

THE HIGH COURT OF SWAZILAND

MAVI MASINA

Plaintiff

And

THE COMMISSIONER OF POLICE

1st Defendant

THE ATTORNEY GENERAL

2nd Defendant

Civil Case No. 2085/2001

Coram

S.B. MAPHALALA – J

For the Plaintiff

MR. L. MAMBA

For the Defendant

MR. E. THWALA

JUDGMENT (06/02/2004) The relief sought

The Plaintiff is suing the Government for damages arising from unlawful assault, arrest and detention in police custody. He alleges that on the 15th February 2001, he was arrested by members of the Royal Swaziland Police stationed in Mbabane on a charge of robbery. The policemen, whose further particulars are unknown to him, were at all times material hereto, acting within the course and scope of their employment with the Swaziland Government.

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Thereafter, the police officers wrongfully and unlawfully assaulted him by repeatedly kicking him all over his body and by covering his face with a rubber tube.

He avers that he was wrongfully and unlawfully arrested and detained in police custody, as the police had no reasonable grounds upon which to believe that he had committed any offence. He asserts that as a result, he suffered damages in the amount of E150, 000-00 in respect of loss of freedom and discomfort, contumelia, assault and pain and suffering.

The Defence

These claims are denied by the Government. In particular, Defendants deny that the police had no reasonable grounds upon which to believe that the Plaintiff had committed an offence when arresting and detaining him. Defendants avers that the Plaintiff was arrested on reasonable suspicion of having robbed one Nonhlanhla Maphalala, an employee at Swaziland Jewellers, Mbabane, of some jewellery following a complaint by the said Nonhlanhla and the police having satisfied themselves that there was sufficient evidence to prefer a charge against him.

Further, the said Nonhlanhla had actually told the police that she knew and had in fact seen that the person who had robbed her was the Plaintiff and her version was confirmed by one Precious Maphalala, her sister.

Furthermore, Defendants avers that the Plaintiff was released from custody after the complainant had changed her mind regarding the identity of the Plaintiff after the plaintiff's father has asked that an identification parade be conducted. Defendants avers that complainant was schooled to change her

mind regarding the identity of the Plaintiff. Their conduct was not in any way wrongful or unlawful. Their conduct if anything amounted to an effort to facilitate peace and combat the commission of crime. Defendants deny that or any person or persons acting on their behalf, acted wrongful or unlawfully and that the Plaintiff suffered any loss and damage as alleged or at all.

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The evidence for and against.

The Plaintiff gave evidence being led by his attorney Mr. Mamba. He then called one witness Nonhlanhla Maphalala.

The Defendants on the other hand led the evidence of eight (8) witnesses to rebutt the plaintiff's claims.

The Plaintiff gave a lengthy account of what transpired from the time he was arrested by the police at home right through his incarceration and final release.

He told the court that he was a Humanities student at the University of Swaziland in his second year. On the 15th February 2001, at about 5.00am to 6.00am six to seven police officers came to his home at Mbangweni, Sidvashini. They told him that he was being arrested for robbery which had occurred at Mbabane Jewelleries where goods worth E57, 000-00 were stolen at gunpoint. He proceeded to the Mbabane Police Station with the officers. He was then interrogated at the CID department by a number of police officers where he was asked to produce the firearm used in the commission of the offence. They also ordered him to produce the jewellery which was allegedly stolen in the heist. He told the officers that he knew nothing about this matter as he was at the University when the offence was alleged to have been committed.

He was then handcuffed with his hands on his back. He was ordered to lie down on his stomach. One officer sat on his feet. The officer who sat on his hands placed a tube around his nose and mouth. He pulled the tube and thus suffocating him in the process. One officer he could not identify kicked him on his right side of his face. The officer kicked him more than three times. He told the court that he did not know the names of most of the officers there but the one who was suffocating him with the tube whose name was "Robert" and the other who sat on his feet was called "Kina". The officer who had the tube would take it on and off at the same time one officer was kicking him. At that time he started to bleed through both the nose and mouth. All this time the officers were asking him to produce the jewellery. He told them that he knew nothing about this matter. However, the officer would proceed assaulting him.

