NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN LONDON CIRCUIT LOCAL DIVISION)

Case No. EL 1033/2016
ECD 2533/2016

In the matter between:

PHUTHUMILE KAMI	**Plaintiff**
and	
MINISTER OF POLICE	**First Defendant**
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**Second Defendant**

JUDGMENT

HARTLE J

Introduction:

[1] The late Mr. Sandile Kami ("the deceased") sued the defendants for damages for his claimed unlawful arrest and detention, and malicious

prosecution, arising from a rape incident alleged to have been committed on 14 June 2015 at Needs Camp, East London, and in respect of which he was alleged to have been involved.

[2] It is necessary at the outset to outline the details of this incident and its unique features as was primarily recorded in the contemporaneous statement of the complainant, Ms. Pamana, so as to appreciate the prosecutorial consequences which flowed from it. The parties at the present trial agreed that this statement (Exhibit A) be admitted into evidence on the basis that its contents were what had informed the relevant arresting officer regarding the nature of the offence alleged to have been committed according to the complainant, and his claimed justification for the deceased's arrest, detention and ensuing prosecution. Ms. Pamana, by the time of the trial, was deceased.

[3] The gist of the complaint as appears from her statement is that on Friday, 13 June 2015, she had proceeded to a tavern near Needs Camp where she enjoyed herself with her friends. In the early hours of the morning, after leaving the tavern, they were approached by a group of four males who separated her from her other female friend and took her to bushes near the police station. She could not identify any of the men who had accosted her in this manner since it was dark and all of them had covered their faces. Three of the four took turns raping her and ejaculated inside of her. It is only the fourth suspect, who she identified in her statement as "Sive", who did not rape her. She related that when it came time for this person she had referred to as Sive to have his turn, he informed the other three suspects that he could not penetrate her because he knew her and that they were cousins. On this basis he also persuaded the other three men to apologize to her for assailing her. "Sive" then accompanied her home. *En route* a vehicle appeared which she flagged down to ask for help. Contemporaneously with her

soliciting the driver's assistance on this basis, "Sive" fled the scene. The driver of the vehicle took her to her home.

[4] On her arrival there she promptly reported the rape to her mother. Her mother also deposed to an affidavit which was entered into the record by consent marked Exhibit B. The first report which the complainant made materially conforms to the information as was related in Exhibit A except that the mother did not say that she was informed by the complainant of the names of any of the suspects.

[5] These statements, together with the J88 medical report, which supports the probability that the complainant had indeed been raped, were the precursor to the police investigation and the deceased's arrest ultimately.

[6] The plaintiff died after *litis contestatio* on 13 May 2017 and his estate was, by the time of the trial, represented by his father, Mr. Phuthumile Kami, who was formally substituted in his stead by order of this court dated 24 October 2017.

[7] The claim for damages was made up of the following components:

7.1 unlawful arrest and detention for the period prior to his first court appearance;
7.2 unlawful detention for the period after the first court appearance, (for 38 days ensuing after his first court appearance);
7.3 malicious prosecution;
7.4 costs of defending the criminal case of the deceased;
7.5 damages; and
7.6 *contumelia*.

[8] Sub-items 5 and 6 above make no sense when read as self-standing claims, neither was it the plaintiff's case that something other than traditional damages were being sought arising firstly from the deceased's alleged unlawful arrest and his detention as a consequence and, secondly, upon his prosecution on the rape charge that was ultimately withdrawn. I accordingly read these "components" as simply forming part of the main claims.

[9] As for the plaintiff's claim for special damages for the legal costs of defending the "failed" prosecution, no evidence was led as to the extent of these even though the fact that they were incurred is suggested from a transcript put up of the bail hearing which ensued shortly after the deceased was arraigned on a Schedule 6 charge of contravening section 3 of the Criminal Law Sexual Offences and Related Matters Amendment Act, No. 32 of 2007 ("SORMAA"). As a result, I granted absolution from the instance in this respect of this claim at the close of the plaintiff's case.[1]

The parties' "stated case":[2]

[10] It is common cause that the deceased was arrested at his house by a police officer, one Sergeant Gcobani Tyafu, without a warrant just before midnight on 23 September 2015 and charged, on the face of it, of having contravened the provisions of section 3 of the SORMAA. As the evidence will reveal, he was arrested following a pointing out by the complainant. He was brought before the magistrate's court on 28 September 2015 on which day the matter was postponed

[1] The plaintiff pleaded in the particulars of claim that the deceased had suffered damages as a result of the defendant's conduct in the sum of R20 000.00, being the costs reasonably expended by him in defending himself against the rape charge including costs of the bail application. The defendants however denied the allegation and put to the plaintiff to the proof thereof. No evidence had been adduced by the plaintiff in support of this claim at all by the close of his case and it made sense to grant absolution at the request of the defendants in this narrow respect.

[2] For some or other reasons the parties prepared a "stated case" (Exhibit E) which formed part of the pleadings from which the facts under this heading were recorded.

to 2 October 2015. At his initial appearance he informed the court that he wished to apply for bail and the prosecutor indicated that she would oppose such an application. The court ordered that he remain in custody whilst arrangements were being made for the bail hearing.

[11] On 2 October 2015 he was legally represented but the hearing did not ensue.[3] The matter was postponed ultimately to 5 October 2015 for the formal bail application during which time the deceased remained in custody.

[12] At the end of the hearing bail was refused, and the deceased remanded to 27 November 2017. On 5 November 2015, pursuant to his having been requisitioned to court earlier, the charge(s) against him were withdrawn.

The pleadings:

[13] The legality of the arrest was challenged by the plaintiff in the pleadings on the basis that it had been without any justification or excuse and that it had been for a purpose other than bringing the deceased to trial. It was further pleaded that the police had arrested him without ever considering the supposed explanation he offered (it is not clear what this was although his warning statement amounted to a denial of the allegations put against him, or that he had raped anyone) and/or the purported lack of identification or the implication of him by the complainant of the offence of rape in the matter under investigation. Also pleaded is that the police acted without critically considering an alternative or less traumatic manner of securing his attendance in court.

[3] This postponement was ostensibly at the request of the defence.

[14] The plaintiff pleaded that the arresting and investigating officer owed him a duty of care in relation to his arrest and detention prior to his first court appearance to assess the strength of the case against him and to determine whether there existed a *prima facie* case on this basis; to ensure that he not be detained in custody or that his detention not be extended when no such *prima facie* case existed against him; and to seek "the imposition of bail and (or his) release ON WARNING (in his favour), as the interests of justice dictated as such".

[15] The claim for unlawful detention as against the police and the prosecution after the first court appearance are founded on the grounds that they acted maliciously and in concert with each other in opposing the granting of his bail. The malice contended for was alleged to be grounded on the basis that no legitimate basis existed for resisting his release on bail neither was there probable cause to prosecute him as there was no *prima facie* case against him. In addition, so it was alleged, they failed to place before the court all relevant information in his favour.[4] As against the police only, the plaintiff contends that the arresting and investigating officer acted without considering whether the deceased was in fact a flight risk and further that he acted in a manner that ignored his constitutional rights contrary to the presumption of his innocence.

