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ZODWA VILAKAZI PLAINTIFF

V

SWAZILAND GOVERNMENT DEFENDANT

Case #1891/94

JUDGMENT

The Plaintiff claims payment of an amount of E1 5 000 as damages for wrongful arrest. At a pre trial conference held in the Attorney Generals Offices the parties agreed on the issues upon which the court would adjudicate. The pre trial minute records that it is common cause that certain members of the Royal Swaziland Police, on 17th August 1994, arrested and detained the plaintiff, and detained her in custody until she was released on 19th August without having been charged or brought before a court.

The parties stated in the minute of the pre trial conference that the issues to be determined were

- a) Did the defendant have reasonable grounds to arrest and detain the Plaintiff, and more particularly did the Defendant have reasonable grounds to believe that the Plaintiff had committed an offence warranting her arrest?
- b) Did the Plaintiff suffer any damages as a result of her arrest and detention, and if so what was the amount of such damages ?

The parties further correctly agreed that the burden of proof on the first issue lay on the defendant, and that of the second issue lay on the plaintiff. The defendant by common accord was

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allowed to begin.

The Defendant called Sergeant Khanyisile Dlamini who effected the arrest. She is a smart looking Office who gave her evidence in an impressive manner, confidently and with assurance. The truthfulness of her account was not questioned by Mr Lukele who appeared for the plaintiff. The Plaintiff when she came to give evidence, was equally not to be faulted. The evidence is really not contentious at all..

The circumstances giving rise to Plaintiffs claim can be described therefore with confidence in the accuracy thereof.

Sgt Khanyisile Dlamini, received a report from a Mrs Manser who was considered for the purpose of the case to be the Plaintiffs employer. She informed Sgt Dlamini at the police station that E4 000 had gone missing from her handbag that morning, and that she suspected the Plaintiff of having stolen the money. Suspicion fell on the plaintiff, because according to Mrs. Manser she was the only one of the

staff, who had access to the office in which the handbag Containing the Money had Been Lying on the Complainant's Desk. Sgt Dlamini Accompanied the Complainant to the Shop and There the Plaintiff Was Confronted with the Allegations Against Her.

Plaintiff denied the accusations. A search was conducted on Plaintiff and on one who was described as her boyfriend. Clearly Mrs Manser thought that the two were associated in the theft of the money.

No money was found at the Plaintiffs home and nothing was found in her Bank book to suggest that the money had been deposited to plaintiffs account These investigations did nothing therefore to advance the case against plaintiff. On the other hand Sgt. Dlamini had positive evidence of the commission of the offence and the plaintiff was the prime suspect having regard to the statement of her employer that she was the only person who could have had access to the room from which the money was stolen.

The plaintiffs evidence took the matter no further. Her protestations of innocence at the

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time were no more than one would expect from one accused of an offence. The test for the lawfulness of the arrest is whether Sgt Dlamini entertained a reasonable suspicion that Plaintiff was guilty of the offence. It is not required that the arresting officer should have available to him or her evidence sufficient to secure a conviction, before making the arrest of a suspect.

At my invitation Mr Lukele has submitted heads of argument which do credit to his diligent research.

The defendant's representative has not responded to my invitation. On the question of what constitutes reasonable grounds for suspicion Mr. Lukele's submissions have been helpful.

The question of what constitutes reasonable suspicion in this context, has been discussed in a number of South African Cases. See for instance RAMAKULUKUSHA v COMMANDER, VENDA NATIONAL FORCE 1989 (2) SA 813 V in which it was held and I quote a portion of the head note:

"The test for a 'reasonable suspicion' required to justify an arrest without a warrant in terms of s 40(l) (b) of the Criminal Procedure Act 51 of 1977 (which requires that the arrestor 'reasonably suspects' the arrestee 'of having committed an offence referred to in Schedule 1') is that 'there must be an investigation into the essentials relevant to the particular offence before it can be said that there is a reasonable suspicion that it has been committed'. The proposition seems to be self-evident that the defendant (in the present case the plaintiff alleged that he had been wrongfully arrested on a charge of having murdered a young Black child in a ritual murder) has to show on a balance of probabilities that the police officers responsible for the arrest of the plaintiff had, after investigating the essential facts, ie including the cause of death of the deceased and the plaintiffs alleged actions relating thereto, whether as the principal offender or as an accomplice in a conspiracy with others, a reasonable suspicion that the plaintiff had committed the murder of the deceased."

Mr Lukele in his heads referred to

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MABONA AND ANOTHER v MINISTER OF LAW AND ORDER AND OTHERS 1988 (2) SA 654 (SE)

in which it was held, (again I quote the head note)

"The test of whether a suspicion is reasonably entertained within the meaning of s 40(1)(b) of the Criminal Procedure Act 51 of 1977 is objective: would a reasonable man in the particular defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of the offence or offences for which he sought to arrest the plaintiffs. It seems that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically and he will not accept it lightly or 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. This is not to say that the information at his disposal must be of 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."

Each case, the authorities stress, must be decided on its own facts in accordance with the principles enunciated. In the present case the arresting officer received the report from the complainant and undertook investigation. Although the complainant's statement was not on oath, it came from an ostensibly responsible person. There was no reason to doubt that the money had been stolen. The complainant's report linking the Plaintiff with the theft as the most likely if not the only suspect had to be taken seriously. The suspicion which Sgt Dlamini says she had, and there is no reason to doubt that she entertained the suspicion, was not flighty or arbitrary, but based on apparently reliable information. The law does not require of her that

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she should have had sufficient evidence to secure a conviction, before making the arrest. The fact that the Plaintiff was released later without being charged does not make the suspicion entertained by Sgt Dlamini at the time of the arrest unreasonable. Unfortunately it is not only those who are eventually found guilty who may be arrested. The administration of justice requires that even those who are only suspected of having committed certain offences may be arrested without a warrant.

Nor in my view do the denials of the plaintiff and her friend detract from the reasonableness of the suspicion. A suspect, whether in fact guilty or not, will often deny his guilt. The fact that the missing money was not on investigation, traced to the Plaintiff, takes the matter no further. There appears to have been ample time to secrete the money. It is not to be expected that the thief having stolen the money, would have remained with it on his or her person, nor would the thief have hastened to the bank to deposit the stolen money to a current or savings account on the very day of the theft, thereby providing proof of his or her implication in the theft.

Mrs Mancer, provided sufficient evidence to Sgt Dlamini on which she could base a reasonable suspicion that the plaintiff was the thief. If it was Mrs Mancer who maliciously or incautiously created an incorrect impression that it was only the Plaintiff, who other than she had had access to the office and thus the opportunity to take the money it is to her, that the plaintiff should look for payment of her damages.

The defendant has shown in the present instance that the arresting officer, effected a lawful arrest and the action must fail. The arrest although lawful was perhaps unnecessary, as there are other ways of bringing accused persons before the court. There has been no suggestion that the plaintiff was about

to abscond and would not have been available to stand trial once it had been decided to prosecute her. This however does not make the arrest unlawful, but greater sensitivity should be shown even in effecting lawful arrests, so that where ever practicable, the rights of citizens should not be invaded, if attendance in court can be achieved in some other way.

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There is the possibility that this matter may go on appeal and the assessment of damages may become relevant. Had I found for the plaintiff on the merits I would have awarded damages in an amount of E10 000. This amount would be in line with previous decisions in this court, having regard to the fall in the value of money, the plaintiffs status compared to that of successful plaintiffs, the length of her detention and the degree of injury to her.

In the result however the action is dismissed with costs.

S.W. SAPIRE

ACTING CHIEF JUSTICE