



**REPORTABLE**

CASE NO: SA 39/2017

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between

**GOVERNMENT OF THE REPUBLIC OF NAMIBIA**

**Appellant**

and

**THOMAS INGHANGWE NDJEMBO**

**Respondent**

**CORAM:** SHIVUTE CJ, SMUTS JA and HOFF JA

**Heard on:** 16 November 2020

**Delivered on:** 30 November 2020

**Summary:** The respondent, Mr Ndjembo, was arrested by a member of the Namibian Police on suspicion that he committed robbery with aggravating circumstances. The police failed to establish a *prima facie* case against the respondent and so they released him the following day. The respondent sued the appellant, the Government of the Republic of Namibia, being the employer of the members of the Namibian Police Force for unlawful arrest and detention. The appellant admitted that the respondent was arrested, but argued that the arrest was lawful. The appellant pleaded that the police had a reasonable suspicion that the respondent committed robbery and he was arrested for the purpose of further

investigation with a view to establishing a case that would entitle them to bring him to justice. After the police failed to gather evidence establishing a *prima facie* case against the respondent, they released him. The High Court found that the police had no reasonable ground to arrest the respondent and so it awarded him damages in the amount of N\$20 000. On appeal to the Supreme Court:

*Held*, that deciding whether there were reasonable grounds for the police to arrest a suspect requires a balance to be struck between two competing public interests, namely the need to guard against encroachment into the constitutional rights of suspects who may be subjected to arbitrary arrest or detention on the one hand and the need to ensure that crimes are effectively investigated on the other.

*Held*, that the test of whether a police officer reasonably suspects a person of having committed an offence referred to in schedule 1 of the Criminal Procedure Act, is whether on an objective approach the police officer had reasonable grounds for the suspicion.

*Held*, that the law provides ample scope for arrest for the purpose of investigation.

*Held*, that a police officer has discretion whether or not to arrest for purpose of further investigation.

*Held*, that such discretion has to be exercised properly and is not unfettered but is subject to judicial oversight: a police officer who arrests a suspect arbitrarily but under the pretence of bringing him to justice runs the risk of being successfully sued for unlawful arrest and detention or malicious prosecution.

*Held*, that on the facts of the case, the police exercised their discretion properly in that they had a reasonable suspicion for the respondent's arrest and when they failed to establish a *prima facie* case, they released him. They thus acted lawfully.

Appeal allowed and decision of the High Court set aside.

---

## APPEAL JUDGMENT

---

SHIVUTE CJ (SMUTS JA and HOFF JA concurring):

### Introduction

[1] This appeal is in a civil action for unlawful arrest and detention instituted by the respondent, Mr Ndjembo, against the appellant, the Government of the Republic of Namibia. Mr Ndjembo also sued the appellant for damages for the alleged loss of his cell phone and watch which he said were confiscated from him by the police at the time of his arrest but not returned upon release. The appellant admitted the arrest, but denied that it was unlawful. It pleaded that s 40(1)(a) of the Criminal Procedure Act No 51 of 1977 (the Act) authorised a peace officer to arrest any person without a warrant whom the peace officer suspects of having committed an offence referred to in schedule 1 to the Act. It further pleaded that the respondent was arrested by a member of the Namibian Police, a peace officer, without a warrant on reasonable suspicion that the respondent committed robbery with aggravating circumstances, an offence referred to in schedule 1 to the Act.

### Background

[2] The respondent was arrested under the following circumstances. On 5 July 2015, around 09h00, a robbery with aggravating circumstances was committed at a club in Windhoek. An elderly gentleman was pounced upon and robbed of substantial amounts of money, a motor vehicle, cellular phones and sundry valuable property. The incident was reported to the Namibian Police who immediately sprang into action with the view to identifying the perpetrators and to

obtaining sufficient evidence so as to justify charging them with the relevant offences before a court of law.