[4] What was insinuated here is that there was a twist in the tale so to speak that had not been disclosed to the court or the import of which had been withheld from it. The premise of the plaintiff's case was that the complainant had done a so-called U-turn at first pointing out the deceased's brother as having been amongst the culprits who had raped her, whereas she later pointed out the deceased (Sandile) as the fourth suspect. A further odd fact in the mix is that this fourth suspect had not in fact raped the complainant himself but had instead "intervened" on her behalf. These facts were however laid bare to the court. The fact that the deceased had denied the allegations put against him was also no secret as this appears from his warning statement. No other explanation was ostensibly put forward that might in the assessment of Sergeant Tyafu have been a reason to suggest that the deceased would in all probability be exonerated at the criminal trial.

[16] The malicious prosecution claim brought against both the police, and by implication the second defendant,[5] is based on the contention that in laying a false charge of rape against the deceased, neither arm of State had reasonable or probable cause for doing so; were actuated by malice and/or improper motives; and had no credible evidence incriminating the deceased in respect of the purported offence

The plea:

[17] In the plea, the first defendant denied generally that the deceased had been unlawfully arrested by members of the service in full view of the public as claimed by the plaintiff. He pleaded, in amplification of his denial, that the deceased had been arrested by a police officer in the presence of his parents on a reasonable suspicion (on the basis contemplated in section 40 (1) (b) of the Criminal Procedure Act, No. 51 of 1977 ("CPA")), that he had committed a Schedule 1 offence, namely rape; that he had been informed of his constitutional rights; that he was detained in accordance with section 50 of the CPA; that he had been charged within 48 hours of his arrest; and that his further detention after his appearance before the lower court was by virtue of orders of court.

[18] Also denied in the plea is the allegation that the continued detention of the deceased after his first appearance in court was unlawful, the first defendant setting it straight that the decision to oppose the deceased's bail was

[5] Although in the introductory paragraphs of the particulars of claim the plaintiff pleads that the second defendant maliciously prosecuted the deceased (in emphasising the National Prosecuting Authority's vicarious liability for the prosecutor's decision), the relevant allegations for a claim for malicious prosecution against the second defendant are not repeated under the heading "Claim 2: Malicious Prosecution". Instead, the focus in the particulars of claim of the offending behaviour on the part of the second defendant was only on the deceased's continued detention purportedly at its instance or that of the arresting officer, both parties acting in concert, to "maliciously" oppose bail.

independently taken by the public prosecutor after an assessment of the case docket and that his further detention had been by virtue of orders of court.[6]

[19] The second defendant denied the allegation that the responsible prosecutor had acted in bad faith either in opposing bail (going to the unlawful detention claim), or in instituting the prosecution albeit it was not clearly implicated in the pleadings in this respect. This notwithstanding, it pleaded that at all material times the relevant members of the National Prosecuting Authority were acting in good faith and well within their statutory mandate as provided for in the National Prosecuting Authority Act, No. 32 of 1998 ("The NPA Act") both in respect of the decision to oppose bail and in forming the resolve that a *prima facie* case existed to justify the prosecution of the deceased and opposition to bail.

The trial:

[20] The trial proceeded before me on both merits and quantum.

[21] By agreement between the parties the plaintiff commenced first in order to meet the evidentiary burden to prove the claim of malicious prosecution and to give flesh to the complaints of illegality concerning the deceased's arrest and detention.[7] Both the deceased's father and his brother, Sivenathi Kami, testified in support of the plaintiff's claim.

[6] This is in accordance with the provisions of section 39 (3) of the CPA which in effect assert that if the arrest is lawful the ensuing detention follows lawfully. The section however deals only with the general legal consequences of an arrest.

[7] See Minister of Safety and Security v Slabbert (2010) 2 All SA 474 (SCA) at [20] – [21]. Although the police bear the onus to prove that the arrest and detention are not wrongful, an "issue" must arise in this respect, meaning that a basis must be laid by the plaintiff to suggest why the arrest and detention was wrongful before the police are saddled with an onus. What seems to have been contended for *in casu* were rather general allegations the pivot been the lack of a *prima facie* case against the deceased from which all other incidents of the alleged wrongfulness naturally and inexorably flowed. The plaintiff's evidence would have had to establish a basis for the claimed illegalities.

[22] In order to justify the arrest and detention,[8] and to refute the allegations of malicious prosecution (such as they were), the defendants adduced the evidence of Sergeant Tyafu and the prosecutor, Ms. Mumtuz Shebudin. It was not in contention that she initially entered the case into the prosecutorial system on the basis that a *prima facie* case existed against the deceased. Quite ostensibly her decision in this respect also set the tone for the prosecution of the offence as a Schedule 6 one for bail purposes.

[23] Documentary evidence, including copies from the relevant police docket and a transcript of the bail proceedings (Exhibit C) concerning the deceased were also entered into evidence by consent on the basis that these documents are what they purport to be.

[24] It is apparent from the manner in which the plaintiff conducted his case and from the closing submissions at the end of the trial that there was less of a focus on any profound illegalities in the deceased's arrest or detention.[9] Instead, pivotal to the success of the plaintiff's claim was the suggestion of the absence of a *prima facie* case against the deceased. The thread of the plaintiff's case was that there had been doubt from the outset concerning the identity of the fourth suspect who had been involved in the rape incident and that the complainant's pointing out of the deceased as that suspect (especially in the peculiar circumstances in which the plaintiff claimed this had happened, and which I shortly detail) detracted from any reasonable suspicion. The plaintiff further raised a technical point, it being contended that even assuming a reasonable suspicion that the deceased was likely the fourth suspect, his described involvement in the rape incident could not be brought within the ambit of a Schedule 1 offence. It appeared to be accepted that the existence or not of a *prima*

[8] See footnote 6 above regarding the pleaded case which the defendants were called upon to answer.
[9] Indeed, the only evidence that was adduced in this respect is that the deceased was not informed of his constitutional rights at home when he was placed under arrest.

facie case was also foundational to the premise whether there was reasonable and probable cause for the prosecution, more or less by the same objective standard of reasoning concerning the lawfulness of the arrest.

The evidence:

[25] The deceased's father and his older brother, Sivenathi Kami, testified on behalf of the plaintiff as to the circumstances of the arrest, both having been present and in the company of the deceased at that moment. They also illuminated the personal circumstances of the deceased especially as these pertained to his status at the time of arrest (and when the offence of rape was said to have been committed), which in essence is that he had been released from a correctional centre at which he had been serving a sentence for a murder conviction and placed on parole or under community corrections subject to certain conditions that *inter alia* curtailed movement beyond his home at night.[10] Sivenathi Kami also gave a context to the circumstance which led to the deceased's detention being extended beyond his first appearance at court until the charges were withdrawn against him. Indeed, both he and the deceased testified at the bail hearing in support of the latter's formal application as is evident from the bail transcript entered into evidence by consent between the parties, marked Exhibit C.