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After some time one officer took off the tube around his face and also the handcuffs from his back. They then handcuffed him in front. One officer who was light in complexion called "Gweje" took out a "fly wheel" which was similar to a fan belt. He used this to beat him on his back. He screamed in pain but the officer would beat him even harder. The other officers would hit him with their open hands and the others kicked him all over the body. At that time he was bleeding profusely.

They then took him to another small office where he found an elderly police officer. He was informed that this officer was investigating his case. The officer wanted to know from him the whereabouts of the jewellery whereupon he told him that he knew nothing of this matter. The officer told him that he was playing games with them. He was then taken to a cell. The Plaintiff told the court that the beatings and torture took 30 to 50 minutes from the time of his arrival at the police station.

He was placed in a small cell with four other inmates. He could not estimate the size of this cell but said it was small. There was a black drum at the side used as a toilet. He was given filthy blankets called "umgacambongolo". He said he did not use the blankets because if he had used them he would have felt sick. He slept on the floor on top of a small mat. He told the court that the cell was filthy and smelling of urine.

The officers came back at night on the same day he was arrested. They came again around 9.00am to 9.30am. The whole day of the following day he was in the cell. They gave him some food but he could not eat the food, as he did not have appetite after the torture the previous day. The whole day he was without any food. Robert came to him at night and told him to divulge what happened. He again told him that he knew nothing of this matter. The officer then proceeded to handcuff him in front and took him out of the cell. He took him to the CID office where he was the first day. He removed the handcuffs from the front and handcuffed him at the back. There were other officers who numbered about 5 or less. They ordered him to produce the exhibits in this case. He again told them that he knew nothing about his matter. The officers proceeded to assault him as they did the first time he came to the police station. A tube was again used in this instance. The officer by the name of Robert was the one who took an active role in the torture. The officers then went out of the office then an officer by the name of Pitso Shongwe came in. He knew

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Shongwe. Shongwe told him that if he would confide in him he would tell the other officers to stop assaulting him. But he also told him that he knew nothing about this matter. The officer left after sometime.

The police officer came again the following day where he was tortured for the third time in police custody. Again Robert took an active role in his torture. Another officer by the name of Kina also took an active part on this occasion. He was then taken back to the cells. He remained in the cells for five days. He was taken to court on the fifth day. On the third day he was able to talk to his father who had in the meantime secured the services of attorney Mr. Mdladla.

The Plaintiff then recounted at great length what happened on the fifth day when he was taken to Sidwashini Remand Centre.

The Plaintiff was then subjected to a very lengthy and searching cross-examination by Mr. Thwala for the Defendants. The cross-examination took two full days and I shall revert to what was revealed therein in the course of this judgment.

The Plaintiff then called his only witness PW1 Nonhlanhla Maphalala. She told the court that she was an employee of the Swaziland Jewellery at the Mall where a robbery took place in the morning hours of the 12th February 2001. She described at great length how two men came to the shop that day and eventually the shop was robbed of jewellery at gunpoint. Essentially her evidence was that the Plaintiff was not the one with the other who robbed the shop that day but one Mandla Masina. A certain man-about-town who used Cracker Masina's son to gain recognition. Cracker Masina is plaintiff's father. Cracker Masina appears to be a celebrity of sorts in the soccer circles in the country.

Nonhlanhla told the court that when she reported the matter to the police the police recorded her statement in writing. The officer who took her statement was one Sandile Chonco. She told the officer that one of the perpetrators of the robbery was one Mandla Masina not Mavi Masina, the Plaintiff. The officer insisted that it was Mavi Masina who was with the other robber. The officer according to this witness then cancelled the name "Mavi" and inserted the name of "Mandla".

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However, when this witness was shown the statement it emerged that the statement was never cancelled. The witness insisted that she told the officer that one of the perpetrators was "Mandla" not "Mavi".

On the 26th February 2001, she was called by the police to identify one of the assailants at the Mbabane Magistrates Court. She found many people in that vicinity but she could not identify any of them as responsible for the robbery on the 12th February 2001. One police officer there pointed out to someone and asked if he was not the one. He pointed at the Plaintiff who was in a group of other men there.

During March 2001, the witness made a sworn statement with the attorney for the Plaintiff Mr. Mamba. An affidavit was prepared and solemnised before a Commissioner of Oaths. In the statement she deposed that she did not say that one of the perpetrators of the robbery was "Mavi" but "Mandla". Finally she testified that it is not true that she was schooled in this matter.