[3] In the course of their investigation, the police received information from a confidential informant whose identity they declined to reveal. Following up on the information, a crack team of specialised investigators, on 6 July 2015, descended upon a house shown to them by the informant. The police had prior information – from the informant – of the owner of the house’s alleged involvement in the robbery. This person will be referred to, in this introductory part of the judgment for convenience’s sake, as the first suspect. The first suspect was not found at home. Instead, his nephew was found there. The nephew was subsequently arrested.

[4] Property identified as those stolen during the robbery was found in the first suspect’s house. Also found in the house was a revolver suspected of having been used in the robbery and a cell phone belonging to the first suspect. Upon inspection of the cell phone, the police found the respondent’s cell phone number stored amongst the first suspect’s contacts. The police had prior information that the first suspect and the respondent knew each other and that they used to meet at a certain place. In light of the information at their disposal, the police suspected the respondent’s involvement in the robbery.

[5] Using the first suspect’s cell phone, the police sent a text message to the respondent’s cell phone telling him to meet at a predetermined place. This is the place the police had information that the suspect and the respondent used to meet at, allegedly to plan nefarious activities. While still at the first suspect’s place, the

police team involved in the operation received video footage of the robbery that was retrieved from the club's Close Circuit Television (CCTV) cameras. Four of the five armed robbers on the video, including the first suspect, were all known to the police and could clearly be identified. Alas, the fifth hooded person could not be identified.

[6] Under the misplaced impression that the message came from the first suspect, the respondent promptly replied 'On my way' and in about a minute arrived at the agreed place. Unbeknown to him, the police squad was hiding in strategic places; waiting for him. He was immediately pounced upon and arrested forthwith.

[7] On his part, the respondent denied that he knew the first suspect and maintained that the cell phone number that invited him to the meeting belonged to the first suspect's girlfriend – an alleged customer of his – and that he thought that it was the girlfriend he was communicating with. When asked to take the police to his residence, the respondent instead took them on a wild goose chase until the police realised that he was obviously unwilling to take them to the right place. They eventually took him to his place of abode when information about its precise location was given to them by a third party affiliated to the respondent.

[8] The search of his house revealed nothing of relevance to the crime the police were investigating. The respondent was nevertheless taken to a police station where he was kept overnight. The police confiscated his cell phone. They told the respondent that they would keep it as part of further investigations. The

following day, 7 July 2015, at about 09h30 the respondent was taken to an office of detectives situated outside the police station where he was interrogated and a written statement subsequently taken from him. In it, he simply narrated the story of how he had been called to the place where he was subsequently arrested. He made no admission of relevance to the investigation.

[9] On the same day, the police also obtained a search warrant that compelled the respondent's cell phone service provider to furnish the respondent's call records to the police. These were provided and they showed that the respondent's cell phone and that of the first suspect's exchanged calls and/or messages the day before the robbery as well as on the date of the robbery, being 5 July 2015. On the day of the robbery, a call was made from the first suspect's phone to the respondent's cell phone at 09h22, recorded by the service provider's Gijima Tower, which according to the appellant's sole witness who also led the police investigation, is in the area where the scene of the robbery was situated.

[10] There was a text message sent from the respondent's number to that of the first suspect at 09h30. This time around the message was picked up by City Heights Tower. The first suspect's number called the respondent's number again at 09h56, which call was recorded by Ceaser Tower, allegedly situated in the respondent's residential area. The respondent was questioned about these calls during interrogation, but he revealed nothing relevant to the investigation. According to the appellant's witness, the investigations in respect of the respondent were completed on 7 July 2015, at 11h27.

[11] The police concluded that no *prima facie* case could be established, so they released him. He was taken back to the police station after 14h00 where he was eventually released from custody only at 19h30. The appellant's witness attributed the respondent's further detention to alleged long administrative processes involved in the release of a suspect and to the number of other suspects the officers were allegedly interrogating at the time.