[26] Regarding those circumstances which dictated that the deceased remain in detention throughout this period, it appeared to have been common cause at the bail hearing, or at least accepted by all the parties concerned including the deceased's legal representative, that the deceased had been arraigned on a Schedule 6 offence at the time and bore the onus to prove that there existed

[10] Suggested in all of this is that the deceased could not have been at the rape scene but the theory of him having had an *alibi* at the time was never really promoted, whether at the time of his arrest, or when charged, or at the bail proceedings.

exceptional circumstances which permitted his release in the interest of justice.[11] Sergeant Tyafu, in his testimony in the current trial, confirmed that he had placed before the magistrate in the bail hearing all of the grounds on which he had based his recommendation to oppose bail. After having heard the evidence and the submissions made thereanent, the presiding magistrate refused the application. As a result, the deceased's detention had continued until 5 November 2015 on which day he was requisitioned to court for the charge(s) against him to be provisionally withdrawn.

[27] There is some dispute regarding the basis or reason for the withdrawal. The defendants submit that it was provisional and for further investigation (which observation accords with what the magistrate endorsed on the charge sheet),[12] whereas the Plaintiff maintains that the case against the deceased was "dismissed" by reason that the State had entertained doubt about his identification as the fourth suspect. In any event this resulted in him having been released from custody on that same day and he was not charged again before he died.[13]

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[11] Section 60 (11) (a) of the CPA, applicable to a scenario such as the present, provides as follows:

> "(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to- (a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release."

The relevant item in Schedule 6 that the State relied upon as establishing the category of offence with which the deceased had been charged is stated as follows:

> "Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively—*(a)* when committed—(i) in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice; (ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;..."

[12] This appears from the charge sheet that was entered into evidence marked Exhibit "D".

[13] By reason of the view that I take in this matter, it is not necessary to find if the fourth element for the claim of malicious prosecution, namely that the proceedings were terminated in the deceased's favour, had been established or not. Ms. Shebudin's assessment that the prosecutor had been wrong to withdraw the charges against the deceased (I deal with this later in my judgment above) is, however, to my mind a tenable one. Firstly the prosecutor withdrawing the charge seemed to misunderstand the mix up in the name of the fourth suspect which, once explained by the complainant, could not be construed as a mistake in the identity of the suspect and, secondly, she failed to appreciate that the State's case did not implicate the fourth suspect as having sexually penetrated the complainant, hence the further DNA tests would not have met the objective, *vis a vis* the deceased at least, of independently confirming or negating his complicity in the rape incident. The prosecutor's decision to withdraw therefore appears to me to have been ill thought through and not appreciative of the nature of the fourth suspect's separate culpability in all the circumstances.

[28] The complainant made her statement to the police on 15 June 2015. Sergeant Tyafu, promoted to this higher rank by the time of the trial, testified that he was assigned the cases of both the complainant and her friend (who it seems had also been raped)[14] and took charge of the investigations. On reading the complainant's statement he claims that he was alive to the fact that the deceased was not implicated as having himself raped the complainant, but in his view, the latter's criminal liability was based on the deceased's own attempt to have raped her, or on the separate basis that he had formed part of the group of persons who had in fact raped her. By reason thereof, so he explained, he had made up his mind that the deceased had committed an offence in terms of section 3, alternatively section 55, of the SORMAA.

[29] He conducted further investigations into the matter for a period of about three months. On the night of the deceased's arrest, a resolve had been formed by the Family Violence Child Protection and Sexual Offences Unit to conduct a raid for suspects in pending cases. The complainant's case was one such matter.

[30] He and other members went to her home where he consulted with her regarding the identity and address of the suspect referred to in her statement as "Sive". The complainant led him to the deceased's home in the company of the other members. Upon arrival there he left her with the other members and went into the yard to enquire about the whereabouts of "Sive". The deceased's father took him to the house in which Sivenathi Kami was sleeping.

[31] He entered the house without the complainant. Sivenathi, the deceased's brother, identified himself as "Sive" whereupon he handcuffed him. At this point he went outside to fetch the complainant to identify the suspect.

[14] No connection between the two cases was suggested, or certainly not insofar as the deceased was implicated.

[32] When she entered Sive's home and saw the deceased (who had coincidentally made an appearance in the company of his girlfriend), she spontaneously cried out and independently pointed him out as the suspect. She explained to Sergeant Tyafu (who had of his own accord handcuffed Sivenathi Kami because he had answered to the name of Sive) that she had mistaken the two brother's names and confused the one with the other but, on seeing their faces, she was well able to recognize and point out the deceased, Sandile, as being the suspect. Sivenathi Kami was instantly released, and the deceased arrested instead. He was handcuffed and according to Sergeant Tyafu informed of the reason for his arrest and read his rights before being taken to the police vehicles standing by.

[33] He detained the deceased at the police station only much later at about 5h15 but explained that this was because he and the other members had continued to engage in the raiding of suspects after the deceased's arrest until early morning.

[34] According to him he complied with procedure and the expected protocols of arrest at the police station.

[35] Asked why he had waited more than 48 hours to bring the deceased before court, he pointed out that the prescribed period had elapsed at 23h40 on Friday, 25 September 2015, which was, by then, well outside of court hours. As a result, he could only bring the deceased before court when he made his first appearance at the magistrate's court on 28 September 2015.[15]

[15] The legality of the arrest on this basis was not really a feature of the plaintiff's case, but the first defendant felt compelled to provide the assurance that proper procedures and arrest protocols had been followed throughout, no doubt on the basis of the general onus that the police bear to justify both the arrest and detention. However see Minister of Safety and Security v Slabbert, *Supra*, at[20] – [21].

[36] Ms. Shebudin is a regional court prosecutor. She verified that she was the person who had made the decision to prosecute the deceased. She explained that the docket had been brought to her at first appearance. She perused the information in it and found that there was a *prima facie* case resulting in the matter being enrolled for first appearance as a Schedule 6 offence. In her opinion the facts of the matter convinced her that the State was dealing with a Schedule 6 offence because it was, as she colloquially referred to it, a "gang rape".[16] She also made the decision that the bail application should be opposed by the prosecution.

[37] She clarified that her decision to oppose bail was based on the prevalence of rape in the community; the fact that the deceased had been released on parole for murder, an offence with an element of violence [the charge against the deceased similarly involved an element of violence]; he had ostensibly not complied with his parole conditions; and a reasonable apprehension existed that he would not comply with his bail conditions if granted bail.

[38] She also expressed the view, when drawn in this respect, that she believed the later decision by the State to withdraw the charge(s) against the deceased to have been wrong because the same *prima facie* case against the deceased remained in existence even at that time.

