(276/79)
N.v.H.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between -

THE MINISTER OF POLICE OF THE REPUBLIC OF SOUTH AFRICA	First Appellant
PATRICK LANGFORD OATES	Second Appellant
LESLIE GAVIN BARNES	Third Appellant
and	
WRIDGE QEQE	Respondent

CORAM: WESSELS, JANSEN, DIEMONT, CILLIé, JJA, *et* HOLMES, AJA.

HEARD: 8 MAY 1981

DELIVERED: 19 MAY 1981

J U D G M E N T

HOLMES, AJA -

This is an appeal against a decision of

the/.........

the Eastern Cape Division, sitting in Grahamstown, awarding R900 to the present respondent as damages for wrongful arrest.

THE RESPONDENT'S CASE IN THE COURT A QUO

Upon a summer's morning in King William's Town, between the hours of ten and eleven, the respondent was driving his maroon-coloured El Camino bakkie in a street near the market square. He had come from his farm near King William's Town and was on his way to the bank to collect some change for use in his bottle store in Zwelitsha, near that town. He was stopped by two policemen (the second and third appellants) who asked leave to search his vehicle. They identified them=selves, at his request, whereupon he got out and told his son, who was a passenger, to open up the canvas sail over the rear of the bakkie. The boy did this.

The/..........

The police found nothing there. They then decided to unscrew the panelling along the interior of the walls of the rear of the bakkie; and one of the policemen fetched a screwdriver from the boot of their car for that purpose. The respondent, who normally has a loud voice, remonstrated; he had bought the vehicle new a year ago, and was proud of it, and had been told by the dealer that the panelling had been fitted with a special sealant to inhibit rusting. He therefore told the police that they would have to take the bakkie to a garage for a proper mechanic to unscrew the panels, and to replace them with their sealant. The police rejected his plea. The respondent was anxious to get to the bank, as it was already past the opening time of his bottle store; and he told the police that they were delaying him, and that he would leave them to it and would return later. One of them told him that he would shoot him if he left. The respondent nevertheless moved away a couple of paces. One of the policemen reacted by putting a handcuff on his left wrist, leading him to their

car, pushing him inside it, attaching the other end of the handcuff to the safety belt, and shutting the door. After this, one of the policemen drove the respondent's bakkie to the C.I.D. office, while the other drove the police car thither, with the respondent locked in it, sulking like Achilles in his tent. At the C.I.D. office the respondent was unhanded and released; and the panels of the inner walls of the bakkie were unscrewed for the purposes of the search. This took, in all, about an hour. At this stage the police informed him that they were searching for dagga. They found nothing, and allowed him to proceed on his way. This alleged wrongful arrest, with its attendant infringement of his liberty and dignity, wounded his amour-propre, he being a married man in his late forties, with six children, a prosperous business, and a farm; and he being a church member and a well known figure who had been involved in Ciskeian politics, and who had at one time held a post equivalent to that of deputy

mayor/..........

mayor of the community council of Zwelitsha; and he having travelled overseas extensively. In particular, he was humiliated by the handcuffing incident which had been witnessed by a curious crowd of some fifty onlookers in a public street. So he sued the two policemen and the Minister of Police for R6 000 for wrongful arrest and assault.

The foregoing is a resumé of the evidence of the respondent, and of a witness who was a passenger in the cab of the bakkie, and of three witnesses who were bystanders. His young son, who was also a passenger, was not called as a witness: he was busy writing important Form III examinations in Durban. There was thus scant occasion on his part for any Dick King excursion to Grahamstown to add his testimony in the proceedings there.

THE APPELLANTS' DEFENCE

It consisted of the plea, the cross-examination of the respondent's witnesses, and the evidence of the two police constables and of Lieut. Cressy from the C.I.D.

The gist of the plea (in reply to the averment in the summons that the respondent was wrongfully arrested by being handcuffed) was that -

(i) the two constables suspected upon reasonable grounds that there was dagga in the respondent's bakkie; and they were entitled in law to search it;

(ii) the respondent unlawfully resisted, hindered, obstructed, or interfered with them in the performance of their duty to search the vehicle;

(iii) the respondent gave them reasonable grounds for believing that he might run away during the said search; and

(iv) it was necessary to handcuff him to enable them to search the vehicle.

