35 of the Constitution provides detailed rights to arrested, detained and accused persons, including the right to be released if the interests of justice permit and upon reasonable conditions, and to humane conditions of detention;

11.6.3 A lawful arrest does not necessarily render the full period of the subsequent detention lawful

11.6.4 Section 13(3)(a) of the SAPS Act provides that a member who is obliged to perform an official duty, shall with due regard to his or her powers, duties and functions, perform such duty in a manner that is reasonable in the circumstances;

11.7 failing to take into account the constitutional principles pertaining to rights of freedom and dignity obliges courts to consider and harmonise these with lawfulness or not regarding the appellant's detention;

11.8 not considering factors which should have been taken into account prior to the arrest and detention being:

11.8.1 The appellant being a flight risk;

11.8.2 If the appellant poses a danger to society;

11.8.3 Will the appellant interfere with the investigation;

11.8.4 Will the appellant stand trial.

11.9 not considering that if the answers to the above questions is in the negative, that detention is not the appropriate sanction and

therefore unlawful;

11.10 That the magistrate did not exercise her discretion in a judicial manner;

11.11 That the magistrate reached a decision on a misdirection of the facts and legal principles, and which could not have reasonably be made by the magistrate properly directing herself to all the relevant facts and principles;

11.12 That the magistrate dismissed the appellant's claim which is shockingly inappropriate and incorrect;

11.13 That the magistrate subsequently made no award on quantum which is shockingly inappropriate.

The charges

[12] The appellant was initially charged with dealing in drugs and unauthorised possession of ammunition. The first charge was later converted to possession of drugs.

[13] Mandrax is contained in Part III of Schedule 2 of the Drugs and Drug Trafficking Act, Act 140 of 1992 and its possession is prohibited by section 4 of that Act.

[14] The sanction for a contravention of section 4 is contained in section 13 and the penalties in section 17.

[15] The prescribed penalty is a fine as determined by the court or imprisonment not longer than 5 years or both.

[16] The possession of ammunition is prohibited in section 90 of the Firearms Control Act, Act 60 of 2000 and the maximum penalty for a contravention is contained in Schedule 4 namely 15 years imprisonment.

[17] Both the mentioned crimes fall under the group of offences listed in section 40(1)(h) of the CPA for which a peace officer may arrest without a warrant.

Bail before first court appearance

[18] Bail for the mentioned contraventions is dealt with in sections 59 and 59A of the CPA.

[19] The former deals with bail granted by a police official before the first appearance in court, which is not authorised if the relevant offence is, inter alia, mentioned in Part II and III of Schedule 2 to the CPA.

[20] Possession of dependence producing drugs appears in Part II of Schedule 2.

- [21] Section 59A provides for bail to be granted by a duly authorised prosecutor. The prosecutor may only grant bail in consultation with the investigating officer and only in respect of Schedule 7 offences.
- [22] The possession of dependence producing drugs appears in Schedule 7, entitling an authorised prosecutor to grant bail before the first court appearance.
- [23] Regarding the second charge, it does not appear in Part II or III of Schedule 2 and there is thus no impediment on the police granting bail, even though it is also absent from Schedule 7, which means prosecutorial bail is not an option.

Application of the law to the facts

Arrest

- [24] The possession of dependence producing drugs and ammunition meets the requirement as mentioned in section 40(1)(h) of the Criminal Procedure Act, Act 51 of 1977 for a police officer to arrest without a warrant.
- [25] There is, however, no obligation on the police officer to arrest the suspect if his attendance at court could have been assured by other means.[1]
- [26] Section 40 of the CPA contains a general discretion to effect an arrest, and an arresting officer has to exercise his discretion when effecting the arrest. This discretion must be exercised within the bounds of rationality[2], the authorising provisions and the provisions of the Constitution.[3]
- [27] The discretion to arrest is to be exercised taking the provisions of the Bill of Rights into consideration[4] and should be used only as a last resort.[5]
- [28] In exercising his discretion whether to arrest or not, the arresting officer should adhere to the guidelines as stated in *Gellman v Minister of Safety and Security*[6] namely:

28.1 Consider whether there are reasonable grounds to suspect that an offence in schedule 1 was committed by the person to be arrested;

28.2 The existence of the reasonable grounds are to be established after a critical analysis of the available evidence;

28.3 The arresting officer should endeavour to obtain corroborating evidence except where the arresting officer observed the commission of the offence;

28.4 After establishing the existence of a reasonable suspicion the arresting officer should then establish the existence of circumstances necessitating an arrest without a warrant. Such circumstances would for instance be the risk of absconding or not attending court on a warning or the commission of further crimes;

28.5 The arresting officer should be mindful of the provisions of Standing Orders dealing with arrest.

- [29] As the appellant was found in possession of the drugs and the ammunition the first three factors would not be applicable.
- [30] The South African Police Service issued National Instruction 11 of 2019 dealing with Arrest, Treatment and Transportation of Arrested Persons.
- [31] The Instruction acknowledges that arrest constitutes one of the most drastic infringements of the rights of an individual. Arrest should consequently be used as a last resort to secure the attendance of an accused in court.
- [32] The appellant was arrested on the basis of information provided to the arresting officer that the appellant was dealing in drugs and an empty Ziplock bag.
- [33] This was disputed by the appellant when he informed the arresting officer that the Mandrax was for his personal use.
- [34] No other evidence indicating that the appellant was dealing in drugs was available and this charge was amended to possession of Mandrax before the appellant was taken to court.
- [35] The appellant was furthermore found in possession of only one tablet of Mandrax which could hardly justify a suspicion of dealing in drugs.
- [36] The amount of ammunition found in the possession of the appellant was substantially less than the amount prescribed in the Act.
- [37] The appellant provided an explanation to the arresting officer for his possession. This explanation was not investigated further by the arresting officer.
- [38] The arresting officer did not consider the existence of circumstances necessitating the arrest without a warrant.
- [39] In this regard the officer should have considered that the appellant resides in the community, is well known, conducts a business in the community, whether he pose a risk of absconding or not attending court should he not be arrested.
- [40] The arresting officer did not consider any of these factors and merely arrested the appellant on the basis of the information received and the possession of the drugs and ammunition.
- [41] The arresting officer testified that although he is aware of other methods to secure the attendance of the appellant in court he was of the opinion that he had no other option than to arrest him.