The affidavit deposed to by PW1 was entered as exhibit "A".

This witness was also subjected to a very long and searching cross-examination by Mr. Thwala for the Defendants. She was quizzed on the apparent contradictions in what she told the police immediately after the robbery and what she has deposed in her affidavit which was drafted by the plaintiff's attorney Mr. Mamba. She insisted that she told the police officer Chonco that it was "Mandla Masina" not "Mavi Masina" and the police officer had effected the change in her statement. However, when pressed further by Mr. Thwala for the Defendants she could not explain why the amendment does not appear on the face of the statement she made to Chonco. This indeed raised questions on her credibility as a witness. I shall avert to this aspect of the matter later on in the course of this judgment.

The Plaintiff then closed his case. In rebuttal the Defendant lead the evidence of eight witnesses. Most of these witnesses were police officers who are connected with this matter some were present when the Plaintiff was arrested and others attended the scene of the robbery on the 12th February 2001, at the Mall. These were DW1 1807

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Sergeant Elijah Nhlabatsi, DW3 3447 Robert Dlamini, PW4 3662 Constable Sifiso Dlamini, PW5 Superintendent John J. Lukhele, DW7 3615 Constable Sibusiso Mabuza and DW8 2905 Sandile Chonco.

DW2 was Precious Maphalala who is the sister to PW2 Nonhlanhla Maphalala who gave evidence on behalf of the Plaintiff. She was employed by the Swaziland Jewellery at the material time. She was also on duty on the 12th February 2001, when the robbery took place. She related how a certain Mandla Masina came to the shop with another man wanting to buy some jewellery at the shop. These two persons came twice at the shop. The robbery occurred whilst she had gone on her lunch break. She did not witness the incident herself. However, the statement which she recorded to the police after the incident the name of "Mavi Masina" is reflected not "Mandla Masina".

The evidence of the other witnesses for the Defendants pertains to the arrest of the Plaintiff and what transpired when the Plaintiff was in police custody. The police officers that gave evidence in this case deny in the strongest terms that they ill-treated the Plaintiff in the manner he has described to the court.

PW6 1821 Gabisile Manyatsi is a Correctional Services Officer stationed at Sidvashini Remand Centre. This witness described in detail the procedure used by them at the Remand Centre when they receive new inmates. The officer testified that the Plaintiff when he was received at the Remand Centre did not have any injuries. If he had injuries he would have not been accepted by the Remand Centre.

DW7 3615 Constable Sibusiso Mabuza and DW8 3905 Sandile Chonco are the officers who attended to the scene-of-crime immediately after the robbery. The officers told the court that at the scene Nonhlanhla Maphalala told them that the person who was involved in the robbery was one "Mavi Masina" who is a son to Cracker Masina. Officer Chonco recorded a statement from Nonhlanhla Maphalala. He deposed that Nonhlanhla told him that the person who committed the robbery was one "Mavi Masina". He denied under cross-examination that he is the one who suggested to her that the person who committed the robbery was "Mavi" not

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"Mandla". In any event, he testified that the statement does not have such an alteration.

## The Arguments

It was argued on behalf of the Plaintiff that in casu that it is common cause that the Plaintiff was in the custody of the police for 12 days, therefore the onus is on the person who effected the arrest to show that the arrest was not only reasonable but also lawful. Mr. Mamba urged the court to rely on the evidence of Nonhlanhla Maphalala and reject the evidence of the Defendants as being contradictory. Strangely, it was submitted that Precious Maphalala who is an independent witness contradicts the evidence of the police that they told the police that the person who committed the robbery was "Mandla" not "Mavi". Her evidence supports that of Nonhlanhla Maphalala.

Mr. Mamba argued at great length on the quantum of damages and that in the present case the Plaintiff has proved his damages as outlined in the particulars of claim.

Mr. Thwala argued au contraire. In this regard he addressed four issues, namely; i) whether or not the Plaintiff was lawfully arrested for the robbery; ii) whether Plaintiff was lawfully detained by the police; iii) whether or not the Plaintiff was assaulted by the police during his detention; and iv) whether any legal steps were contravened by the police.