#### The High Court's approach

[12] In a short judgment, the court below presented a brief summary of the pleadings and the evidence and also briefly discussed the law. Having applied the law to the facts, the court concluded that the police officer who arrested the respondent did not do so on an objective reasonable suspicion. The court did not give reasons for this conclusion. On the claim for the alleged missing cell phone and watch, the court found that the respondent did not prove that his watch, if at all he had one, had been confiscated by the police. As to the cell phone, it was admitted by the appellant that the cell phone was in the appellant's possession; that its return to the respondent had been tendered, but that the respondent had declined to collect it from the police station. Accordingly, the court made an order: awarding N\$20 000 in damages to the respondent for the unlawful arrest; compelling the return of his cell phone, failing which payment of N\$800 to him in damages, and awarding him the costs of suit. The appeal lies only against that part of the judgment and order of the High Court finding that the arrest and detention of the respondent was unlawful and awarding damages as well as the costs of suit.

### Applicable legal principles

[13] At the heart of the court's assessment of whether there were reasonable grounds to arrest a suspect lies a potential tension between two competing public interests. On the one hand, there is a need to guard against arbitrary arrest or detention that would make greater inroads into constitutional rights of arrested persons.<sup>1</sup> This consideration requires that the purpose of the arrest must be in fact to bring the arrested persons before a court of law to ensure that they are prosecuted and not to harass or punish them for an offence they have not been convicted of.<sup>2</sup> On the other, there is a greater need to ensure that crimes are effectively investigated and that those who commit them are brought to justice. It is in the interest of the rule of law that reported crimes are effectively investigated. Doubtless, effective investigation of crime serves the interests of victims of crime and of the public in general. What is required therefore is a balance to be struck between these two competing public interests.

[14] The Legislature sought to draw the required balance by providing firstly, in s 40(1)(b) of the Act, that a peace officer may arrest without a warrant any person 'whom he reasonably suspects of having committed an offence referred to in schedule 1, other than the offence of escaping from lawful custody'. Secondly, by providing in s 50(1) of the Act that a person arrested, whether with or without a warrant must be brought to a police station or if arrested on a warrant, to any other place mentioned in the warrant and if not released by reason that no charge is to be brought against him, be detained for a period of 48 hours unless he or she is

---

<sup>1</sup> Article 11(1) of the Namibian Constitution provides: 'No person shall be subject to arbitrary arrest or detention.'

<sup>2</sup> Cf. *MacDonald v Kumalo* 1927 EDL 293 at 301; *Tsose v Minister of Justice & others* 1951 (3) SA 10 (A) at 17C-D (*Tsose*).



brought before a magistrate and the further detention is ordered by the court for trial or for the purpose of adjudicating upon the cause for the arrest.

[15] It would appear that the 'jurisdictional facts' that must exist for peace officers to exercise the power conferred upon them by s 40(1)(b) are that the arrestor must be a peace officer; he or she must entertain a suspicion; suspicion that the arrestee has committed an offence referred to in schedule 1 to the Act, and that the suspicion must rest on reasonable grounds. On the facts of the appeal before us, it was common cause that the arrestor was a peace officer; that he entertained a suspicion; suspicion that the respondent had committed a schedule 1 offence. The issue in dispute at the trial was whether the suspicion was based on reasonable grounds.

[16] Put differently, the question the court below was called upon to decide is whether it was justifiable to arrest in the circumstances where preliminary investigations had not yielded any relevant information or established *prima facie* evidence implicating the suspect.

[17] Whether a peace officer may arrest without a warrant a person whom he or she 'reasonably suspects' of having committed a schedule 1 offence appears to me to depend on what constitutes reasonable suspicion. This court in *Nghimwena v Government of the Republic of Namibia*<sup>3</sup> – adopting the views of the authors Lansdown and Campbell – noted that 'suspect' and 'suspicion' are vague and difficult words to define. One of the enduring definitions of the word 'suspicion' was

---

<sup>3</sup> (SA27-2011)[2016] NASC (22 August 2016).

given by Lord Devlin in *Shaaban Bin Hussien & others v Chong Fook Kam & another*:<sup>4</sup> Speaking for the Privy Council, the learned law lord has this to say on suspicion:

‘Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; “I suspect but I cannot prove”. Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage.’