[39] It is evident from the bail transcript that the court was, firstly, informed by Sergeant Tyafu of the unexpected turn by the complainant in identifying the deceased as the fourth suspect despite having named "Sive" as the responsible person in her police affidavit. He also disclosed to the bail court that the deceased had not himself raped the complainant. The magistrate, not surprisingly in my view, was quite unmoved by the last detail and in fact had reason to admonish the

[16] This conforms to the circumstances outlined in Schedule 6 of the CPA already set out in footnote 11 above.

deceased's legal representative for constantly alluding to the deceased as having "intervened" in the rape incident or on behalf of the complainant whereas it was plain to the court that the deceased had, at the end of the complainant's ordeal, simply elected to not rape her. This claimed glitch, or vaunted weakness in the State's case, evidently did not impress the magistrate at all. Instead, he expressed the firm view that the deceased's role was in no way minimized in all the circumstances, neither did the fact that he had declared he would not rape the complainant after all detract from his separate culpability and involvement in the unfortunate debacle.

The arrest:

[40] Section 40 (1)(b) of the CPA provides that:

> "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."

[41] The requisite jurisdictional facts which must be in existence before the jurisdiction whether or not to arrest a suspect without a warrant arises are: (1) the arrestor must be a peace officer; (2) the peace officer must entertain a suspicion; (3) the suspicion must be that the suspect committed an offence referred to in Schedule 1; and (4) the suspicion must rest on reasonable grounds.[17]

[42] It is not in contention that Sergeant Tyafu was a police officer within the meaning and contemplation of section 1 of the CPA and that he had purported to

[17] Duncan v Minister of Law & Order 1986 (2) SA 805 (A) at 8181 G – H and Minister of Safety and Security v Sekhoto & Another 2011 (1) SACR 315 (SCA) at paras [6] and [28].

harbor a suspicion that the deceased committed, if not the offence of rape, then a contravention of section 55 of the SORMAA.

[43] Whilst not in issue that the offence of rape is an offence within Schedule 1 of the CPA, it was contended on behalf of the plaintiff that since the fourth suspect had not in fact raped the complainant according to her, his arrest could not for this reason have been brought within the purview of section 40 (1) (b) of the CPA. Since the statutory offence of contravening section 55 of the SORMAA is not listed in Schedule 1, so it was submitted, the first defendant could never succeed in justifying a warrantless arrest on the basis of such a charge.

[44] It is necessary in dealing with the nature of the criminal case within Sergeant Tyafu's contemplation, to advert to the provisions of section 3 of the SORMAA which provide that:

> **"3. Rape.**-Any person ("A") who unlawfully and intentionally commits an act of sexual penetration with a complainant ("B"), without the consent of B, is guilty of the offence of rape."

[45] It was an accepted fact that the fourth suspect had not himself committed an act of sexual penetration with the complainant, but that is not the end of the matter because the facts as related to Sergeant Tyafu by her suggested that the fourth suspect had committed the offence of either "attempted rape" (he explained his understanding that the deceased would have raped her and had every intention to do so, but waited right until the end when he co-incidentally recognized who she was and then at last indicated his refusal to sexually penetrate her), or he had conspired with the three other suspects to rape her, or had acted as an accomplice to them in all the circumstances.[18]

[18] All of these prospects appear to my mind to be objectively justifiable on the facts that were conveyed to Sergeant Tyafu.

[46] Section 55 of SORMAA of provides as follows:

> **"55. Attempt, conspiracy, incitement or inducing another person to commit sexual offence.-** Any person who-
>
> (*a*) attempts;
> (*b*) conspires with any other person; or
> (*c*) aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person, to commit a sexual offence in terms of this Act, is guilty of an offence and may be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable."

[47] It is also necessary to advert to the list of offences in Schedule 1, or at least those that are relevant for present purposes. These are set out in the list of offences applicable to arrests by police officer under section 40, and private persons acting under the authority of section 42, of the CPA as follows:

> **"SCHEDULE 1**
>
> …
>
> Rape **or compelled rape as contemplated in sections 3 and 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.**
> **Sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.**[19]
> **Any sexual offence against a child or a person who is mentally disabled as contemplated in Part 2 of Chapter 3 or the whole of Chapter 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.**
> **Trafficking in persons as provided for in section 4 and involvement in the offence as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013.**

[19] This offence replaced the offence of indecent assault. The offence of sodomy, listed after "indecent assault", was also removed from the list.

Bestiality as contemplated in section 13 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.[20]

...

Any offence, … the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine.

…

Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

…"

[48] I have highlighted above the portions that were added to Schedule 1 by section 68 of the SORMAA or the later amendment act.[21] It is so that the offence of section 55 itself is not listed in the Schedule,[22] but a self-standing offence of conspiring, incitement or attempting to commit any offence referred to in the Schedule itself is also one of the offences contemplated by the legislature (with reference to sections 40 and 42 of the CPA) where an arrest without a warrant might be justified in my view by the mere severity of the principal offence and the serious punishment that a contravention under section 55 of the SORMAA would attract and which would have, before the amendment by the SORMAA, have comfortably resorted under the list of serious offences at play.[23]

[49] If one has regard to the end portion of section 55, the legislature clearly intends that the commission of an offence under section 55 ought, on conviction,

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[20] These three categories of offences, after "sexual assault" were added by the SORMAA and the item relating to "Trafficking" tweaked by section 48 of Act No. 7 of 2013.

[21] The later amendment concerns only the offence of trafficking. See section 48 of Act No 7 of 2013.

[22] It ought to be since it is a statutory offence and at first blush may create confusion.

[23] See Minister of Safety and Security v Sekhoto and Another 2011 (5) 367 (SCA) at [40] in which the SCA, focusing on the issue of the rationale for an arrest emphasized that a peace officer could seldom be criticized for arresting a suspect for *serious crime* and thereupon remarked that the offences listed in Schedule 1 are serious, not only because the legislature thought so. See also par [25] which emphasizes that an arrest under the circumstances set out in section 40 (1) (b) of the CPA (by reason of what kind of offences the Schedule contemplates) could hardly amount to a deprivation of freedom which is arbitrary or without just cause in conflict with the Bill of Rights. The charging of a suspect of "attempted rape" (as it is still colloquially referred to even after the inception of the SORMAA), or of being an accomplice to a perpetrator(s) who rape(s), or under the mantle of a conspiracy to rape, especially where it concerns a so-called "gang rape," pursuant to the new SORMAA, could hardly be passed off as a minor offence. It is regarded under the SORMAA as an equally serious offence as the primary offence of which it is a subset.

to result in a punishment "to which a person convicted of actually committing that offence would be liable". Whilst it seems to have been clarified by our courts that such a conviction would not attract a life sentence in a so-called gang rape scenario,[24] it is nonetheless an offence that would certainly attract punishment for a period of imprisonment exceeding six months without the option of a fine, as is also contemplated in Schedule 1 above.

