Civil Appeal No. 36/2006

In the matter between

**NANA SIKHONDZE** Appellant

and

**THE COMMISSIONER OF POLICE** First Respondent

**THE ATTORNEY GENERAL** Second Respondent

Held at Mbabane

**CORAM:** **BROWDE AJP**
**ZIETSMAN JA**
**RAMODIBEDI JA**

**HEARD:** 3rd November 2006
**DELIVERED:** 16th November 2006

***SUMMARY***

*Action for damages - Allegation of unlawful arrest and detention - Reasonable suspicion for suspecting commission of an offence - Section 22(b) of the Criminal Procedure and Evidence Act 67/1938.*

**JUDGMENT**

**RAMODIBEDI, JA**

[1] On the evening of 29 March 2002, four young men

caused a huge commotion at Mayaluka Bar in the Lubombo District. It is said that they were downright chaotic, breaking the bottles on the floor, turning the snooker tables upside down, fighting everyone in the bar and generally causing such mayhem that the patrons thereat fled the bar. But more significantly, it is alleged that the youngest of these men fought with a security officer over the latter's shotgun. In the process the young man was shot in the foot. It turned out that that young man is the appellant in this case.

[2] Consequent upon the incident referred to in the preceding paragraph, the appellant was arrested and detained by the police. He gives conflicting dates as to when this occurred. In his particulars of claim he alleges it was on 8 May 2002. In his evidence at the trial however he says it was on 28 May 2002. Be that as it may, the appellant was remanded into custody and was ultimately tried before a Magistrate's Court on a charge of attempted robbery. He was acquitted and discharged on 4 December 2002.

[3] Thereafter, the appellant brought an action against the respondents for payment of a sum of E500 000-00 as damages for unlawful arrest and wrongful detention.

[4] The High Court dismissed the appellant's claim on

the ground that the police had a reasonable suspicion for believing that the appellant had committed "the crimes for which he was charged." On appeal before this Court, the appellant challenges the correctness of that decision.

[5] Now, the provisions of Section 22(b) of the Criminal Procedure and Evidence Act No. 67 of 1938 are crucial in the determination of this matter. That Section provides:-

> "*22. Every peace officer and every other officer empowered by law to execute criminal warrants is hereby authorised to arrest without warrant every person* **-**
>
> *(a) ...*
>
> *(b)whom he has reasonable grounds to suspect of having committed any of the offences mentioned in Part II of the First Schedule;*"

The offences mentioned in Part II of the First Schedule in turn include robbery as well as an attempt to commit robbery.

[6] Turning to the facts of the case, the appellant gave evidence at the trial. He did not call any witnesses. In outline, he confirmed that on 29 March 2002 he went to Mayaluka Bar which he described as "one of the

watering holes". When he realised that the bar was about to close, he decided to go to the toilet to answer the call of nature. While coming out of the toilet he heard a gunshot. He was shot in the leg and fell back inside the toilet. He was later taken to the hospital by the police. On his discharge from the hospital on 16 April 2002, he called the police to come and fetch him because he had no money. They graciously obliged.

[7] Under cross-examination the appellant denied that he was shot whilst attempting to rob a security officer of his firearm. He had considerable difficulty, in my view, explaining why he did not lay a charge against the person who shot him if indeed he had been shot in the circumstances which he described.

[8] The respondents relied on the evidence of four witnesses, namely, Jabue Doris Dlamini (DW1), Owen Bhekithemba Masuku (DW2), 4268 Woman Constable Buhle Lindelwa Simelane (DW3) and 3547 Constable Piva Zibuko (DW4).

[9] In a nutshell, DW1 gave impressive evidence confirming the commotion at Mayaluka Bar as fully outlined in paragraph [1] above. She worked at the bar as a "barlady". She consistently testified to seeing the appellant throw a bottle at the security officer (DW2) who was entering the bar at that stage in order to

investigate the commotion in question. She further testified to seeing the appellant engaged in a "scuffle" with DW2 during the course of which a gunshot went off. Not a single question was put to her in cross-examination to dispute her version.

[10] The security officer (DW2) corroborated DWl's evidence in material respects. He, together with his colleagues, had been summonsed through the control radio to attend to the "squabble" at Mayaluka Bar. He confirmed that one "guy" threw a bottle at him. He ducked but the attacker came "straight" at him "in a very aggressive manner." In his own words, he is recorded as having said the following on page 75 of the record:-

> "*My Lord I am one person who in my line of duty I use a weapon and as I was there and as this guy was approaching me aggressively I tried to give him way but however he came straight to me aiming for the weapon. The kind of weapon that I used is long such that I was holding it with both my hands and the guy who was approaching me said that he wanted the gun and he was running for the gun, I couldn't push him away my lord because both my hands were pushing the gun and he was also aiming for it and then we started fighting over it. As we were fighting over the gun I heard the ladies screaming. We proceeded fighting over the gun and there was a fire*

*shot my lord.*"

[11] It is the evidence of DW1 that after the gun had gone off, the appellant ran outside. He was found inside the men's toilets where he had locked himself up.

[12] Once again it is pertinent to note that not a single question was put to DW2 to challenge his material version relating to the struggle over the gun in question. Nor was it disputed that the appellant actually said he wanted the gun, a factor which would seem to confirm the charge of attempted robbery.

[13] DW3 is a police officer who was patrolling the area in the company of one Sergeant Fakudze at the material time in question. The two officers responded to an alarm raised over the radio to the effect that there was "chaos" at Mayaluka Bar. DW2 and his colleague reported to them the details about the chaos that had just occurred. More importantly, they were informed that the security officers had been fighting over a gun with the person who was lying down at that stage, namely, the appellant. There were pieces of broken bottles, chairs were turned upside down and so were the snooker tables.

