IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, MAKHANDA

Case no: CA208/2022

In the matter between:

GERSWIN GAWIE Appellant

and

MINISTER OF POLICE Respondent

JUDGMENT

Zilwa AJ

[1] This is an appeal against the judgment of the regional court in Gqeberha dismissing the Appellant's action brought against the Respondent claiming damages arising from an alleged unlawful arrest and detention.

[2] The trial court dismissed the claim. It upheld the defence that the arrest was lawful in terms of section 40(1)(a) or, alternatively, section 40(1)(b) or, further

alternatively, section 40(1)(h) of the Criminal Procedure Act[1] ('*CPA*'), which permits an arrest without a warrant. The court held, on the facts that the Appellant had been lawfully arrested on a reasonable suspicion of being in illegal possession of ammunition in contravention of section 90 of the Firearms Control Act[2].

[3] At the commencement of the proceedings the Appellant brought an application for condonation for non-compliance with the provisions of Rules 50(4)(a) and (7)(a) of the Uniform rules and for re-instatement of the appeal. Since there was no opposition to the application, it was granted.

[4] The Appellant's case was that on 30 September 2010 he had been with his friends at one Gershwin Goliath's house where they had a meal. The house had a servant's quarters which he and his two friends, together with their girlfriends, occupied for the remainder of the night. During the early hours of the morning they had heard a knock on the door. Initially, no one responded to his enquiry as to who was at the door. Later, he heard male voices and the door was kicked open with the police identifying themselves as such. The police, he said, had removed the females from the room and ordered the males to stand next to the wall. On searching the room the police had discovered a box of live ammunition. The police slapped them with open hands and then lifted and carried them for approximately 30 to 40 metres before throwing them into the police van. They were transported to Bethalsdorp Police Station and placed in different rooms. They were asked about the ammunition to which they responded that they did not know anything about it. Then they had been taken to the cells and detained.

[5] There were a number of factual disputes at the trial, but the facts which may be accepted as undisputed are the following: the Appellant and his friends were in occupation of the servant's quarters in which live ammunition was discovered; the Appellant was among the people arrested by the police late on the evening of 30 September 2010; and that he was detained at Bethalsdorp Police Station and released on 4 October 2010.

---

[1] 51 of 1977

[2] 60 of 2000

[6] It is common cause that the police officers were acting in the course and scope of their employment and the sole issue to be determined on the merits is whether the arrest and detention was lawful. It is well established that the onus rests on the Minister to establish the lawfulness of an arrest. This is so because an arrest constitutes such a serious interference with the liberty of the individual concerned that it is fair and just to require that the person who carried out the arrest, or caused the arrest, should bear the onus of proving that his action is justified in law.[3]

[7] In *casu*, the Minister relies on sub-sections 40(1)(a) or 40(1)(b) or 40(1)(h) of the CPA in justifying the arrest. The sub-section that is directly applicable to the facts of this case is 40(1)(h) and I shall confine the judgment to this subsection. It provides (in relevant part) as follows:

> "(1) A peace officer[4] may without warrant arrest any person –
> (h) who is reasonably suspected of committing or having committed an offence under any law governing … . the possession or disposal of arms or ammunition."

[8] To succeed in this section 40(1)(h) defence, therefore, the jurisdictional facts to be established by the Minister are that, at the time the arrest was effected: (i) the arrestor was a peace officer; (ii) the arrestor entertained a suspicion; (iii) the suspicion was that the suspect was committing or had committed an offence under a law governing the possession or disposal of arms and ammunition; and (iv) the suspicion rested on reasonable grounds.[5]

[9] In *Sekhoto* the SCA provided guidance on how the evidence in an unlawful arrest case should be assessed in order to determine whether the arrest was unlawful. The following is a two-stage process:

---

[3] *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at 589 E-F; confirmed in *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 367 (SCA) at para [7]

[4] All policemen are peace officers by virtue of their appointment.

[5] *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818 G-H

9.1 First, the Minister is obliged to establish the jurisdictional facts which must be present before a police officer may effect an arrest without a warrant in terms of s 40(1) of the CPA.

9.2 Once those four jurisdictional facts are present, a peace officer may, without a warrant, arrest a person. In other words, once these jurisdictional facts are established, the police officer has the statutory power to exercise his discretion on whether the person should be arrested and detained or not.