[50] I point out further that there is a self-standing item in the Schedule dealing with a sexual offence against a child, who under SORMAA is one under the age of 18 years. The complainant in *casu* was 17 years. No doubt the gravity of such offences for purposes of inclusion under Schedule 1 lies in the fact of a child's vulnerability. "Sexual offence" is defined in the SORMAA as "any offence in terms of Chapters 2, 3 and 4 *and section 55 of this Act* and any offence referred to in Chapter 2 of the Prevention and Combating of Trafficking in Persons Act, 2013, which was committed for sexual purposes".[25] Insofar as the complainant was a child at the time of the offence the deceased was suspected to have committed, the relied upon contravention of section 55 of the SORMAA, whether on the basis of an attempt, as part of a conspiracy, or as an accomplice to the other perpetrators, would also on its own have brought the offence within the ambit of Schedule 1 of the CPA.[26]

[51] Whilst the statutory offence of contravening section 55 of the SORMAA does not feature in its own right as an item under Schedule, it would be absurd in my view to elevate and include as a category of serious offences the item concerning sexual offences committed against a child or a person who is mentally disabled (assuming for the moment the legislature intended to confine the

[24] Lekeka v S [2020] 3 All SA 485 (FB) at [39].
[25] Emphasis added.
[26] Quite evidently it is the gravity of an offence and the serious punishment attracted thereby that puts in in the category of serious offences which, from a rationality point of view, would justify an arrest by a police officer without a warrant. See footnote 22 above.

offences contemplated in this category to *only* those listed in part 2 of Chapter 3 and the whole of Chapter 4 of the SORMAA for purposes of this item),[27] at the expense of an offence involving an attempt to commit rape, or a conspiracy to rape, or of being an accomplice to a rape, now charged under section 55 of the SORMAA, because the latter are obviously more serious offences.

[52] In the result I conclude that the offence that Sergeant Tyafu reasonably suspected the deceased to have committed, whether construed as one of attempted rape, acting as an accomplice, or pursuant to a conspiracy under the alternative statutory contravention of section 55 of the SORMAA, properly resorts under Schedule 1.

[53] I proceed now to the question whether Sergeant Tyafu's suspicion was reasonable.

[54] There was not much in dispute between the parties concerning the flow of the arrest save in respect of two important features which I am inclined to resolve in favour of the defendants. Both the deceased's father and his brother sought to create the impression that the complainant had at first pointed Sivenathi Kami out as the suspect and that Sergeant Tyafu had arrested him on this basis. They also sought to impress upon the court her supposed about turn thereafter as if to suggest that she entertained doubt who the fourth suspect was, dithering between a choice of Sivenathi and the deceased. Sergeant Tyafu however maintained a version that the complainant was only invited in after Sivenathi Kami had been handcuffed in her absence and without her involvement in this "blapse" on his part. What emerged further from his testimony is that he was surprised at her reaction when she saw the deceased. She thus pointed to one suspect only and

[27] The way the item reads it could mean all sexual offences against a child or a disabled person, or only those contemplated in the chapters of the SORMAA specifically referred to in the description of the category.

was not confused about the identity of the fourth suspect. She also without hesitation explained her blunder to Sergeant Tyafu which only concerned the name by which she had mistakenly called this suspect in her statement. Not only was this explanation entirely plausible in the whole scheme of things, but Sergeant Tyafu also happened to mention this contemporaneously to Ms. Shebudin. This came forth from her account of the premise that was provided to her by the time she made her decision to prosecute and oppose bail, so the likelihood of this significant detail being an after-the-fact fabrication on Sergeant Tyafu's part can in my view be safely ruled out.[28] It is also significant in my view that before the present suit was on the horizon both brothers at the bail hearing testified that it was only after the complainant was brought in from outside to identify a suspect that the deceased was pointed out as the person present during her rape ordeal, this after Sivenathi Kami had first been handcuffed by Sergeant Tyafu in her absence. Their testimony in that forum was further consistent with the first defendant's version in the present trial that she only pointed out the deceased and that she did so promptly, independently, and spontaneously. The deceased added in his testimony given at the bail hearing that the complainant was crying when she identified him.

[28] Sergeant Tyafu's failing perhaps was in not getting the complainant to depose to a supplementary affidavit setting out these extraordinary events (or in dealing with it himself in his arrest statement), but nothing turns on it because he reported orally to Ms. Shebudin what had happened and it was on this information that she satisfied herself that the complainant's identification of the deceased as the fourth suspect, rather than "Sive" named in her statement, had been adequately cleared up. She also confirmed in her testimony that Sergeant Tyafu had orally disclosed to her that the complainant informed him of, or he had drawn her on, the issue of when exactly she had had an opportunity to see his face which she in turn had clarified was in the lights of the approaching vehicle that had come to her rescue. It was not enlarged upon at the bail hearing, or Sergeant Tyafu's version criticised, when he explained to the court that the fourth suspect had asked her to accompany him away from the rape scene and that, along the way, " a car appeared with lights." The clear import of this is that she had had an opportunity to catch a glimpse of this person then as opposed to at the rape scene. (The absence of explanatory or supplementary affidavits might be the reason why the second prosecutor provisionally withdrew the charges against the deceased on the basis of a concern about identity later on, but that cannot detract from the circumstances known to Sergeant Tyafu and Ms Shebudin at the critical moments, or from the objective reality of a *prima facie* case against the deceased at those times.)

[55] The test whether a suspicion is reasonably entertained within the meaning of section 40 (1)(b) of the CPA is objective.[29] In this instance, would a reasonable man in the arresting officer's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the deceased had committed rape, or at least a competent verdict in this instance, falling under the mantle of conspiracy, incitement, or attempt as described in Schedule 1.[30]

[56] In Mabona and Another v Minister of Law and Order and Others[31] the court expounded upon the expectation of such a reasonable man effecting an arrest without a warrant.

> "It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorizes drastic police action. It authorizes an arrest on the strength of a suspicion and without the need to swear out a warrant, i.e. something which otherwise would be an invasion of private rights and personal liberty. *The reasonable man will therefore analyze and assess the quality of the information at his disposal critically, and he will not accept it lightly 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."* (Emphasis added)

[57] The court in Mabona went on to state what the threshold of such an examination is:

> "This is not to say that the information at his disposal must be of a 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."

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[29] Minister of Safety and Security & Another v Swart 2012 (2) SA SACR 226 (SCA) at [20]; S v Nel & Another 1980 (4) SA 28 (E) at 33H.
[30] R v Van Heerden 1958 (3) SA 150 (T) at 152; S v Reabow 2007 (2) SACR 292 (E) at 297 c – e.
[31] 1988 (2) SA 654.

[58] Indeed, in Duncan v Minister of Law and Order[32] the court found that the word "suspicion" implied an absence of certainty or adequate proof. In this instance the uncertainty claimed by the plaintiff had less to do with the commission of a Schedule 1 offence than the identity of the fourth suspect.