### The Court's analysis and conclusions thereon

I shall address this case on the same format used by Mr. Thwala for the Defendants viz 1) whether or not the Plaintiff was lawfully arrested for robbery; 2) whether Plaintiff was lawfully detained by the police; 3) whether or not the Plaintiff was assaulted by the police during his detention; and 4) whether any legal steps were contravened by the police.

I proceed to address these questions ad seriatum, thus:

1. Whether or not the Plaintiff was lawfully arrested for robbery.

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The police purported to arrest the Plaintiff in terms of Section 22 (b) of the Criminal Procedure and Evidence Act (as amended). Section 22 of the Act reads in extenso as follows:

"Arrest by peace officer for offences committed in his presence and on the grounds of suspicion every peace officer and every other officer empowered by law to execute criminal warrants is hereby authorised to arrest without warrant every person;

- a) who commits any offence in his presence;
- b) whom he had reasonable grounds to suspect of having committed any of the offences mentioned in Part II of the First Schedule;
- c) whom he finds attempting to commit an offence, or clearly manifesting an intention to do so.  
(my emphasis)

The question of whether the suspicion of the person affecting the arrest is reasonable must be approached objectively. Accordingly the circumstances giving rise to the suspicion must be such as would ordinary move a reasonable man to form the suspicion that the arrestee has committed a First Schedule offence (see R vs Van Heerden 1958 (3) S.A. 150 (T) at 153). In order to ascertain whether a suspicion that a schedule offence has been committed is "reasonable" there must obviously be an investigation into the essentials relevant to each particular offence (see Ramakulukusha vs Commander Venda National Force 1989 (2) S.A. 813 (v) 836 G -937B)

It is trite law that the onus is on the person making the arrest to show that his suspicious had a reasonable basis (see Rossean vs Boshoff 1945 CPD 135 and the case of R vs Folkus 1954 (3) S.A. 442 (SWD)).

The case in casu therefore ought to be decided on the legal principles outlined above. In my

assessment of the evidence in toto I come to the conclusion that the police in the present case had reasonable suspicions that the Plaintiff together with an unknown individual had committed this offence of robbery and thus satisfying the rigours of Section 22 (b) of the Criminal Procedure and Evidence Act. The facts reveal that the police were notified by telephone that a robbery had been committed at the Swaziland

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Jewellers on the day in question. The police proceeded to the scene (PW6 and PW8) where on their arrival they were informed that one of the suspects was "Mavi Masina" who is the Plaintiff in the present case. It happened that the Plaintiff was also known to the two officers who attended to the robbery as he had had a brush with them in an incident involving jewellery. The officers received this information from the complainant Nonhlanhla Maphalala who was present when the robbery took place,

Nonhlanhla Maphalala in her statement recorded by PW8 (3905) at 13h40hrs on the day of the robbery stated inter alia:

"I recall very well on this day I was on duty when two middle aged man (sic) came into the shop of which one of them I know as a son of Cracker Masina (Mavi)...".

However, Nonhlanhla Maphalala somersaulted and made an affidavit prepared by plaintiff's attorney Mr. L. Mamba and said that she informed the two police officers who came to the shop that the person was "Mandla Masina".

At paragraph 6 of the affidavit she states the following:

"After the statement had been taken and read to me I was asked to sign it. I refused to do so as the name the police officer had written down was Mavi and not Mandla. I informed him that I would not sign it and he then amended the name in the statement to read Mandla. Thereafter I signed it".

The above statement is not true in that the statement which Nonhlanhla made (exhibit "D") was never amended. When Nonhlanhla Maphalala was pressed on this in cross-examination she failed to come with a clear answer.

In the circumstances, I find that what is reflected in exhibit "D" portrays the true facts of what occurred that day.

Again there is the evidence of Precious Maphalala which also boggles the mind. She also mentioned that it was "Mavi Masina" who came to the shop earlier on. This is found in exhibit "C". Also this witness told the court in-chief that her statement had

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the name "Mandla". Surprisingly, the statement was not amended as she said it was amended by the police.

In my view, both witnesses for whatever reasons did not tell the court the truth but it is clear to me that they are the ones who represented to (PW7 and PW8) that one of the perpetrators was Mavi Masina. Armed with this information the police proceeded to arrest the Plaintiff. The arrest in my considered opinion fell squarely within the purview of section 22 (b) of the Penal Code and in the circumstances the police officers' actions cannot be faulted.

