IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL CASE NO: A3115/2016

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

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DATE

In the matter between:

BENFOL KEHLA MALINGA Appellant

and

MINISTER OF POLICE Respondent

JUDGMENT

MKHABELA AJ (MEYER J CONCURRING)

[1] This is an appeal against the judgment of the Johannesburg Magistrates' Court holding that the Minister of Safety and Security was not liable for damages suffered by

the appellant because of his arrest and subsequent detention for two days by members of the South Africa Police Service ("SAPS") since the appellant s'arrest was lawful.

[2] The incident giving rise to the appellant's cause of action occurred on or about 13 and 14 August 2014, when the appellant was arrested and subsequently detained for two days for having committed perjury by making a false statement under oath to the Booysens Police to the effect that he was hijacked by unknown people. The appellant was charged with the offence of having contravened s 9 of the Justice of Peace and Commissioners of Oaths Act 16 of 1993, which provides that 'any person, who in an affidavit or solemn attested declaration made before a person competent to administer an oath or affirmation or take the declaration in question, has made a false statement knowing it to be false, shall be guilty of an offence and liable upon conviction to the penalties prescribed by law for the offence of perjury'. In the alternative, the appellant was charged with the crime of attempting to defeat the administration of justice.

[3] The events preceding his arrest and subsequent detention are largely common cause between the parties. The appellant had been employed as a driver by one Mr Franswell.

[4] It is common cause that on or about 13 August 2014, Constable Baloyi (Baloyi) and his colleague, Constable Maphosa, (Maphosa) went to the appellant's place of employment. On their arrival they introduced themselves as police officers from Johannesburg Central Police Station. They had with them a police docket in which the appellant had opened a car hijacking case the previous night at the Booysens Police Station. Mr Franswell, the appellant's employer, upon being asked by Baloyi about the whereabouts of the appellant, confirmed that the appellant was indeed employed by him and was on duty.

[5] Baloyi and Maphosa requested that the appellant should take them to the scene of the crime. The appellant obliged and accompanied them to the alleged crime scene.

[6] On arrival at the purported[1] crime scene, the appellant decided to tell the truth and revealed that in fact he had never been hijacked at all. He went on to explain that he had lost his keys when he had gone inside a horse betting place and he realised that he could lose his employment for being at an unauthorised location, he then concocted the alleged hijacking incident.

[7] Upon the appellant's revelation or admission that he was never hijacked, Baloyi and Maphosa took the appellant back to his place of work.

[8] On arrival at the appellant's place of work, his employer, Mr Franswell was informed about the false hijacking incident and the appellant was then arrested by Baloyi and taken into custody after having been informed that he was being arrested for committing perjury.

[9] During cross-examination, Baloyi was asked whether he agreed that perjury was not a serious offence to which he responded that he did not know. He testified that according to him "if a person did something[2] wrong it was his duty to arrest that person".

[10] The following exchange between Baloyi, and the appellant s' attorney , Mr Talane,is instructive and worth reproducing in its entirety:

"Mr Talane: *Do you know under which schedule of the Criminal Procedure Act this office resorts?*

Const Baloyi: *As a police officer if a person has done something which is actually against the law it is my duty to arrest that person and detain him.*

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1 I say purported hijacking because it did not take place since the appellant subsequently admitted that it was a lie.

2 See 008-140 to 008-141, top of page of the record.

Court: *Yes, Sir, just answer the question, the question is do you know what schedule this offence falls under.*

Const Baloyi: *I do not know."*

[11] The respondent called two other officers to testify in addition to Baloyi, namely Maphosa and Constable Mokgotla respectively. It is not necessary to refer and analyse their evidence given at the trial.

[12] The appellant was the only witness that testified in his case. His testimony focussed on asserting that the statement that he signed when he opened the false hijacking case was not made under oath.

[13] The cross-examination of the appellant was uneventful and the respondent's attorney did not appear[3] to be aware of what the triable issue was notwithstanding the Magistrates' attempts to steer her in the right direction.

[14] In closing argument, the attorney for the appellant conceded that Baloyi as the arresting officer was entitled to assume that the appellant made a statement under oath when the appellant opened the case of hijacking at the Booysens Police Station.

[15] However, the submission on behalf of the appellant was that *"our law calls[4] upon the exercise of a discretion when an offence has been committed whether to arrest or not to arrest at that time"*. In *Minister of Safety and Security v Sekhoto and another* 2011 (1) SACR 315 (SCA), however, it was held that there is no jurisdictional requirement that obliges a police officer to consider whether there are less invasive options available to bring a suspect before court,

[16] The respondent's submission was that the appellant committed the offence of perjury when the appellant admitted that he was never hijacked at the purported crime

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3 See the cross-examination of the appellant in the record.

4 See the address to the Court by Mr Takalane for the appellant.

scene and that the arresting officer was entitled to effect the arrest since the offence of perjury was being committed in his presence as contemplated in Section 41A of the Criminal Procedure Act, 51 of 1977 ("CPA").