As/...........

As to the averred reasonable grounds for suspecting that there was dagga in the respondent's maroon bakkie, the evidence was that of constable Barnes, the third appellant. He was a detective constable and a member of the South African Railway Police, seconded to the Department of Narcotics of the South African Police. Giving evidence at the trial in May 1979 he said that he was 24 years of age. That would make him about 22½ years of age on 11 January 1978 when the incident in question occurred. He said that he had been with the Police for six years and had had 4½ years' experience at the time in question. He said further that he had been working in the narcotics department for two years. This would mean that, on the occasion in question, he had had about six months' experience in that department.

His evidence was that in East London on the morning in question (namely, 11 January 1978) and between the hours

of 8.30 to 9.30 am, he received an anonymous telephone call informimg him that an orange El Camino bakkie, with a black stripe on it, and with a canvas sail over the back, was travelling from Cathcart to King William's Town conveying dagga. The witness also said that the message was that "this vehicle will be coming through". The informer spoke in broken English and sounded like a Black person, and he said that he did not wish to become involved. Hence the conversation was very short. Nothing was said as to the vehicle's registration number; or whether it had already left; or when it would be coming through. The road from Cathcart to King William's Town is a main national tarred road. Constable Barnes reported this conversation to the second appellant (Constable Oates); and they set out for King William's Town by motor car. There they came across the respondent driving a maroon El Camino bakkie with a sail over the back. (There was evidence that this was a very popular make of vehicle.)

The/............

The vehicle was dusty. They stopped him. The witness said that he spoke to the respondent in English. He informed him that he was from the police, and that he had received information about a vehicle, corresponding in description with that of the respondent's bakkie, which was said to be conveying dagga. The respondent replied that he was no dagga runner, and asked to see a certificate of police appointment. This was exhibited to him by the second appellant. They informed the respondent that they would like to search his vehicle. He refused. They persisted in their request, asking him to climb out of the vehicle. The respondent told his young son to get out and open the canvas at the back. The boy got out. So did the respondent. He was aggressive, angry and shouting. He walked a few paces away - about 15 paces - and called out to the crowd of some 50 people who had gathered. This gave the witness the impression that he was a dagga smuggler: he said

that/.........

that the <u>modus operandi</u> of such a person is to try to move away from his vehicle and to disappear into the crowd. The witness thought that that was what the respondent was attempting to do. They followed him and tried to reason with him and to explain that they merely wanted to search his vehicle on information received, and that they wanted to take him to the police station to search his vehicle there. The respondent was still very annoyed, gesticulating with his hands in the air and saying that he would not go. The witness told him that if he did not control himself they would perhaps have to handcuff him and then take him away to the police station so that they could search his vehicle. His reaction was to hold out his hands, saying "Handcuff me, handcuff me." The witness went to his car and returned with his handcuffs, and put one on the respondent's left wrist. The respondent then willingly accompanied him to the police car where the other handcuff was clipped on

to the safety belt. On arrival at the C.I.D. office the witness released the handcuffs and the respondent got out. He was fuming with indignation and complained to Lieut Cressey there. Up to this stage, according to the witness, the respondent's bakkie had not been searched at all: not even the canvas sail had been lifted up. The vehicle was now searched and the panels were unscrewed. The search lasted about an hour. No dagga was found. The appellant was allowed to go. The witness was asked what he thought the respondent might have done had he not been handcuffed. He replied, "He might have run away or he might have assaulted us." He added that they were not able to perform their duties properly until after they had handcuffed him.

The foregoing summary of evidence by Constable Barnes was supported in general by that of Constable Oates who is the second appellant; and Lieut. Cressey testified to the events at the C.I.D. office.

It will be seen that the evidence of the respondent does not tally in some respects with that of the two constables. I shall discuss the divergences later.

THE FINDINGS OF THE TRIAL COURT

The trial lasted three days and the evidence runs to 276 pages. In a considered and painstaking judgment the trial Court came to the following basic conclusions -

(a) The second and third appellants were entitled to stop and search the respondent's vehicle for dagga. (This conclusion was reached "with some misgiving".)