9.3 The second factual enquiry, which arises only when it is alleged[6] by the arrestee, is whether the discretion was lawfully exercised, taking into account all relevant facts applicable to the exercise of the discretion, in the context of the particular case. In this instance the Appellant has not placed any reliance on the improper exercise of the discretion in his pleadings and Mr van Rooyen, on behalf of the Appellant, acknowledged, correctly, that the issues do not arise.

[10] The Minister's case, supported by the evidence of the arresting officer, Warrant Officer Joubert, was that the Appellant had been arrested after the ammunition was discovered in the room that he was in charge of. The police had attended a scene of armed robbery where people had been shot. WO Joubert's evidence was that they had received information about the suspects' whereabouts and they had been directed to the servant's quarters where the Appellant and his co-occupants were found. Initially they had knocked on the door and identified themselves as police, but, although they could hear people inside, no one opened the door. WO Joubert then called for a backup and, when further policemen arrived, the door had been forced open. On searching the room they had discovered a box with ammunition. They enquired from the occupants about the ammunition found, but no one provided any response, even when they were informed that they were being arrested for illegal possession thereof.

---

[6] *Minister of Law and Order and Another v Dempsey* 1998 (3) SA 19 (A) at 37B-39F; *Sekhoto* para [48] - [49].

[11] The first three required jurisdictional fact for s 40(1)(h) were not in dispute. The only issue in dispute in this case was whether WO Joubert's suspicion that the Appellant was in possession of the ammunition was founded on reasonable grounds. Self-evidently WO Joubert and his colleagues could not have known for sure at the time to whom the ammunition belonged and he arrested all the occupants. In my view, a reasonable suspicion as contemplated in *Duncan* was established. If the evidence of WO Joubert is accepted, this evidence satisfies the test for the reasonable suspicion justifying an arrest without a warrant and the Minister will have established compliance with the requirements in s 40(1)(h).

[12] The first question that one needs to ask is why the police went directly to the servant's quarters, and not to the main house, if they were not directed by the informers? Secondly, why did the Appellant ignore the police when they were knocking at the door until the door was kicked open, if there was nothing to hide? Thirdly, why did they keep quiet and not explain and, if needs be, distance themselves from the ammunition found from the room they had been in occupation of?

[13] On the other hand the Appellant's evidence was full of improbabilities, for instance, why would the police lift and carry them for approximately 30 to 40 metres over the fence before throwing them into the police van?

[14] In my view the magistrate was correct in preferring the evidence of WO Joubert and rejecting the evidence of the Appellant because the former's evidence was clear, concise and to the point. He did not contradict himself in any material way. His evidence was more probable than the Appellant's version. As WO Joubert testified, the reason that he suspected the Appellant and his co-occupants was because he had been directed to the room where they were found and on his arrival this was all verified by the discovery of the illegal ammunition. He thus harboured a reasonable suspicion that the occupants had committed the offence.

[15] The Appellant's version failed to account for the ammunition found. According to him he could not be held liable for the ammunition found in the room because, to the knowledge of WO Joubert, the room did not belong to him and he was only there for a night. This does not advance the debate. The evidence must be viewed holistically and then one is required to make a value judgment as to whether a reasonable man would have harboured a suspicion that the Appellant had committed the offence contended for. When doing so, I do not think that the conclusion reached by the magistrate was wrong.

[16] In the circumstances, I find that the Respondent established each of the jurisdictional facts to bring himself within s 40(1)(h) and to show that *prima facie*, the arrest was authorised by the CPA and therefore lawful. The appeal must therefore fail.

Costs

[17] The trite legal principle is that the costs should follow the outcome and I do not find any reason to depart from that. The Respondent's success in this matter should entitle him to his costs.

Order

[18] Accordingly the appeal is dismissed with costs.

_____

H ZILWA
JUDGE OF THE HIGH COURT (ACTING)

EKSTEEN J:

I agree.

_____

JW EKSTEEN
JUDGE OF THE HIGH COURT

Appearances:

For Appellant:	Adv C Van Rooyen
Instructed by:	Swarts Attorneys, Gqeberha c/o NN Dullabh & Co., Makhanda
For Respondent:	Adv Hesselman
Instructed by:	State Attorneys, Gqeberha
Date Heard:	17 November 2023
Date Delivered:	21 January 2024