[59] A close examination of the conduct of Sergeant Tyafu prior to effecting the arrest reveals that he firstly relied on the information contained in the docket. He was possessed of, *inter alia*, the complainant's statement, the first report to her mother, the J88 medical report confirming the rape, a name by which the suspect was known to the complainant ("Sive"), information that he gleaned from the further interview with her immediately prior to effecting the arrest and her input in pointing out "Sive's" address that was known to her. At the moment of arrest there was more significantly the spontaneous and independent pointing out by her of the deceased as the fourth suspect. He also observed her reaction when it dawned on her that the deceased was the person, not who had raped her, but who had to her mind "helped" her to bring the traumatic ordeal to an end. There was also her explanation to him at the scene of the arrest which would similarly have assured him who the relevant suspect was and contributed to his decision to arrest the deceased.

[60] I accept Sergeant Tyafu's account that the complainant explained right then and there that she had made a mistake with the name "Sive" mentioned in her statement. She was quite clear however which of the two brothers had been involved in the rape incident as the fourth suspect.

[61] It was the crux of of the plaintiff's case that the pointing out of the deceased by the complainant under the peculiar circumstances in which it happened was not sufficient to amount to a reasonable suspicion. It was additionally suggested

[32] 1984 (3) SA 560 (T).

that Sergeant Tyafu ought to have undertaken further investigations before effecting the arrest pursuant to the pointing out given the twist that played itself out in the end.

[62] Although the mistake in isolation (on the defendants' version which I accept) might be a cause to reflect that Sergeant Tyafu's suspicion fell below par, the pointing out by the complainant of the deceased, albeit of a person not named in her statement, when viewed cumulatively with the other information that was before Sergeant Tyafu prior to the arrest and at his disposal after his own "blapse" was pointed out to him, is to my mind sufficient to sustain a reasonable suspicion.

[63] It was not as if the complainant at that moment or even before had doubted the identity of the fourth suspect. She had simply called him by the wrong name in her statement, but immediately brought this to Sergeant Tyafu's attention when she noticed that he had acted on her error by putting the handcuffs on the wrong brother. There would in my view have been nothing further to have investigated beyond her explanation and clarification of who the fourth suspect was to her.

[64] Sergeant Tyafu added that he had also been assuaged that the explanation of her error was genuine when he noticed her emotional reaction upon seeing the deceased. He further explained in his testimony that he had tested the complainant's opportunity to identity "Sive" after leaving the crime scene in this suspect's company. In this respect she had related to him that she had seen him in the lights of the car that she had flagged down to assist her before he fled the scene. He mentioned this opportunity that she had to see the fourth suspect contemporaneously at the bail hearing and also repeated this to Ms. Shebudin who was equally assured that the complainant was then certain of the identity of the fourth suspect although she had unfortunately called this person by the wrong brother's name.

[65] In all the circumstances, therefore, I am satisfied that Sergeant Tyafu entertained the requisite reasonable suspicion and that the arrest was thus lawful.

[66] Of course, the matter does not end there. Once the required jurisdictional facts are present the discretion whether or not to arrest arises.[33] Although section 40 (1) (b) of the CPA gives peace officers extraordinary powers of arrest and such powers necessarily avail in the fight against crime, it must be sensitively counterbalanced against the arrested person's constitutional rights of personal liberty and dignity. A court will therefore carefully scrutinize in each case whether the infringement of these rights is legally in order.[34]

[67] The purpose of an arrest is to bring a suspect before court. If the arrest is effected for a purpose other than this, or for another purpose which does not fall within the jurisdictional framework of section 40, the arrest will be unlawful for that reason alone.

[68] The evidence *in casu* to my mind certainly falls short of demonstrating that Sergeant Tyafu had any sinister agenda or objective other than bringing the deceased to justice. The suggestion that because the matter had come a long way since he took over the docket and therefore, he did not *have to* arrest the deceased, is negated by the serious nature of the offence against the latter. In this regard peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of good faith and rationality. This standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court:

> "A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection, or even the optimum, judged from the vantage

[33] Minister of Safety and Security v Sekhoto and Another, *Supra*, at para [25].
[34] Minister of Law and Order v Dempsey 1988 (3) SA 19 (A) at 38 C.

> of hindsight and so long as the discretion is exercised within this range, the standard is not breached."[35]

[69] In a rationality enquiry, the critical enquiry, as suggested by Harms JA in Sekhoto, should not be focused on the manner of the arrest but rather the rationale for the arrest. He made this clear when he remarked upon the limited role of the peace officer in the process of making an arrest as follows:

> "While the purpose of arrest is to bring the suspect to trial the arrestor has a limited role in that process. He or she is not called upon to determine whether the suspect ought to be detained pending a trial. That is the role of the court (or, in some cases a senior officer). The purpose of the arrest is no more than to bring the suspect before the court (or the senior officer) so as to enable that role to be performed. It seems to me to follow that the enquiry to be made by the peace officer is not how best to bring the suspect to trial: the enquiry is only whether the case is one in which that decision ought properly to be made by a court (or the senior officer). Whether his decision on that question is rational naturally depends upon the particular facts but it is clear that in cases of serious crime – and those listed in Schedule 1 are serious, not only because the Legislature thought so – a peace officer could seldom be criticized for arresting a suspect for that purpose."[36]

[70] As in Sekhoto, the opinion was formed by Sergeant Tyafu in the present matter concerning a serious offence and one in respect of which the legislature has deemed it proportional to arrest without a warrant. [37] Further, the fact that he self-evidently assumed it to be *his duty* to carry out the arrest in order to cause the deceased to appear in court does not in any way detract from the situation. His motive makes no difference to the enquiry, given my finding above that the arrest was rationally justifiable.[38]

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[35] Sekhoto *Supra* at para [39].
[36] Sekhoto *Supra* at para [44].
[37] As was stated in Sekhoto at para [25] it could hardly be suggested that an arrest under the circumstances set out in section 40 (1) (b) could amount to a deprivation of freedom which is arbitrary or without just cause in conflict with the Bill of Rights.
[38] Object is relevant while motive is not. Sekhoto *Supra* at para [31].

The claimed illegalities in the arrest:

[71] The plaintiff's case was further that the deceased was not informed of the reason for his arrest and that he was not read his rights during the arrest. The deceased's brother and father testified that he was handcuffed and taken to the police vehicles outside, but nothing was said as to the reason for his arrest, at least not in their presence, neither did they personally hear his rights being read to him. Sergeant Tyafu's evidence on the other hand was that the deceased had been arrested in line with the protocols customarily followed. Upon arrest, according to him, he informed the deceased that he was being arrested and of the reason therefor. He also claimed to have read him his rights. This same testimony was given by Sergeant Tyafu at the bail hearing, and it aroused no challenge. I add that the deceased himself had testified at that hearing quite co-incidentally that the arresting officer had informed him of the date of the alleged offence, and it had also been suggested to him that he should inform the police of the names of these other people who the deceased was said to have "stopped" from raping the complainant, this suggesting that there was indeed a conversation about the offence rather than "nothing" having been said.