[17] In the light of the background facts the issue that falls crisply for determination is whether the arrest was lawful. If the answer is in the affirmative, it will be the end of the enquiry. However, if the answer is in the negative, the second issue that would have to be determined is the issue of the quantum of damages for the two nights that the appellant spent in police custody.

[18] The Learned Magistrate found correctly, in my view that the appellant committed perjury when he opened the alleged hijacking case as contained in exhibit A – and that the onus was on the defendant to justify the arrest. In any event, the appellant s' attorney conceded in close argument that Baloyi was entitled to assume that the appellant had made the statement under oath when he opened the case of hijacking at the Booysens police station.

[19] I agree with the learned Magistrate's finding that it is highly unlikely that the police officer who took the statement which is exhibit A would not have explained to the appellant the consequences of taking the prescribed oath.

[20] In analysing the applicable law, the Learned Magistrate noted that the respondent contended that the arrest was lawful in terms of Section 40(1)(b) and that an arrest without a warrant is only permissible where the following requirements are met:

20.1 First, where the arrestor is a peace officer;

20.2 Second, the arrestor must entertain a suspicion.

20.3 Third, the suspicion must be that the suspect or arrestee committed an offence referred to in Schedule 1 of the CPA.

20.4 Fourth, the suspicion must rest on reasonable grounds.

[21] The Magistrate held correctly in my view on the probabilities that the appellant made a false statement under oath to the effect that he was hijacked and that Baloyi was in possession of this statement when he arrested the appellant.

[22] It is trite law that both statutory and common law perjury are serious crimes and experience shows the disturbing frequency with which the state witnesses materially depart from their police statements, thus potentially frustrating the proper administration of justice.[5]

[23] Schedule 1 of the CPA *inter alia* provides as follows:

"Any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, the punsishment wherefor may be a period of imprisonment exceeding six months without the option of a fine.''

S v Andhee 1996 (1) SACR 419 (A), is but one example where Smalberger confirmed a sentence of 9 months'imprisonment for perjury. I nevertheless disagree with the Learned Magistrate's finding that the arrest of the appealing was lawful.[6] All four jurisdictional facts must be present to justify an arrest without a warrant. Once it is accepted that the third jurisdictional fact is missing, it is the end of the matter. The credibility of the appellant in neither here nor there.

[24] In this regard Baloyi, who is the arresting police official, did not even know under which schedule perjury falls into. It follows therefore that Baloyi could not have

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5 *S v Morrow* 382/93 [1996] ZASCA 4 (28 February 1996) at para 14; S v Kumbani 1979 (3) 339 (E) at 341 B-C.

6 See page 007-4, para 10 of the CaseLine pagination.

exercised a discretion to the effect that the offence of which the appellant was arrested for fell under Schedule I of the CPA. He did not entertain a suspicion that the appellant committed an offence which is referred to in Schedule 1 of the CPA.

[25] The Magistrate's finding to the effect that the arrest was lawful cannot be sustained and falls to be set aside – since it amounts to a glaring misdirection on the facts and the law. It is, as I have mentioned, trite law that there is no fifth jurisdictional fact given the decision of the SCA in the case of *Minister Safety and Security v Sekhoto*.[7]

[26] It is well-established that where a misdirection is so significant such as in this case, an Appeal Court is entitled "not to accord to the Magistrate's finding of fact the same weight which would ordinarily be given to the finding of fact of the Trial Court".[8] Furthermore, it is trite law that where the trier of fact has misdirected himself or herself in respects so material that they vitiate the presumption that the findings of fact are correct an Appeal Court is obliged to re-evaluate the evidence afresh as best as it can given the limitations inherent[9] in it not having seen and heard the witness testifying.

[27] In this case it is not in dispute that Baloyi did not even know under which Schedule perjury falls. On the contrary he did not entertain a suspicion not one that the appellant committed an offence referred to in Schedule 1 of the CPA. Accordingly, there could be no dispute that the third jurisdictional fact is absent. Hence the appeal must succeed on this basis alone.

[28] This brings me to the question of quantum. It appears that upon a reflection of the case law, an amount of R120 000.00 would be reasonable since the appellant spent

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7 2011 (1) SACR 315 (SCA)
8 See the case of *S v Morrow* (382/95) 1996 (1) Z SCA 4 (28 February 1996).
9 See *S v Morrow* at para 14.

two nights under very intolerable conditions such as sleeping in the same room which has the toilet that can not be flushed after one has relieved oneself.

[29] In the result the following order is made:

1. The appeal is upheld with costs.

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

"(a) The defendant is to pay to the plaintiff an amount of R120 000.00.

(b) The defendant is to pay the plaintiff's costs of suit."

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R MKHABELA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

I agree and it is so ordered

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MEYER J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

COUNSEL FOR THE APPELLANT: Adv E Lauren

INSTRUCTED BY: Talane Attorneys

ATTORNEY FOR THE RESPONDENT:	Ms N Cingo
INSTRUCTED BY:	State Attorney, Johannesburg
DATE OF HEARING:	19 April 2021
DATE OF JUDGMENT:	22 July 2021