## 2. Whether the Plaintiff was lawfully detained by the police.

Having found the arrest of the Respondent to have been lawful, his ensuing detention was, prima facie, also lawful and the onus is upon the Plaintiff to show that there was a stage when it became

unlawful.

The period for which a person arrested without warrant may lawfully be kept in custody is regulated by sub-section (1) and (2) of section 30 of the Criminal Procedure and Evidence Act (as amended). Those sub-sections reads as follows:

"30 (1) no person arrested without warrant shall be detained n custody for a longer period than in all the circumstances of the case is reasonable. 2. Unless such person is released by reason that no charge is to be

brought against him, he shall, as soon as possible, and without undue delay, be brought before a Magistrates Court having jurisdiction upon a charge of an offence".

It is apparent that no fixed time has been laid down for lawfully keeping an arrested person in custody. Beck JA delivering the judgment of the Court of Appeal in Commissioner of Police and another vs Mathokoza Vilakati Appeal Case No. 23/2003 (unreported) stated the following:

"Detention following a lawful arrest only becomes unlawful when it is no longer reasonable in all the circumstances of the particular case".

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In the instant case it is common cause that the Plaintiff was in the custody of the police for a period of five (5) days when he was transferred to the Remand Centre where he spent a further seven (7) days. In total he was in custody for twelve (12) days.

It is also common cause that the Plaintiff was charged with the offence of Armed Robbery and that he appeared before the Mbabane Magistrate Court for a formal remand where he was remanded in the custody of the Sidwashini Remand Centre to the 26th February 2001.

In assessing the evidence before me I am unable to say that the detention was unlawful. The Plaintiff was charged with a very serious offence that of Armed Robbery of a jewellery shop where jewellery valued at E55,000-00 were stolen at gunpoint. There were two perpetrators who fled the scene in a motor vehicle. Clearly from the facts the investigations of such a crime were of a complicated nature.

In my view following the ratio in the Court of Appeal case I have already cited the Commissioner of Police and another vs Mathokoza Vilakati (supra), I find on the facts and in all circumstances of the case that the detention was not unreasonable.

### 3. Whether or not the Plaintiff was assaulted by the police during his detention.

In the present case the only evidence of assault is that of the Plaintiff himself. Here the court has no independent evidence that has been led that corroborate the evidence of the Plaintiff. His evidence in my view raises more questions than answers. Firstly, the Plaintiff outlined his assaults by the police on the days he was in their custody. During this time the Plaintiff was sharing his cell with two other inmates who on all probability would have observed the Plaintiff injuries after he had been assaulted by the police. The Plaintiff has not called any of his cellmates to corroborate his version.

Secondly, the Plaintiff could have called the Magistrate to whom he first appeared, who must have seen his injuries. The injuries described by the Plaintiff when he gave his evidence in-chief were of a grievous nature in that he said he was bleeding all

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over. In this regard I agree with the submissions advanced by Mr. Thwala for the Defendant that the Plaintiff ought to have complained to the Magistrate about the assaults he was subjected to in police custody. The Magistrate was the first independent person he could have complained to when he first

appeared for a formal remand.

Thirdly, the Plaintiff could have called the prison officials to say that in spite of his visible injuries as alleged he was admitted to prison against the standing policy that prisoners with injuries are not admitted into prison.

Fourthly, police officer Lukhele told the court that he visited the cells at the police station in the middle of the night. He testified that the purpose of these nocturnal visits was to establish if any inmates had any complaints. The officer told the court that he saw the Plaintiff in one of the cells but the Plaintiff said nothing. The argument advanced by the plaintiff's attorney to explain away this omission on the part of the Plaintiff is that he could not have reported to a police officer as Lukhele was "another brick on the wall". I must say that I am not satisfied with this explanation on the simple reason that Lukhele was never part of the officers who interrogated the Plaintiff whilst he was in police custody.

For the reasons I have outlined above I find that in all probabilities the Plaintiff has failed to prove his case for the relief sought.

In the result, judgment is granted in favour of the Defendants and that the plaintiff's claim is accordingly dismissed with costs.

S.B. MAPHALALA

JUDGE