[72] The reason for the arrest and the deceased's rights were further ostensibly read to him at the police station as is evinced by Exhibits "I" and "J" which were entered into evidence during the trial. These exhibits constitute the statutory notice of rights form and warning statement respectively. They were not challenged by the plaintiff as presenting an unfair reflection of what had taken place and I accept accordingly that proper deference was accorded to the deceased as a suspect. It is entirely implausible in my opinion that Sergeant Tyafu would not have been mindful of the necessary respect to be accorded the deceased as a suspect when he arrested him, more especially given his own error in the scenario before the complainant confirmed who in her view the fourth suspect was.

The tenor of the evidence:

[73] As an important aside it needs to be clarified that the evidence for the plaintiff was unreliable in the whole scheme of things. Both the deceased's father and his brother when they testified presented a biased picture of what went down at the arrest (which clearly contradicted the evidence presented at the bail hearing by both Sivenathi Kami and the deceased in this respect) and sought to promote an image of the deceased as an innocent victim and a law-abiding citizen who honoured his bail conditions. Mr. Kami senior, for example, insisted that he never let the deceased out of his sight and was careful to ensure that he met his parole conditions, but the careful hawk eye oversight he claims to have maintained over him, even at night while his sons slept in the nearby cottage, seems to me to be entirely implausible. He was most reluctant to make the very realistic concession that he could not account for the whereabouts of the deceased 24-7. He also gilded the lily somewhat concerning adverse comments Sergeant Tyafu supposedly made at the time of arrest, for example branding his son as an animal, which neither of his sons mentioned in their testimony at any point. Additionally, he insisted that the case against the deceased had been dismissed (whereas on the face of the charge sheet and docket this was not the case) and was not prepared to admit of any mistake in this respect. He and Sivenathi Kami also co-incidentally both honed in on the complainant's so-called about-turn after supposedly first pointing Sivenathi out as the suspect. Since this aspect in their oral evidence at the civil trial was in conflict with Sivenathi and the deceased's evidence given at the bail hearing, this unfortunately suggests an obvious conspiracy between the plaintiff's witnesses to undermine the complainant's identification of the fourth suspect.

[74] Sergeant Tyafu's evidence on the other hand was logical, conforms to record keeping, was corroborated by that of Ms. Shebudin, consistent with his

prior testimony given at the bail hearing and indeed with that of the deceased and Sivenathi in respect of the material issues for present purposes, and is entirely plausible. He also readily made concessions where necessary. I am accordingly satisfied that the defendants' version should prevail where in conflict with that of the plaintiff's.

[75] Having said so I accept that the deceased was read his rights at the time of his arrest and that the procedure for the arrest was also lawful.

The detention:

[76] The next issue identified by the parties in the case management processes for determination by the court is whether the police opposed bail. It seems to have been accepted during the trial that Sergeant Tyafu indeed *recommended* that bail be opposed and even if he was not prepared to make the concession that the deceased was not a necessarily a flight risk, he was clearly guided by the serious nature of the offence for which the deceased had been arrested; that he was a parolee and subject to community corrections and that the circumstances of the case warranted that he be detained post arrest. Objectively no fault can be found in this stance adopted by him once it is accepted that a *prima facie* case could be made out against the deceased and that the essential facts at his and the State's disposal brought the charge within the ambit of Schedule 6 of the CPA. For the rest, at the screening of the case, Ms. Shebudin made the formal decision to oppose bail as she was obliged to after Sergeant Tyafu had placed the docket before her to decide on the further conduct of the matter.

[77] The pleaded basis for the deceased's initial and ensuing detention being wrongful and unlawful was, as indicated above, premised on the basis of there having been no *prima facie* evidence against the deceased, and the State and

Sergeant Tyafu's supposed failure to have placed before the court all relevant information in his favour.

[78] Section 12(1)(a) of the Constitution guarantees the right of security and freedom of a person, which includes the right 'not to be deprived of freedom arbitrarily and without just cause'.

[79] Section 35(1) of the Constitution provides that anyone who is arrested on the premise of having committing an offence has the right, amongst others—

> "(d) to be brought before a court as soon as reasonably possibly, but not later than—
>
> (i) 48 hours after the arrest; or
>
> (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expires outside ordinary court hours or on a day that is not an ordinary court day;
>
> (e) at the first court appearance after being arrested, to be charged or to be informed of the reasons for the detention to continue, or to be released; and
>
> (f) to be released from detention if the interest of justice permit, subject to reasonable conditions.[39]

[80] The qualification that the interests of justice should permit the suspect's release from detention is an important one, particularly in the present scenario.

[81] As outlined in Sekhoto already referred to above:

> "While the purpose of arrest is to bring the suspect to trial, the arrestor has a limited role in that process. He or she is not called upon to determine whether the suspect ought to be detained pending a trial. That is the role of the court (or in some cases a senior officer). The purpose of the arrest is no more than to bring the suspect before the court (or the senior officer) so as to enable that role to be performed."

[39] The rights enshrined in section 35 of the Constitution are echoed in section 50 of the CPA.

[82] In *casu* Sergeant Tyafu did exactly that. He brought the deceased before the court to determine his fate from that moment on.

[83] The discretion of a court to order the release or further detention of the suspect is subject to wide-ranging, and in some cases stringent, statutory directions. Indeed, in some cases the suspect must be detained pending his trial, in the absence of special circumstances.

[84] The CPA requires a judicial evaluation to determine whether it is in the interests of justice to grant bail. In certain instances, such as in the present case, a special onus rests on a suspect before bail may be granted, and he has a duty to disclose certain facts, including prior convictions, to the court.

[85] Concerning the necessary trajectory that followed in respect of the bail hearing concerning the deceased, and the not unexpected outcome based on the objectively justifiable *prima facie* case that existed against him, it is apposite to refer to the *dictum* in S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat,[40] in which bail proceedings were characterized as follows:

> "[11] Furthermore, a bail hearing is a unique judicial function. It is obvious that the peculiar requirements of bail as an interlocutory and inherently urgent step were kept in mind when the statute was drafted. Although it is intended to be a formal court procedure, it is considerably less formal than a trial. Thus the evidentiary material proffered need not comply with the strict rules of oral or written evidence. Also, although bail, like the trial, is essentially adversarial, the inquisitorial powers of the presiding officer are greater. An important point to note here about bail proceedings is so self evident that it is often overlooked. It is that there is a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application the enquiry is not really concerned with the question of guilt. That is the task of

[40] S v Dlamini 1992 (2) SACR 51 (E).

> the trial court. The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail. The focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial; and that entails in the main protecting the investigation and prosecution of the case against hindrance."

