IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NUMBER: CA89/2021

DATE HEARD: 26/11/2021

DATE DELIVERED: 02/12/2021

In the matter between:

MARK JASON ACCOM	1st Appellant
DYLAN DUAN KRIEL	2nd Appellant
PERVIN JASON VAN DER MONIE	3rd Appellant
and	
THE MINISTER OF POLICE	Respondent

JUDGMENT

GOVINDJEE AJ:

[1] The appellants instituted three separate actions claiming damages against the respondent for unlawful arrest and detention. The matters were subsequently consolidated for hearing. The presiding Magistrate dismissed the appellants'

claims, concluding that their arrests had been lawful. That decision is the subject of this appeal.

The pleadings

[2] The appellants' particulars of claim were framed almost identically. They claimed that they had been arrested without a warrant and detained for a period of approximately 23 hours. The arrests were alleged to be unlawful, wrongful and without reasonable and probable cause or justification for the following reasons:

- The South African Police Service (SAPS) members, employed by the respondent, knew, alternatively should have known, that no reasonable grounds existed for the arrests and detention.
- The SAPS members did not entertain a reasonable suspicion that the appellants had committed an offence and that such suspicion rested on reasonable grounds.
- The SAPS members failed to exercise their discretion to arrest and detain the respondents rationally. They knew or ought to have known that no *prima facie* case existed against the respondents and could not have entertained a reasonable suspicion that the appellants had committed an offence referred to in Schedule 1 of the Criminal Procedure Act 51 of 1977 ('the Act').
- The arrestor invoked his power to arrest the appellants either for the purpose of harassment, or for a purpose not contemplated in the Act.
- There was no basis upon which to arrest the appellants, given that no charges were brought. The SAPS members neglected to exercise their

discretion with regards to the arrest and continued detention and / or release of the appellants from custody reasonably or at all.

- The SAPS members neglected to take relevant considerations into account when exercising their discretion to arrest the appellants, so that the decision to arrest was irregular and unlawful. The arrests were effected *animo iniuriandi* by the SAPS members.

[3] As a result, the appellants claimed that they were deprived of their liberty and privacy unlawfully and wrongfully. They suffered injury to their reputation and dignity, as well as emotional and mental distress, insult and *contumelia*, and required future medical treatment in the form of psychological counselling. Each of the appellants claimed general damages amounting to R100 000,00 and the estimated cost of future medical expenses in the amount of R50 000,00.

[4] The respondent admitted that the appellants were arrested by members of the SAPS without a warrant, allegedly for unlawful possession of dagga, and for committing this offence in the presence of the arresting officer. As such, he contended that the arrests were lawful and justified, in terms of section 40(1)*(a)*, alternatively section 40(1)*(h)* of the Act, and the subsequent detentions were also lawful and justified in terms of sections 39(3) and 50 of the Act.

The trial proceedings

[5] Constable Julius, the arresting officer, was the only witness to testify on behalf of the respondent. He had been stationed at Kamesh Police Station at the time of

the incident and was part of a team that had proceeded with a search warrant to 84 Lovebird Street ('the premises'), which was a known drug post.

[6] Julius and another constable had approached an outer building at the premises. Three males (the appellants), unknown to the witness, were sitting outside that building. Julius offered the following versions of events as to what happened next:[1]

> 'One male, one of the three jumped up and came towards us and we approached towards them, towards him Your Worship. Then we clearly noticed they were busy cleaning dagga…in a tray…'

And later:[2]

> 'As they approached me I approached them. We were approaching each other and we explained to them that there was a search warrant that we have…'

One of the males then pointed and said 'That is not our stuff'. Following the direction of the point, Julius found a red Puma bag which contained compressed dagga and loose dagga, approximately two metres away from where two of the appellants had been seated.

[7] The dagga was confiscated and, Julius said, the appellants were advised of their rights and arrested on the basis that they could not provide a clear description of the owner of the dagga. Julius contended that an offence had been committed

[1] P 45-46 of the index.
[2] P 49 of the index.

in his presence, and that it was his duty to arrest the appellants. Other team members had meanwhile proceeded to execute the search warrant inside the premises, and another arrest was effected. A case docket was prepared at Kamesh Police Station and the arrested persons were detained. The docket was provided to the Investigating Officer, via the Community Service Centre Commander. It was past 16h00 when the arrests had been fully processed.