[18] Lord Devlin drew a distinction between reasonable suspicion and *prima facie* proof in the following terms:

‘*Prima facie* consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all. . . . Suspicion can take into account also matters which, though admissible, could not form part of a *prima facie* case.’<sup>5</sup>

[19] Our current Criminal Procedure Act 51 of 1977 is of South African origin, which Namibia adopted as its own legislation at Independence by virtue of Art 140(1) of the Namibian Constitution. As such, the interpretation of s 40(1)(b) of the Act by South African decisions found by our courts to be of persuasive value is a useful guide that our courts may follow. It is to that jurisdiction’s approach to the interpretation of s 40(1)(b) that I propose to turn next.

[20] In addressing the question whether a peace officer ‘reasonably suspects’ a person of having committed an offence referred to in schedule 1, the Appellate Division of the Supreme Court of South Africa in *Duncan v Minister of Law and*

<sup>4</sup> [1969] 3 All ER 1627 (PC) at 1630C-D.

<sup>5</sup> Id. At 1631B-C.

*Order*<sup>6</sup> observed that the question whether a peace officer 'reasonably suspects' a person of having committed an offence referred to in schedule 1 is objectively justiciable. It was pointed out that the test is not whether a peace officer believed that he or she had reason to suspect, but rather whether on an objective approach, the officer in fact had reasonable grounds for the suspicion.<sup>7</sup>

[21] Discussing the meaning of the phrase 'reasonable suspicion', the same court albeit with a different nomenclature in *Powell NO & others v Van der Merwe & others*<sup>8</sup> and in the context of a discussion of the validity of a search warrant, endorsed the observations made by the judge *a quo* in that case that a reasonable suspicion 'was an impression formed on the basis of diverse factors, including facts and pieces of information falling short of fact, such as allegations and rumours'. What is most relevant, so the court emphasised, is the total picture that emerges from the facts.<sup>9</sup> It is indeed the allegations or rumours that must be verified through further investigations to establish a *prima facie* case, if any, which in turn would conclude the investigations.

[22] After a careful analysis of the jurisprudence and legislative history of s 40(1)(b) and its legislative predecessor, the Appellate Division in *Duncan* found that if the jurisdictional facts that must exist before a peace officer may invoke the provisions of s 40(1)(b) are in place, the peace officer may then resort to the power of arrest.<sup>10</sup> He or she has discretion as to whether or not to exercise that

---

<sup>6</sup> 1986 (2) SA 805 (A).

<sup>7</sup> At 814D.

<sup>8</sup> 2005 (5) SA 62 (SCA) para 35.

<sup>9</sup> *Id.*

<sup>10</sup> At 818H.

power.<sup>11</sup> Although the grounds upon which the exercise of such discretion may be questioned are circumscribed, such discretion has to be exercised properly.<sup>12</sup> The court found that neither from what was said in previous cases nor from the legislative history of s 40 of the Act, can it be said that the legislature had not contemplated further investigations to be undertaken subsequent to the arrest of a suspect.<sup>13</sup> On the contrary, the legislature must have contemplated that further investigations could lead either to the suspect's release from detention or his or her prosecution on a criminal charge.<sup>14</sup>

[23] That there is scope for further investigations prior to the suspect's appearance in court is also apparent from the provisions of s 50(1) of the Act, which as previously noted, permits the detention of a suspect for a period of 48 hours before he or she is taken to court. Having analysed the legislation this way, the court in *Duncan* concluded that an arrest without a warrant was not unlawful just because the peace officer intended to make further investigations before deciding whether to release the suspect or to proceed with his prosecution as contemplated by s 50(1) of the Act.<sup>15</sup>

[24] If the intention of the arresting officer is to bring a suspect before court, then there can be no question of the arrest being unlawful. It would of course be unlawful to arrest the suspect with the professed intention to bring him or her to

---

<sup>11</sup> At 818I.

<sup>12</sup> *Id.*

<sup>13</sup> At 819H.