(b) They were not entitled to unscrew the panels at the rear of the vehicle -

(i) themselves

(ii) in the street

(iii) in the face of the respondent's protestation.

(c) Accordingly, they were not entitled to arrest him to give effect to their unlawful purpose in removing the panels.

These findings will be discussed later.

The trial Court's judgment also records that it was admitted that the two constables were acting in concert in all that they did; and that it was common cause that, if their actions were unlawful, they and the first appellant were liable.

THE PROCEEDINGS IN THIS COURT

Counsel for the appellants indicated at the outset, rightly in my view, that he could not point to any specific misdirection in the judgment of the trial Court. Counsel did, however, rather murmur against what he described as the "uncharacteristic" hypercritical attitude of the learned Judge towards the police evidence. As to that, a careful perusal of the record of the proceedings, including the considered judgment of forty pages, leaves me with the impression of a judicial officer who was painstakingly

careful/.............

careful to be fair to both sides.

It was common cause that the relevant statutory provision was Section 11 (1) of the Abuse of Dependence - producing Substances and Rehabilitation Centres Act, No. 41 of 1971. Under the marginal heading of "Powers of the Police", the section reads, in so far as here relevant -

> "11 (1) If any police officer suspects upon reasonable grounds any dependence-producing drug or plant from which such drug may be manufactured, to be on or in a place, vessel, vehicle or aircraft, and that a contravention of this Act is being or has been committed by means or in respect of such drug or plant, such police officer may at any time without a warrant enter and search such place, vessel, vehicle or aircraft and seize such drug or plant, or may search and interrogate any person whom he may find on or in such place, vessel, vehicle or aircraft with a view to obtaining from such person information concerning

the/........

the presence of any dependence-producing drug or such plant or the cultivation of such plant on or in that place or elsewhere.

(2) ....

(3) ....

(4) Any person who obstructs or interferes with any police officer in the exercise of any powers or the performance of any duty under this Act, shall be guilty of an offence and liable on conviction to a fine not exceeding five hundred rand or to imprison=ment for a period not exceeding twelve months or to both such fine and such imprisonment."

As the Afrikaans text of the Act was signed by the State President, I mention that the words "to be" in the opening lines of the English text, appear as "kan word" in the Afrikaans text.

I agree, with respect, with the following observation by GALGUT, AJ, (later JA) in R v Van Heerden, 1958 (3) SA 150

(TPD)/............

(TPD) at page 152 D (cited by counsel for the respondent) in relation to comparable wording in the Criminal Procedure Act of those days -

> "'Suspect' and 'suspicion' are words which are vague and difficult to define. Dictionary meanings and decided cases were quoted to the Court as to the meaning of these words. Save for saying that these suggest that suspicion is apprehension without clear proof I do not intend to deal with the meaning of 'suspect', because it seems to me that the words 'reasonable grounds' qualify the suspicion required by the section. These words must be interpreted objectively, and the grounds of suspicion must be those which would induce a reasonable man to have the suspicion."

On this aspect of the case counsel for the appellants accepted finding (a) of the trial Court; see the paragraph heading "Findings of the trial Court", <u>supra</u>. The thrust of the appeal was directed at the other two basic findings, namely, (b) and (c), <u>supra</u>.

Counsel for the respondent contested finding (a) but only as a second string to his bow. His main contention was that the two policemen acted unreasonably. I shall therefore assume, without deciding, in favour of the appellants, that the two constables suspected on reasonable grounds that there was dagga in the bakkie; and that they were entitled to search it.

Hence the nub of the appeal is: why was the respondent handcuffed? There was argument before us as to the extent to which the courts should scrutinise the conduct of the police in the performance of their powers and duties. Holding a balance in this anxious area between constituted authority and the freedom of the individual, I agree with the approach of Mr Justice Jan Steyn in Solomon v Visser and Another, 1972 (2) SA 327 (C) at page 345 D (cited by counsel for the appellants) -

"It/.............

"It is true that the Police have many onerous duties and that the Court must not make it difficult for them to perform their functions. If the Court were to do so the public could be deprived of the full measure of the protection to which it is entitled. On the other hand the Police have considerable powers, and should they exceed or abuse those powers and they injure the individual, the Court must, in my view, not hesitate to compensate the citizen in full measure for any humiliation, indignity and harm which results."