[8] Julius testified further that he had exercised his discretion by arresting and detaining the appellants. They could not be released at that point in time because further investigation was required on the part of the Investigating Officer, who had the discretion to release the appellants. Constable Julius himself did not enjoy this discretion given his rank. The appellants had subsequently been taken to the Uitenhage Police Station.

[9] Under cross-examination, Julius indicated that it was possible that the dagga could have belonged to the owner of the property. He presumed that the owner of the property was the person who had been arrested inside the house by other members of the team, but had not asked him about the dagga found outside on the tray and in the bag. It was also put to the witness that he had all the requisite details to have furnished the appellants with a written warning to appear in court, so that arrests were unnecessary.

[10] The third appellant was the only witness to testify in support of the claims. He said that they had visited the premises in order to collect a compact disk from the property owner (‘Bouwer’). As Bouwer was busy, they were told to wait on the side

of the house. The police approached and took them to the back of the house where they were searched. While the body search yielded nothing, a tray with scissors on it was found lying on the ground at the back of the house. A big bag was subsequently found, but the appellants were unsure as to its contents. He denied that any of the appellants had been in possession of dagga on the day of their arrest.

[11] Bouwer and another person were brought out of the house by the police. The appellants, he explained, were handcuffed and advised that they were to be taken to Kamesh Police Station for being in possession of dagga, without being advised of their rights. Statements were taken at the police station and they spent the night in the police cells without being given the opportunity to be released on bail. The third appellant said that he would have heeded any warning to appear in court had such a warning been issued in place of an arrest.

The judgment of the court *a quo*

[12] The Magistrate, after quoting sections 40(1)*(a*) and *(h)* of the CPA, narrowed the key enquiry to whether the appellants had been in possession of the dagga. He found the evidence of Julius to be far more probable than that of the third appellant, and drew an adverse inference from the fact that the other appellants had not testified. He considered that it was improbable that the appellants would have been told to wait at the side of the building, and that the appellants would have been escorted by the police to the back. Julius, he found, could not have known about the dagga on the tray or the bag of dagga found at the back of the

house. His evidence that the appellants had been found cleaning the dagga was accepted, and the appellants' version rejected. The arrest was held to be lawful. As the appellants were brought before court within 48 hours of the arrest, their subsequent detention was found to be lawful in terms of section 50(1) read with section 39(3) of the CPA. The appellants' claims were dismissed with costs.

The appeal

[13] Various grounds of appeal were advanced. In particular, the appellants submitted that the Magistrate erred by drawing an adverse inference based on the failure of the other appellants to testify, considering that the police officer who had accompanied Julius had not testified without that consequence; Julius had admitted that he had arrested all three appellants because he could not determine the owner of the dagga; The Magistrate ought to have found in the appellants' favour based on this admission alone; Julius had also conceded that the dagga could have belonged to Bouwer, who had been arrested in the premises on charges of dealing in drugs; The evidence did not support a finding that the appellants had been in possession of dagga; and finally, the Magistrate had erred in finding that the detention was lawful given the absence of any evidence.

Analysis

[14] Section 40(1)(*a)* provides that a peace officer may arrest any person who commits or attempts to commit an offence in his presence, without a warrant. In terms of section 40(1)(*h*), any person who is reasonably suspected of committing

or having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or dependence-producing drugs or the possession or disposal of arms or ammunition, may be arrested without a warrant.

[15] The respondent relied exclusively on the testimony of Julius to prove the jurisdictional facts for a lawful arrest. The Magistrate seemingly failed to appreciate various internal and external contradictions in Julius' testimony, or to apply the technique for resolving these discrepancies. As a result, it is doubtful whether the Magistrate's findings on the evidence should stand. It is, however, unnecessary to determine the appeal on this basis.