<sup>14</sup> *Id.*

<sup>15</sup> At 820C.

justice, while the real intention is to frighten or harass him or her as an inducement 'to act in a way desired by the arrestor, without his appearing in court'.<sup>16</sup>

[25] That it is lawful to arrest for the purpose of further investigations, appears also to be the position under English law. This much was confirmed by the House of Lords in *Holgate-Mohammed v Duke*.<sup>17</sup> In that matter, the appellant instituted action against the respondent, a chief constable, claiming damages for false imprisonment following her arrest without a warrant by a constable investigating a case of theft of jewellery from a house in which the appellant was a lodger. The constable determined that he had reasonable cause for suspecting that the appellant had stolen the jewellery, but that he had insufficient evidence for the appellant's conviction. The constable therefore decided to arrest the appellant in the belief that she was more likely to confess to the theft if she was arrested and taken to a police station for questioning than if she was questioned in her home.

[26] The House of Lords was called upon to decide whether the Court of Appeal was correct in holding that where a constable had reasonable cause for suspecting that a person had committed an arrestable offence, he could exercise the power of arrest without a warrant in terms of the relevant section of the Criminal Law Act 1967 and use the period of detention to establish whether his suspicions were justified and also to seek further evidence rather than obtaining the evidence before exercising the power of arrest. The House of Lords held that in exercising the power of arrest under the relevant section, a police constable was

---

<sup>16</sup> *Tsose* at 17E-D.

<sup>17</sup> [1984] 1 ALL ER 1054 (HL).

exercising an executive discretion which could only be questioned under the well-established principles applicable to the exercise of such discretion.

[27] In applying the principles relating to the exercise of 'executive discretion,' their lordships reasoned that a belief held in good faith by the constable that there was a greater likelihood that a suspect would respond truthfully to questions about a crime if she was questioned under arrest at the police station than if she was questioned at her own home was not an irrelevant consideration that the constable was precluded from taking into consideration. As there were no grounds for finding that the constable had not exercised his discretion properly, he had therefore not acted unlawfully when arresting the appellant for the purpose of further investigation.

[28] I am of the respectful view that the approach by the South African and English courts on the point is sound and their decisions surveyed above are persuasive. As such, they should be followed by our courts. It is against the backdrop of the above legal principles that I return to the fuller consideration of the evidence led on behalf of the appellant at the trial, as summarised in the introductory part of this judgment, to determine whether there was a legal basis for the police to arrest the respondent.

#### Application of the legal principles

[29] Before I delve into the factual matrix of the case, I wish to make the following general observations on the power of arrest. As a general proposition, it is desirable that the police should first investigate before they arrest, even where

they have to arrest without a warrant someone suspected of having committed a schedule 1 offence. However, an outright prohibition of the arrest for the purposes of conducting further investigation could seriously hamper the work of the police in their important obligation to investigate crime and protect society from criminal elements. This is particularly true in serious and fast-moving crimes such as robbery and similar offences.

[30] The law gives the police the power to arrest without a warrant provided that the prerequisites set out in s 40(1)(b) are satisfied. It does not, however, mean that such power has to be exercised as a matter of course in all situations and everywhere. What it means is that the peace officer has a discretion that has to be exercised properly. Such discretion is not unfettered as it is subject to judicial oversight. There are many instances in which this discretion may be exercised, which include but not limited to the possibility of the suspect fleeing; the situation where the evidence may be dissipated or the need to prevent the further commission of crime. However, a peace officer who overreaches and abuses his or her discretion by arresting a suspect arbitrarily, but under the guise of conducting further investigations runs the risk of a successful action for malicious prosecution or unlawful arrest and detention being instituted against him or her.

[31] Returning to the factual setting, it will be recalled that the uncontested evidence was that a daylight robbery had occurred at a club in Windhoek where an elderly victim was robbed of his valuable property by five armed men. On 5 July 2015, an informant notified the investigating officer that the first suspect, one Petrus Iyambo, and the respondent had planned the robbery with the assistance of

a person working at the club who had supplied them with inside information about the owner's movements. The informant also gave the cellular telephone numbers of Mr Iyambo and the respondent's to the investigating officer. The informant pointed out Mr Iyambo's residence to the investigating officer and his colleagues.