[42] The arresting officer testified that he has no knowledge about the content of the Drugs and Drug Trafficking Act and that he was of the opinion that dealing in drugs is a Schedule 1 offence and he was consequently acting within the ambit of the Criminal Procedure Act to arrest the appellant and did not have to consider alternatives to arrest.

Detention

[43] The further detention of the applicant calls for a more considered evaluation.

[44] Apart from the CPA regulating the release of arrested persons the South African Police Service issued National Instruction 3 of 2016 dealing with Bail and the release of Persons. It similarly confirms that the detention of a person is a serious infringement of a person's right to freedom and security and should only be limited to those instances as dictated by the interests of justice.

[45] The Instruction specifically deals with the factors to determine whether it would be in the interests of justice to refuse a bail application and continue with the detention. The factors are the following:

45.1 there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public, any person against whom the offence in question was allegedly committed, or any other particular person or will commit a Schedule 1 offence (Annexure B);

45.2 there is a likelihood that the accused, if released on bail, will attempt to evade his or her trial;

45.3 there is a likelihood that the accused, if released on bail, will attempt to influence or intimidate witnesses or conceal or destroy evidence;

45.4 there is a likelihood that the accused, if released on bail, will undermine or jeopardize the objectives or the proper functioning of the criminal justice system, including the bail system; or

45.5 in exceptional circumstances, there is a likelihood that the release will disturb public order or undermine the public peace and security. and criteria to be considered by a police official in establishing

[46] The arresting officer as well as the community service commander testified that they do not know the meaning of "in the interests of justice." Neither of them consequently considered any of the mentioned factors in determining whether the appellant should be released on bail.

[47] The first question to be considered is whether the appellant could be released on bail by a police officer before his first appearance in court.

- [48] As the possession of dependence producing drugs appears in Part II of Schedule 2 the appellant could not be released on bail before the first appearance in a court by a police officer. It does, however, appear in Schedule 7 and consequently bail may be granted by a designated prosecutor in terms of sect 59A.
- [49] The next question to be answered is whether the arresting officer had a duty to inform the prosecutor of any information that would assist the latter to determine whether the arrested person should be released on bail.
- [50] In *Mahlangu and Another v Minister of Police*[7] the court concluded with reference to the decisions in *Botha v Minister of Safety and Security*, *January v Minister of Safety and Security*[8] that there is indeed a duty on police officials not only to establish the lawfulness of the arrest and detention but also to inform the prosecutor of information either justifying or not justifying the detention or further detention of the arrested person.
- [51] The police officer is thus duty bound to consider the necessity of the detention of the arrested person.[9]
- [52] The arresting officer did not inform the appellant of the different possibilities in applying to be released on bail. The SAP14 form that informs an arrested person of his right to apply for bail contains a general reference to bail and provides no specifics in this regard.
- [53] An arrested person is reliant on the arresting officer to be provided with the different bail application options. The arresting officer is in turn duty bound to consider the necessity of further detention.
- [54] This the arresting officer did not do.

Conclusion

- [55] Considering the plethora of authorities, legislation and the SAPS Instructions referred to above which the Court below did not consider when deciding that the appellant's arrest was unlawful, I conclude that the Magistrate misdirected herself in respect of a number of facts and in law. The appellant was a candidate for release on bail before his first appearance in court and arrest was a drastic measure to secure his attendance at court instead of using other methods.
- [56] As the issue of quantum was not decided at the trial the matter will be set down for hearing on quantum only.
- [57] The arrest and further detention of the appellant was unlawful, and the appellant is entitled to damages as may be proven by the appellant.

E Raubenheimer

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

I concur

G Malindi

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 1 November 2024.

Counsel for the Appellant: Adv L Swart instructed by Koos Geldenhuys Attorneys Counsel for the Respondent: Adv DF Makhubele instructed by the State Attorney, Johannesburg Date of Hearing: 4 June 2024 Date of Judgment: 1 November 2024

- [1] Minister of Safety and Security v Sekhoto and Another 2011 (1) SACR 315 (SCA) para 10 and Louw v Minister of Safety and Security 2006
- (2) SACR 178 at 186a – 187e.
- [2] Sekhoto (n 1 above)
- [3] Mahlangu and another v Minister of Police BCLR 698 (CC); 2021
- (2) SACR 595 (CC)
- [4] MR v Minister of Safety and Security 2016(2) SACR 540 (CC)
- [5] Minister of Correctional Services v Tobani 2003(5) SA 126(e), National Instruction 11 of 2019 para 6(1)
- [6] 2008(1) SACR 446 (W)
- [7] (n 3 above)
- [8] 2012 (1) SACR 305 ECP
- [9] Mvu v Minister of Safety and Security 2009 (2) SACR 291 (GSJ)

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