[16] Even accepting the existence of the various jurisdictional facts for an arrest, police officers are never obliged to effect an arrest. There remains a discretion to be exercised.[3] A prudent policeman will, for example, not simply ignore less invasive methods of bringing an accused person to justice, and, in so doing, fail to exercise the discretion properly or at all.[4]

[17] In *MR v Minister of Safety and Security*,[5] the Constitutional Court considered whether it was obligatory for police officers to have arrested the applicant for committing an offence. The applicant was 15-years old at the time, posed no threat to the police officers, could be subdued with ease, was unlikely to commit another

[3] *Matebese v Minister of Police* [2019] ZAECPEHC 37 para 29.
[4] See *Minister of Safety and Security v Sekhoto and Another* (2011) 1 SACR 315 (SCA) para 49; *Barnard v Minister of Police and Another* 2019 (2) SACR 362 (ECG) at para 48: it is for the plaintiffs to prove that the arresting officer exercised his discretion improperly or not at all, with respect to the availability of less invasive means than the warrantless deprivation of the arrestee's liberty and freedom of movement.
[5] 2016 (2) SACR 540 (CC).

offence and was not a flight risk.[6] The Court confirmed that an ordinary reading of the applicable section gave police officers a discretion whether to arrest or not. The permissive wording of the section required police officers to consider and weigh the prevailing circumstances before deciding whether an arrest was necessary. The enquiry is fact-specific. Police officers must necessarily display a measure of flexibility in their approach given that they are confronted with different facts on each occasion that they effect an arrest.[7]

[18] Individual liberty and human dignity are rights that enjoy constitutional protection. Arrests constitute a severe impingement on those rights. Courts are therefore required to evaluate the evidence of the reasons for an arrest in some detail. This includes considering whether the police officers exercised their discretion at all and, if they did, whether it was exercised properly[8] so as to justify the arrest.[9] The discretion must be exercised in good faith, rationally and not arbitrarily and with the objective of bringing the subject before court.[10] It is also clear that the Bill of Rights impacts on the common-law understanding of how police discretion should be exercised in the case of children.[11]

[19] The following extracts from the evidence of Julius suggest that he took little time to decide that an arrest was necessary.[12]

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[6] At para 41.
[7] *MR supra* at para 42.
[8] *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H; *Sekhoto supra* paras 6, 28.
[9] *MR supra* at para 43, 44.
[10] *Barnard supra* at paras 10, 11.
[11] *MR supra* paras 48 *et seq*.
[12] P 47, 50 of the index.

> ‘So we took the dagga in their presence and then I read them their rights there and arrested them because they could not give me a clear description of whose dagga it was…they were cooperative…I had to arrest them because they committed an offence in my presence…’

And:[13]

> ‘an offence was committed in my presence Your Worship and it is my duty to arrest anyone who commits an offence in the presence of a police official…I found them in possession of the dagga busy cleaning it and processing it and then they could not give me a clear explanation of whose dagga it was... So I arrested them…’

[20] When asked specifically about the exercise of a discretion, Julius offers only the following, effectively begging the question:[14]

> ‘I used my discretion Your Worship by detaining them and I could not release them at that said moment…’[15]

[21] These extracts demonstrate that Julius was under the impression that he was obliged to arrest the appellants because, as far as he was concerned, an offence had been committed in his presence. The single suggestion that further investigation was required, necessitating arrest, was unsubstantiated. In essence, he afforded them an opportunity to provide information about the owner of the

[13] P 54, 64 of the index.
[14] See *Barnard supra* at para 54.
[15] P 51 of the index.

dagga. When that was not forthcoming, he proceeded immediately with the arrest.[16]

[22] There was certainly no consideration given to the age of the appellants, and whether the constitutional provisions governing the interests of children were applicable.[17] There was also no thought given to the conduct of the appellants at the time. The record reflects that they did not try to run away. There is no notion that they were a danger to the police or caused any physical harm at the time.[18] In addition, it cannot be said that the offence, on its own, was so serious as to justify an arrest.[19]

[23] The purpose of arrest is to bring the arrestee before court and an arrest will be irrational and unlawful if the arrestor exercises his discretion to arrest for a purpose not contemplated by law.[20] These factors seem to have been ignored, whether due to haste, ignorance or otherwise. Given the testimony of Julius, extracted above, there was no need for the appellants to testify regarding his failures to exercise his discretion.[21] The respondent's own version adequately demonstrates those failures, and confirms that the warrantless arrest followed immediately upon the appellant's responses (or lack thereof) when asked about the ownership of the dagga. This despite the failure to give a reasonable explanation amounting to nothing more than a contributing consideration as to

