

THE HIGH COURT OF SWAZILAND

NANA SIKHONDZE

Plaintiff

And

THE COMMISISONER OF POLICE

1st Defendant

THE ATTORNEY GENERAL

2nd Defendant

Civil Case No. 1684/2003

Coram: S.B. MAPHALALA-J

For the Plaintiff: MR. S.C. DLAMINI

For the Defendants: MR S. KHUMALO

JUDGMENT

(14ⁱⁿ July 2006)

[1] The Plaintiff instituted proceedings by way of action for the sum of E550,000-00 being in respect of compensation for unlawful arrest and detention, interest thereon at the rate of 9% per annum, costs of suit and further and/or alternative relief.

[2] Plaintiff alleges in his Particulars of Claim that on or during the 8 May 2002, members of the Royal Swaziland Police wrongfully and unlawfully arrested and detained him in custody. Plaintiff further alleges that he suffered damages for wrongful and unlawful arrest and detention in the sum of E500,000-00.

[3] Defendants have filed a plea against the action alleging, *inter alia*, that Plaintiffs arrest was neither wrongful nor unlawful. The police arrested Plaintiff upon reasonable suspicion that he had committed the offence of attempted robbery on 28th March 2002, at Mayaluka Bar in that he attempted to rob a security guard of his service shotgun. The Defendants further averred that the Plaintiff was then brought before court on the day of his arrest, whereupon the court remanded him into custody. His detention was at the instance of the Magistrate.

[4] In the trial the Plaintiff gave evidence on his own behalf and did not call any other witnesses. The Defendants on the other hand led the evidence of four witnesses including that of DW1 Jabu Dlamini, DW2 Owen Bhekithemba Masuku, DW3 4268 Woman Constable B. Simelane and DW4 3547 Detective Zibuko.

[5] The Plaintiff stated in his evidence that he was 22 years old and is a resident of Big Bend in the Ubombo Region. He is unmarried but has a two-year old offspring. He does odd jobs for a living such as firewood and candles. He related that on the 29 March 2002, he was at Mayaluka Bar which is in Big-Bend. He drank beer with other people. At about 8.00pm he decided to move to the Bend Inn with his companions. His companions went but he went to the toilet first. On his way out of the bar he heard a gunshot and was hit on the right foot in the outer side of the ankle. The pellets came out of

the foot through the inner side of the ankle. He fell down. He was carried out of the bar by certain men and placed at the gate. Whilst at the gate he was seen by a woman who was passing by. This woman raised an alarm and also telephoned the police. At this stage he was bleeding profusely, had lost strength and was in the process of losing consciousness. The police eventually arrived and took him to hospital. When he got better, as he had no money, he telephoned the police and asked them to take him home. The police duly obliged and took him home on the 16th May 2002. A few days later the police sent a message that he was to report at Big-Bend Police Station. He went to the police station on the 28th May 2002 and was immediately arrested on a charge of attempted robbery. At the trial before the Big-Bend Magistrates Court he was remanded in custody until the 4th December 2002, when the trial commenced. At the trial Plaintiff pleaded not guilty to a charge of attempted robbery. The Prosecutor at the trial called one witness, namely Owen Masuku (who is DW2 for Defendants in the present trial). This witness told the court that he saw the Plaintiff following his colleague and he fired his gun on the ground and Plaintiff got injured. The Crown then closed its case. The Plaintiff was acquitted and discharged without being put to his defence. This was the case for the Plaintiff.

[6] The first witness for the Defendants DW1 Jabu Dlamini is a bar lady at Mayaluka Bar. She is 35 years old and married. She has been working at the bar for thirteen years. On the 28 March 2002, she was at work at the bar. It was busy as it was the end of the month. Certain customers got drunk and started being rowdy. They smashed empty beer bottles and turned the tables upside down. The younger of these customers who looked like the Plaintiff was particularly drunk. She and other employees tried to calm this customer down. She then called the company security. The Plaintiff threw a bottle at him in order to get out of the bar. There was then a struggle over the gun and a shot went off. She then went to make a statement to the police.

[7] This witness was cross-examined by the Crown. I shall revert to some of her important answers in due course.

[8] DW2 Owen Bhekithemba Masuku was the next witness. He testified that he is a security guard who was at the time employed by Ubombo Sugar Limited. He was on duty on the 29th May 2002, and at 7.30pm got a message through the radio that he was to report at Mayaluka Bar where there was a disturbance. He and his colleagues immediately went to the bar as it was close to where they were. When they got to the bar they found lots of customers outside. He went into the bar through the main door and found four males inside and the bar ladies. A bottle was thrown at him which he avoided. There was a struggle with the Plaintiff over the firearm and a shot went off. The Plaintiff then went out of the bar. When they were at the gate they decided to call an ambulance. He suspected that the Plaintiff and his colleagues wanted to stage a robbery.

[9] The third witness for the Defendants was another police officer DW3 4268 Woman Constable B. Simelane who said that she has been a police officer for five years. She and Sergeant Fakudze received a report that there was chaos at Mayaluka bar. They rushed there. At the gate they found the Plaintiff lying down and bleeding profusely. The security guards told him Plaintiff had been shot by mistake during a struggle for a gun. Whilst this witness and colleagues were placing Plaintiff on the police van, an ambulance arrived and took him to hospital. She and her colleagues eventually arrested the Plaintiffs companions.

[10] This witness was cross-examined at some length but she stuck to her testimony in-chief.