Having regard to the divergences between the respective versions (see under the headings, "The respondent's case in the Court a quo", and "The appellants' defence", supra), I now set out the findings of the trial Court. The learned Judge -

(a) believed Lieut. Cressey's evidence as to the scene which the respondent made at the C.I.D. office; and took that into account against the respondent in assessing credibility;

(b) did/..........

(b) did not believe that the police threatened to shoot the respondent;

(c) found that there were unsatisfactory features in the evidence of the two constables, e.g., (i) the entries in their note-books were not an accurate reflection of their evidence as to what happened and why they handcuffed the respondent; (ii) the extremely polite and formal terms in which they said they spoke to the respondent were somewhat improbable; and(iii) their plea did not ~~fully~~ reflect fully the circumstances in which they acted, according to their evidence;

(d) made this finding: "I am therefore by no means satisfied that I can accept their (i.e., the constables') evidence completely at face value, and I am of the view that it shows a definite trend on their part to put their conduct in the best possible light";

(e) accepted that in the street the respondent's son did remove, or start to remove, the canvas sail over the rear of the bakkie;

(f) could not accept the constables' evidence that they would not allow this to be done unless the respondent himself were present at the back of the vehicle;

(g) found that the crux of the factual position was that it was common cause that the trouble only started when the unscrewing of the panels was mooted;

(h) held that the constables did produce the screwdriver in the street to carry out their stated intention of unscrewing the panels in the bakkie; and

(i) found that the respondent was extremely annoyed and he stormed about and problaimed to the gathering crowd that this was only done to "Black people"; and that he did start to leave the scene.

The foregoing findings were made by the learned Judge who was steeped in the evidence and the atmosphere of this three-day trial. No misdirections were contended for. This Court cannot therefore interfere with them.

With/.............

With that prelude, I come to the vital question in the case, namely, "Why was the respondent handcuffed?" The plea (in reply to the claim in the summons that the respondent was unlawfully arrested by being handcuffed), in apparent reliance upon section 11 (4) of Act 41 of 1971, set out above, avers that the respondent unlawfully "resisted, hindered, obstructed or interfered with" the police in the performance of their duty to search the vehicle; that he gave them reasonable grounds for believing that he might run away during the search; and that it was necessary to handcuff him to enable them to search the vehicle.

On the other hand, the relevant entries in the policemen's note-books, written up within a day or so of the incident, were as follows -

> - "Driver's conduct very rude. No co-operation. Thus handcuffed."

I/...............

I emphasize the causal significance of the word "thus"; and the absence of any reference to "obstructing" the police in their performance of their duty, or of running away. True, one must make allowance for the fact that the note-book entries are as laconic as a telegram and do not expatiate on the incident. As against that, however, the policemen knew that the respondent had taken their names at the C.I.D. office; and their identical entries suggest some collaboration. Hence one might expect that they had given the matter some attention. So it is surprising to find such a divergence between the virtually contemporaneous entries in their note-books, and the averments in their subsequent plea.

Among the reasons given by the constables for the handcuffing of the respondent were that he put his two hands out and invited handcuffing; that he might provoke a riot; that he might run away; that he might attack them; that he was refusing to let them open the panels; and to calm him down. Some of these seem rather lame,

bearing in mind that they were two young men in their early twenties, whereas he was a mature married man in his late forties with six children and business responsibilities. However, I do not think that it is necessary to deal further with this aspect, for the trial Judge summed it up by his finding, "They vacillated considerably in their reasons for the handcuffing". In particular, the trial Court held: "I find it difficult to accept that with two of them present, they could reasonably have believed that the respondent could successfully run away". Nor could they rely on his so-called invitation to them to handcuff him, which arose out of their threat to do so if he did not calm down.

Furthermore the third appellant, replying to questions by the trial Judge, said this -

"But /........

"But you know you have certain powers to arrest. --- That is correct.

If a man is committing a crime in your presence for example. --- That's right.

Or if you reasonably suspect that he is going to commit a crime, or one of those things. *Now was it for any one of those reasons that you arrested him? --- No, no. The only reason I would think of ..... was to prevent him from running away.*

Because you thought he might run away? --- That's correct.