[16] See *Barnard supra* at para 56 for an analogous example, and failure to respond when asked about stolen goods.
[17] See *MR supra* para 51.
[18] See *MR supra* para 52.
[19] See *Banda v Minister of Police* [2021] ZAECGHC 55 at paras 59, 60.
[20] *Minister of Police v Claasen* [2020] ZAECGHC 115 para 16; *Barnard supra* at para 55.
[21] See *Barnard supra* para 57.

whether the jurisdictional factors justifying an arrest were present. This is something separate from the exercise of discretion. It is only once the jurisdictional factors are present that the discretion whether or not to arrest arises.[22]

[24] The court *a quo* erroneously summarised the crux of the matter as follows:

> 'The court is tasked with the question whether the Plaintiffs were in fact in possession of the dagga. If they were the arrest was lawful. If they were not the arrest was unlawful.'

[25] That approach ignores the permissive wording of section 40, the discretion to arrest and the factors relevant to the exercise of that discretion. A careful weighing and consideration of all factors as part of the exercise of a value judgment was palpably absent. It also ignores the reality that one of the appellants was a minor at the time he was arrested. The approach adopted resulted in the Magistrate arriving at an outcome which could not reasonably have been reached. The court *a quo* was misdirected in its approach, justifying this court's interference. The Magistrate's decision must be substituted with an order that the appellants' arrests, and subsequent detention, were unlawful.

Quantum

[26] The third appellant testified that the appellants were detained on the evening after their arrest in reasonable conditions at Kamesh Police Station. They spent

[22] *Barnard supra* para 54.

time at the court cells at the Uitenhage Magistrate's Court from approximately 08h00 until 14h00 the following day, before being released. The problem was that they were joined in those cells by prisoners from St Albans, who searched them. The experience was awful and frightening according to the third appellant.

[27] The *actio iniuriarum* is designed to afford personal satisfaction for the impairment of a personality right, such as dignity. The primary concern is to provide a measure of satisfaction through the payment of money, as a solatium, and as a form of payback for the injustice suffered. The unlawful deprivation of liberty is a serious deprivation of fundamental rights requiring an appropriate award of damages.

[28] But this is not to suggest that large amounts are always justified whenever an arrest and detention is found to be unlawful. As Holmes J remarked in *Pitt v Economic Insurance Co Ltd*:[23]

> 'I have only to add that the Court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but must not pour our largesse from the horn of plenty at the defendant's expense.'

[29] Various considerations militate against a substantial damages award for each of the appellants. There is, on the whole, a paucity of available evidence regarding the appellants' claims. There is certainly no basis for a claim based on future medical expenses to succeed. The detention, all in all, was for a period shorter

[23] 1957 (3) SA 284 (D) at 287E-F.

than 24 hours. The bulk of that period was spent in detention in reasonable circumstances. Two of the appellants did not testify, so that the actual impact of the arrest and detention on them is unknown.[24] It may be accepted that the second appellant was, at least initially, detained separately from adults.

[30] While previous decisions provide some useful indications, the actual amounts awarded are ultimately influenced by the facts of each case. An award for general damages in the sum of R40 000 appears to me to be appropriate for each of the appellants in this instance.

Order

[31] In the result:

1. The appeal is upheld with costs.

2. The order of the court *a quo* is set aside and is replaced with the following:

"1. The defendant is ordered to pay to the plaintiffs the amount of R40 000,00 each, as and for damages.

2. The defendant is ordered to pay interest on the aforesaid amounts at the legally prescribed rate, from the date of service of summons to date of payment.

[24] See *Barnard supra* para 63.

3. The defendant is ordered to pay the plaintiffs' costs of suit, together with interest calculated thereon at the legally prescribed rate, from a date fourteen (14) days after taxation to the date of payment."

A GOVINDJEE

ACTING JUDGE OF THE HIGH COURT

EKSTEEN J:

I agree.

JW EKSTEEN

JUDGE OF THE HIGH COURT

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