[86] Whilst there is no absolute duty resting on a prosecutor to oppose bail in all cases, he/she has a public duty to oppose bail in appropriate cases where the interests of justice so require.[41] Schedule 5 and 6 offences contemplated two scenarios where the court must order that the accused be detained in custody until dealt with in accordance with the law, unless the accused, after having been given a reasonable opportunity to do so, satisfies the court that the interest of justice permit his release.[42]

[87] Whenever section 60 (11) is applicable, there can be no question of an inquisitorial procedure and the issue of bail has to be decided on the question whether the accused has discharged the burden of proof placed on him by section 60 (11).[43] It is for the accused to put his/her case forward first and for the State to answer it. There is no onus on the State to disprove the existence of exceptional circumstances.[44]

[88] The import of this all is that an accused person who alleges innocence and claims that he will ultimately be acquitted, must prove his future acquittal on a balance of probability.[45]

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[41] Carmichele v Minister of Safety and Security and another 2001 (1) SA 489 (SCA).
[42] Section 60 (11) of the CPA.
[43] See generally S v Mbele & another 1996 (1) SACR 212 (W) 237 f – g.
[44] Compare S v Porthen & others 2004 (2) SACR 242 () para 60 and S v Scott-Crossley 2007 (2) SACR 470 (SCA) paras 4 and 12.
[45] S v Mathebula 2010 (1) SACR 55 (SCA) at para 12.

[89] The plaintiff's case for unlawful detention is that the police and the prosecutors breached the duty of care that they owed the deceased by failing to place all relevant information before the court. However, the two features of the matter that would supposedly have weakened the case for the state and improved the deceased's chances of a future acquittal on the requisite standard of proof were not withheld from the bail court. I have dealt with this above. The mistake in the complainant having given the wrong name to the fourth suspect in her police statement was indeed explained to the prosecutor and placed on record by Sergeant Tyafu when he testified at the bail hearing. It was further never downplayed that the fourth suspect had not sexually penetrated the complainant himself, but still the gravity of his involvement loomed large and could not have promoted his chances of a future acquittal on the basis of his objective attempt to have raped, or involvement in a conspiracy to rape, or assisting in the whole sordid debacle as an accomplice, even assuming that he had, as the deceased legal representative perceived the situation to have been instead, provided some form of succor to the complainant.

[90] It is trite law that the strength of the State's case is a factor that a court must take into account when determining exceptional circumstances, and that the Constitution imposes a duty on the State not to perform any act that infringes the entrenched right to freedom.[46]

[91] In Mahlangu and Another v Minister of Police,[47] the court held that although the lawfulness or otherwise of a court order for an arrested person's detention depends primarily on the conduct of the prosecutor and/or the magistrate, the police can incur liability for damages for detained person being

[46] W v Minister of Police (92/2012) [2014] ZASCA 108 (20 August 2014) paras 3 and 28.
[47] (1393/2018) [2020] ZASCA 44)21 April 2020).

denied their freedom after their appearance before a court, notwithstanding the court having ordered such detention.[48]

[92] In Mahlangu it also held that the police may be liable if through some wrongful conduct, independent of the arrest, the police intended to influence the prosecutorial decision to request and/or the court's discretion to direct the further detention of the arrested person, where, but for the unlawful conduct of the police the further detention would not have been ordered by the court. In that case, the court said, the police would foresee, as inevitable, at the time of such wrongful conduct, that the detained person would be deprived of his liberty.[49]

[93] In Woji v Minister of Police[50] Mr. Woji was lawfully arrested on a charge of robbery and was remanded in custody at his first court appearance. At the bail hearing conducted shortly thereafter the investigating officer testified dishonestly that Mr. Woji was clearly identifiable on a video of the robbery which he had viewed. It was on the basis of this evidence that bail was refused. Mr. Woji was detained until he prosecutor viewed the footage and saw that Mr. Woji could not be identified as one of the robbers, at which point he withdrew the charge. In the action that ensued for damages for wrongful detention the court held, on the facts and evidence before it, that the investigating officer subjectively foresaw that his evidence would lead to the refusal of bail, and he proceeded recklessly to assert that it was Mr. Woji on the video footage of the commission of the crime.

[94] This case is entirely distinguishable on the merits. Sergeant Tyafu when called to give evidence at the bail hearing, placed before the bail court all the information in his possession, including the issue of the mix up of the names of

[48] See also De Klerk v Minister of Police [2019] ZACC 32 (CC), Minister of Police & Another v R Muller [2019] ZASCA 165 (29 November 2019); Minister of Police v Mahleza [2021] ZAECGHC 83 (14 September 2021).
[49] Mahlangu *supra* at para [22].
[50] [2014] ZASCA 108; 2015 (1) SACR (SCA).

the deceased and his brother and the anomaly that the fourth suspect had himself not raped the complainant. In my view there can be no suggestion that he misrepresented or withheld facts from the prosecution on the strength of which a decision to release the deceased could have been taken.

[95] The further detention of the deceased pending the trial was at the discretion of the magistrate who in my view provided good reasons why the deceased had failed to meet the onus on him to satisfy the court that it was in the interests of justice to permit his release on bail.[51]

[96] There is also no basis on the evidence before me to find that he influenced the prosecutorial decision or the discretion of the bail court in any actionable manner, neither that he misled the court in any way.

[97] Both Sergeant Tyafu and Ms. Shebudin were justified in proceeding on the premise of a *prima facie* case against the deceased of his involvement in the so-called "gang rape". This required them to follow the prescripts of section 60 (11) (a) of the CPA and let the law takes its course.

[98] The plaintiff has therefore failed to establish that the police (or the second defendant for that matter) caused the deceased's detention when the magistrate ordered that he be detained in custody on the various occasions until the charge(s) against him were ultimately withdrawn.

[51] In the case of W v Minister of Police, the detention was as a result of incorrect information given by the police to the court at the bail hearing.

Malicious prosecution:

[99] As for the claim of malicious prosecution, I am unable to conclude that the plaintiff discharged the onus to prove the elements of such a claim. As against the first defendant, it was accepted that he played no role in instigating the proceedings against the deceased in the sense in which this element is ordinarily understood. As is the custom, all he did was to place the docket and a recommendation before Ms. Shebudin and leave it with her to decide on the future conduct of the matter. The second defendant's decision to enter the case into the system, in turn, rested on a *prima facie* case which afforded reasonable and probable cause for the ensuing criminal proceedings against him.

[100] The evidence in my view further failed to establish that the defendants acted with malice (*animo injuriandi*) in any manner contended for by the plaintiff.

[101] It is unnecessary to go into further detail regarding the other elements of this claim.

Conclusion:

[102] In the result the plaintiff's claims are dismissed, with costs.

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B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING:	1, 2, 3 and 5 March 2021 –
DATE LAST HEADS OF ARGUMENT FILED	2 July 2021
DATE OF JUDGMENT:	18 February 2022*

*Judgment delivered electronically at 14h00 on this date by email to the parties.

APPEARANCES:

For the applicant: Mr. S D Mfeyo instructed by Magqabi Seth Zith Attorneys, East London (ref. Mr. Magqabi)
For the defendants: Ms. A M Da Silva instructed by the State Attorney, East London (ref. Mr. L Isaacs).