[14] Under cross-examination the following crucial evidence was significantly elicited from DW3:-

> "*Q. According to your evidence and according to the evidence of everyone who has testified here, there is nothing to suggest that there was any attempted robbery.*
>
> *A. My lord I did mentioned* **(sic)** *that one of the security officers informed us that he* **(appellant)** *got shot mistakenly after they were fighting over the gun.*
>
> *Q. So the robbery you are talking about it has to be the gun.*
>
> *A. That is correct my lord.*"

[15] The evidence of DW4 is equally crucial. He is the investigating officer. He, too, was called upon to go and assist at Mayaluka bar because "there were boys who were troublesome". He was informed of an attempted robbery of the security officer's gun as well as the charge of malicious damage to property.

[16] On 6 May 2002, DW2 and his colleagues proceeded to the hospital where they introduced themselves to the appellant as police officers who were investigating a crime of malicious damage to property at Mayaluka Bar and a crime of attempted robbery. After he was duly cautioned, the appellant

informed DW4 that "he knew the crimes of malicious damage to property, however he did not know the crime of attempted robbery, he was just shot."

[17] DW4 further testified that on 8 May 2002, he handed over the "charges" to the prosecutor. These were a charge of malicious damage to property as well as a charge of attempted robbery.

[18] Significantly, DW4 testified that before arresting the appellant he sought legal advice from the prosecutor who has since become a magistrate. He received the green light to go ahead. This was "actually the person who frames the charges."

[19] Under cross-examination DW4 was asked the following question:

> "*Q. What I want to know is that on what basis did you believe that the plaintiff had committed a crime of attempted robbery. On what basis did you personally believe.*
>
> *A. My lord firstly it is that I found him* **(the appellant)** *at the bar breaking the bottles and I talking of the charge of malicious damage to property. Again my lord when I was taking statement from the people who witnessed the incident I was convinced that indeed he had attempted the robbery.*"

[20] In argument before this Court, Mr. Dlamini for the appellant dwelt heavily on the first sentence in DW4's answer as set out in the preceding paragraph. He sought to argue that the witness gave contradictory evidence in that he claimed to have found the appellant in the actual act of breaking the bottles whereas elsewhere in his evidence he only arrived on the scene late, after the alleged incident had already occurred. I do not agree. Firstly it is self-evident that the sentence in question does not make sense. It is reasonably possible to simply put it down to poor translation. The Court will naturally be disinclined to criticize a witness on the basis of a translation which is unclear or suspect.

Secondly, I consider that the correct approach is to read the sentence in question in the context of DW4's entire evidence. Viewed in this way it is clear that DW4 arrived on the scene after the bottles had already been broken. It is for that reason that counsel for the appellant proceeded to ask the witness the following question:-

> *"Q. And you say you believed that he* **(appellant)** *had committed attempted robbery on the strength of the statement that he* **(sic)** *had collected from the witnesses.*

*A. That is true my lord.*"

[21] Typically, not a single question was put to DW4 that he was concocting the story about the statements he received from the witnesses implicating the appellant. Moreover, as indicated earlier, the defence witnesses remained unchallenged on the crucial point that the appellant attempted to rob DW1 of his shotgun and that he committed an offence of malicious damage to property.

[22] In the seminal case of SMITH v SMALL 1954(3) SA 434 (SWA) at 438, decided some fifty two years ago, Claasen J expressed himself in the following terms:-

> "*...it is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved.*" I agree.

[23] In a substantially similar case in BHEMBE v THE COMMISSIONER OF POLICE AND ANOTHER, Appeal case No. 55/2004, this 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 warrant. It is the function of a trial court, and not of the arresting authority, to reach a conclusion as to the reliability and sufficiency of the evidence gathered by the Police, as the authorities show.*"

> Similarly, I desire only to add that it is not the duty of a police officer who decides to effect an arrest to conduct a mini-trial as to the cogency of the statement or incriminatory information he has received before he can arrest a suspect. I have no doubt that such a procedure would fail to protect the community, and would therefore work an injustice.

[24] In S v GANYU 1977f4) SA 810 fR. AD) at 813C Macdonald CJ made the following celebrated statement with which I am in full agreement:-

> "*In deciding whether a reasonable suspicion has been proved, it must of necessity be recognised that a reasonable suspicion never involves certainty as to the truth. When it does, it ceases to be suspicion and becomes fact.*"

[25] Viewed objectively, I am satisfied from the aforegoing factors that the police had reasonable grounds for suspecting that the appellant had committed the offences of attempted robbery and malicious damage to property. The fact that the Public Prosecutor at the Magistrate's Court decided to lay a charge of attempted robbery of cash and not DWl's shotgun is incomprehensible to me. And so is the fact that no charge of malicious damage to property was preferred against the appellant. The public prosecutor

had enough information and statements of witnesses to lay proper charges but he did not. The point however is that his ***post facto*** remissness cannot affect the question whether the police had reasonable grounds at the time of arrest for suspecting that an offence falling under Part II of

Section 22(b) of the Criminal Procedure and Evidence Act had been committed.

[26] The result is that the appeal is dismissed with costs.

**M.M. RAMODIBEDI**

**JUDGE OF APPEAL**

I agree

**J. BROWDE**

**ACTING JUDGE PRESIDENT**

I agree

**N.W. ZIETSMAN**

**JUDGE OF APPEAL**

For Appellant: Mr. S.C. Dlamini

For Respondent: Mr. S. Khumalo