[32] On 6 July 2015, the investigating officer, with the assistance of other police officers mounted an operation to apprehend the suspects and to bring them to prosecution. A search at Mr Iyambo's residence produced some of the property stolen from the victim. An informant took the police to the residence of Mr Iyambo's girlfriend where Mr Iyambo was found. He was arrested forthwith. The respondent's cell phone number was saved in Mr Iyambo's contacts as 'Tommy'. It was not disputed that Tommy is the respondent's other name. The investigating officer used Mr Iyambo's cellular phone to lure the respondent to the place where the respondent was arrested.

[33] The place where the respondent was arrested – a sewer – was the location where the respondent and Mr Iyambo were alleged to have met regularly to plan villainous activities. The text message sent by the police to the respondent's number simply invited the respondent to 'meet at our usual place'. The respondent's residence, which was also searched by the police, was identified to the police by his girlfriend. As earlier noted, the respondent refused to identify it. The appellant's witness was pertinently asked why the respondent was arrested if nothing relevant was found at his residence. The witness replied:



'The suspect was detained to carry out further investigations to see if sufficient evidence could be found to link the suspect to the offence we were investigating. Once we failed to get sufficient evidence, we released the suspect.'

[34] The witness also emphasised the importance of the seizure of the respondent's cell phone, telling the court that the next thing he did after he had handcuffed the respondent and explained to him the reasons for the arrest was to get hold of his cell phone, in order – in his own words – 'to make sure that the cell phone was in my hands'. The witness explained further that the police wanted to establish if there had been any communication between the respondent and Mr Iyambo prior to, during or after the robbery. It is thus clear from the evidence that the purpose of the respondent's detention after the search of his residence proved nothing relevant to the police enquiry and after the lack of his identification in the CCTV footage was to facilitate further investigation, particularly to establish if there was communication between the respondent and Mr Iyambo.

[35] The total picture that emerges from the facts, including pieces of unverified information, is that there was reasonable suspicion that the respondent was involved in the robbery. He had some association with Mr Iyambo who was identified from the CCTV footage of the robbery and in whose house some of the stolen property was found. The accuracy of the information that Mr Iyambo and the respondent used to meet at a sewer was tested and confirmed through the trap set against the respondent. The respondent's conduct after he took the police on a wild goose chase when asked to take them to his residence evidently is another instance of conduct that raised a reasonable suspicion. The police had reasonable grounds to want to investigate the respondent's cell phone records. These

revealed that the respondent and Mr Iyambo did exchange calls and messages, but as the police could not establish a *prima facie* case against the respondent, they were under a duty to release him. This they did, thereby acting properly under the circumstances.

### Conclusion

[36] On the facts of this case, it cannot be said that the arresting officer exercised his discretion improperly by arresting the respondent for the purpose of conducting further investigation. He had reasonable grounds for doing so. There can therefore be no question of his acting unlawfully. The court below erred in equating reasonable suspicion with *prima facie* proof. As noted above, *prima facie* consists of admissible evidence while suspicion may take into account matters that could not be put in evidence at all, such as hearsay information. It follows that the appeal must succeed.

### Costs

[37] As the respondent was legally aided both in this court and in the High Court, in line with the provisions of s 18 of the Legal Aid Act 29 of 1990, no order as to costs will be made.

### Order

[38] In the result, the following order is made:

- (a) The appeal is upheld.

(b) The order of the High Court is set aside and there is substituted for the following order:

‘The plaintiff’s claim for unlawful arrest and detention is dismissed.’

(c) No order as to costs is made.

---

**SHIVUTE CJ**

---

**SMUTS JA**

---

**HOFF JA**

APPEARANCES

APPELLANT:

Mr TC Phatela

Instructed by Government Attorneys

RESPONDENT:

Ms C Williams

Instructed by the Director of Legal Aid