Did you tell him that he mustn't go away? --- Well, his attitude ... no, we didn't directly ... to tell him this."

(My italics.)

The words which I have just italicised seem to me somewhat at variance with the averments in the plea to the effect that it was necessary to handcuff the respondent because he unlawfully resisted, hindered, obstructed or

interfered/.........

interfered with the police in their search of the bakkie. That averment apparently relies on the offence created by section 11 (4) of Act 41 of 1971, as set out earlier herein, which offence could permit of arrest without warrant in terms of section 40(1)(a) of the Criminal Procedure Act, No 51 of 1977.

However that may be, I proceed to examine the evidence on the question of the respondent's alleged "obstruction" etc.

Constable Oates (the second appellant), giving evidence nearly eighteen months after the incident in question, gave his age as 24 years, with five years in the police force, and a year or two in the narcotics division thereof in East London. He testified, among other things, that the respondent did not physically obstruct them in their search of the vehicle in the

street. The witness got the impression that the respondent was insisting that the bakkie be taken to a garage for the removal of the panels.

Detective Constable Barnes (the third appellant), in the course of his evidence under cross-examination, said this -

> "Did you feel that he was obstructing or interfering with you in the course of your duty? ---- Not directly but I would say indirectly.
>
> Indirectly. --- By just going off and leaving, I mean if he had stayed by the vehicle we could have searched the vehicle and it would have been finished but I mean he sort of indirectly interfered with us by just walking off and saying well look, I am not going to stand by and let you search my vehicle and strip my car ..... "

One recalls that the witness had also said that they did not directly tell him that he must not go away; see the earlier quotation, supra. So the position is

this: the second appellant says that the respondent did not physically obstruct them in the street. The third appellant says that the respondent "sort of indirectly interfered with us by just walking off .... " And the witness admits that they did not directly tell him not to go away. In these circumstances the reasons for the handcuffing begin to look a bit thin. Moreover, the Court pointed out that the respondent was co-operative until the unscrewing of the panels was mooted; and that the cause of his vehement objection thereafter was twofold - (i) the intended removal of the panels by the police with a screwdriver in the street on a week-day morning in town - they not being qualified mechanics; and (ii) the waste of time as he wished to return to his business.

In all the circumstances the final finding of the trial Court was that the respondent's attitude, including the starting to walk off to attend to his business, did

not/..........

not amount to an obstruction of the constables; and did not justify his handcuffing and detention.

On a consideration of the record, and the arguments in this Court, I am unpersuaded that this finding was wrong.

It is not necessary to decide further, as the trial Court did, that it was unlawful for the police to insist that they themselves unscrew the panels in the street in spite of the respondent's protestations. It is sufficient to hold, in the circumstances of this case, that the respondent did not act unlawfully in deciding to leave the police to their task of searching the vehicle while he left the scene on foot to go to his bank. That conduct of his, in the circumstances of this case, was not unlawful and did not warrant his handcuffing.

There/...........

There is no appeal against the quantum of damages awarded.

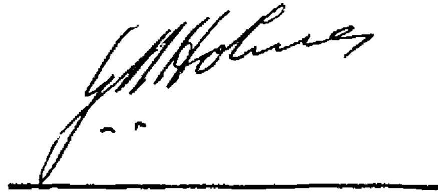
I wish only to add this. One realises that the police have difficult and arduous and sometimes dangerous duties to perform; and that their conduct should not be judged with armchair criticism and microscopic scrutiny. Nevertheless, on the evidence as a whole, and recognising that the respondent turned out to be a difficult customer, I agree with the learned Judge who tried the case, that the two constables, no doubt zealously seeking to perform their duties, acted rather precipitately; and that this sorry affair might have been avoided if they had exercised a little more tact, and had, at the least, directed some enquiries to the respondent when they stopped his vehicle.

Section 11 (1) of Act 41 of 1971 (supra) specifically confers power to interrogate.

To/..........

To sum up the whole case, I see no reason for disturbing the award of damages granted by the late Mr Justice Addleson.

In the result, the appeal is dismissed with costs.



G N HOLMES

ACTING JUDGE OF APPEAL

WESSELS,	JA)	
JANSEN,	JA)	CONCUR
DIEMONT,	JA)	
CILLIé,	JA)	