[11] The Defendants then called their last witness DW4 3547 Detective Zibuko who testified that he has been a police officer for 12 years. Whilst at the police camp he received a report that he had to go to Mayaluka bar where there was a disturbance. He first went to the charge office where he found three people already arrested. He joined in the interrogation of these persons and they told him that one of them had sustained injuries after being shot at the bar. He was then placed in charge of the investigations. He said he had been on the scene when the commotion took place. He saw the Plaintiff and colleagues turn the tables upside down and he retreated back outside where he called for reinforcement in view of the chaos inside the bar. This witness was cross-

examined at length by Counsel for the Plaintiff and I will in due course revert back to his replies.

[12] In submissions before me *Mr. Dlamini* for the Plaintiff premised his arguments on a judgment of this court by Strydom J in the case of *Maxwell Lukhele vs Attorney General - High Court Case No. 1057/1991* that the test is whether the Defendants had reasonable grounds for the arrest, detention and prosecution of Plaintiff and more particularly did Defendants *bona fide* believe on reasonable grounds that Plaintiff had committed the crimes for which he was charged. He argued that on the facts of the present case the Defendant would dismally fail the above-cited test as *in casu* the Defendant did not have reasonable grounds for the arrest, detention and prosecution of Plaintiff.

[13] The Crown on the other hand has premised its defence on the *dictum* in the Court of Appeal judgment in the matter of *Timothy Bhembe vs The Commissioner of Police and the Attorney General, Appeal Case No. 55/2004 (unreported)* at page 8 where Beck JA of that court stated the following:

"It is not the duty of a police officer to elevate a reasonable suspicion to the level of certainty before a suspect may lawfully be arrested without a warrant. It is the function of a trial court and not the arresting authority, to reach a conclusion as to the reliability and sufficiency of the evidence given by the police, as the authorities show".

[14] The Crown further relied on what is stated by Macdonald CJ in the case of *S vs Ganyn 1977 (4) S.A. 810* that in deciding whether a reasonable suspicion has been proved, it must be necessary be recognized that a reasonable suspicion never involves certainly as to the truth. When it does, it ceases to be suspicion and becomes fact.

[15] *Mr. Khumalo* for the Crown also premised his arguments on the trite principle of law that the Defendants bear the *onus* of proving on evidence that Plaintiffs arrest was neither unlawful nor wrongful and malicious. The Defendant must prove on a balance of probabilities that Plaintiffs arrest was lawful. In order to discharge that burden, the Defendants must satisfy the court that their version is more probable than the Plaintiff in that it is consistent with all the facts that have either been proven, are common cause or are not

disputed.

[16] According to *Mr. Khumalo* the Defendants in the present case have succeeded in discharging the *onus* of proving that the arrest and detention of the Plaintiff was lawful. Plaintiff was arrested on reasonable suspicion that he had attempted to rob one Owen Masuku, a security guard of his service shotgun. Plaintiff's arrest was therefore in terms of Section 22 (b) of the Criminal procedure and Evidence Act No. 67 of 1938 which provides that:

"Every peace officer and every other officer empowered by law to execute criminal warrants is hereby authorised to arrest without warrant every person:

(b) Whom he has reasonable grounds to suspect of having committed any of the offences mentioned in Part II of the First Schedule".

[17] The question therefore before this court presently is whether the police when they arrested the Plaintiff had reasonable grounds to suspect that he had committed an offence mentioned in Part II of the First Schedule.

[18] It appears to me on the assessment of the whole body of evidence that the evidence of the Defendants is more probable than that of the Plaintiff on how the arrest was effected by the Defendants. The evidence of the bar lady DW1 Jabu Dlamini was not successfully challenged during cross-examination and therefore remains unrebutted. She deposed that on the day in question she was on duty at the bar and four unusual customers arrived at the bar, of which she knew only one of them to be Tiger Steenkamp. She went on to state that amongst the four men, there was a young man whom she positively identified in court as the Plaintiff. The four men had some drinks and then became chaotic and started breaking bottles and turning tables upside down and further insulting the bar-lady. She then called the security officers to come and assist the situation. She went on to state that when the security officers arrived, the three elder men ran out through one of the doors leaving the Plaintiff behind. The security officers who were two in number entered the hall using two different entry points. When one of the security officer (Owen Masuku) entered the hall the Plaintiff is said to have thrown a beer bottle at him and charged at him and a scuffle ensued and she heard a gunshot.

[19] DW1's testimony was in a large measure corroborated by DW2 Owen Masuku, the security officer who also testified that when he got to the bar, he found that the set-up there was not usual as the chairs and tables were turned upside down and there were broken bottles all over the place. He further stated that Plaintiff first threw a beer bottle at him and further charged at him attempting to disarm and rob him of his service shotgun.

[20] DW3 and DW4 both corroborated each other and further corroborate DW2 (the security officer) in that they all testified to the effect that the police were called by the security officers and that the police investigations revealed that Plaintiff did attempt to rob the security officer of his firearm. All the defence witnesses corroborated each in saying that Plaintiff was with Tiger Steenkamp and others during the commission of the offence and that the three others were subsequently charged with malicious injury to property.

[21] On the other hand it appears to me that the evidence of the Plaintiff was not truthful when viewed against the testimonies of defence witnesses. In his evidence in-chief he stated that he was shot whilst exiting the toilet and he fell back inside the toilet and he spent about ten minutes without being assisted. I find this strange and impossible in view of the fact that there were people who were inside the bar and outside who heard the gunshot. Plaintiff failed under cross-examination to give a reasonable explanation why he did not report the shooting within a reasonable time. In this regard I am inclined to agree with the Crown's view that this shows a guilty mind on the part of the Plaintiff.

[22] In sum, on the totality of all the evidence adduced in the present case I have come to the considered view that the Defendants *bona fide* believed on reasonable grounds that Plaintiff had committed the crimes for which he was charged.

[23] In the result, for the afore-going reasons Plaintiff's claim is dismissed with costs.

S.B. MAPHALALA
JUDGE