MONGAKGOTLA v THE ATTORNEYGENERAL 2010 1 BLR 13 CA

Citation: 2010 1 BLR 13 CA

Court: Court of Appeal, Lobatse

Case No: Civ App 33 of 2009

Judge: Mcnally AJP, Foxcroft JA and Kirby AJA

Judgement Date: January 28, 2010

Counsel: J Nnoi for the appellant.rnM B Keaikitse with her K Pheko for the respondent.rn

Flynote

Delict
- Damages - Wrongful arrest and detention - Quantum of - Appellant detained during investigation into robbery - Appellant detained overnight in dirty, smelly police cell, without food or access to shower - Appellant C awarded P5 000 damages.

Delict - Damages -
Wrongful arrest and detention - Wrongfulness - Reasonable suspicion - Appellant arrested on suspicion of commission of robbery - Whether suspicion reasonable

Headnote

The appellant was cautioned, and then arrested and detained, on suspicion D of having been involved in the commission of a robbery that was still under investigation. He claimed damages for his alleged unlawful arrest and detention. The High Court found that the arresting officer had harboured a reasonable suspicion that the appellant was involved in the commission of the robbery and dismissed the appellant's action. The facts upon which the finding of 'reasonable suspicion' was based were that the E arresting officer had been given a tip-off that the robbery was committed by members of the Mongakgotla family, the appellant had been pointed out as a member of the Mongakgotla family, and the appellant had refused to answer questions by the police while they were conducting their investigation. The appellant appealed against the High Court's decision.

Held: (1) The suspicion of the arresting officer was not reasonable F because it was based on nothing more than a tip-off that the robbery was committed by members of the Mongakgotla family and a pointing out of the appellant as a member of the Mongakgotla family.

(2) As a cautioned suspect the appellant was entitled to refuse to answer questions and his silence did not strengthen the reasonableness of the suspicion at the time of his arrest.

(3) It followed that the appellant's arrest and detention for 16½ hours was G unlawful.

(4) The appellant spent the night in a dirty and smelly police cell, and the blankets were dirty. He was unable to sleep at all and was provided neither with access to a shower nor with food.

(5) In the circumstances an amount of P5 000 would adequately compensate the plaintiff for his injuria. H

Case Information

Cases referred to:

Mongakgotla v The Attorney-General [2008] 2 B.L.R. 144

Mosaninda v The Attorney-General [1994] B.L.R. 411

Raphoto v The Attorney-General (Civ Case 1664/05), unreported

Sekobye v The Attorney-General [2006] 1 B.L.R. 270, CA

Tlharesegolo v The Attorney-General [2001] 2 B.L.R. 730

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APPEAL against dismissal of action for damages for wrongful arrest and A detention. The facts are sufficiently stated in the judgment.

J Nnoi for the appellant.

M B Keaikitse (with her K Pheko) for the respondent.

Judgement

FOXCROFT JA: B

The appellant brought an action for unlawful arrest and detention, claiming P30 000 in damages. His action was dismissed in the High Court by Newman J, who held that the arresting officer had harboured a reasonable suspicion that he had participated in a robbery at Tshipidi Bar. This appeal is directed against that finding of the court a quo. C

It was, as the learned judge a quo remarked, common cause that the arresting officer, Detective Assistant Superintendent Moleele, had received a tip-off that the robbery under investigation was committed by members of the Mongakgotla family, residing at Leru ward in Kanye. The appellant was pointed out to Moleele as a member of that family by one Oshima Banankoko, who had been arrested in connection with an unrelated matter. D Ironically, when the appellant was released from custody Oshima was arrested and charged together with two other Mongakgotlas, Kitso and Tetlo, with the robbery.

The onus was of course on the arresting officer to establish that he had reasonable grounds to arrest the appellant without a warrant. In Sekobye v The Attorney-General [2006] 1 B.L.R. 270, CA at p 272D Tebbutt JP said: E

'It is now well-established that as an arrest is prima facie considered odious, being an interference with the liberty of an individual, the onus, where an arrest and detention of a plaintiff is admitted, rests on the defendant - in casu the police - to justify such arrest and detention.'

Newman J held as follows in the present matter reported as Mongakgotla F v The Attorney-General [2008] 2 B.L.R. 144 at p 147H-148A:

'Every case

of this kind must be determined on its own peculiar facts, and, on the accepted facts of this case, I find that it was not unreasonable for Moleele to have taken the plaintiff into custody for questioning, nor was it unreasonable for the police to have detained the plaintiff, following his refusal to answer their G questions, while they pursued their lines of enquiry. Accordingly, this court is satisfied that the defendant has discharged the onus of establishing that the arresting officer had reasonable grounds to suspect the plaintiff of having been involved in the robbery under investigation.' H

When one examines the evidence given by Moleele one finds certain disquieting features. Moleele testified that after the appellant was pointed out his name was called out and he responded. The appellant confirmed his name to Moleele and said that he lived at Leru Ward in Kanye. After the appellant was 'cautioned' that an investigation of a case of robbery was in

process, that he was implicated as a suspect, and that the police wished A to question him, Moleele said:

'we then arrested him and took him to the police station'.

The arrest occurred at around 3 pm on 16 April 2006. The appellant told the police that he knew nothing about the robbery. The record then reveals the following: B

'We asked him to account for his whereabouts on the date of the offence, on the night of 14 April 2006 until the morning of 15 April 2006. He then told us that he is not going to say anything anymore so he opted to remain silent. We tried to ask him questions and he still remained silent.'

It was of course the appellant's constitutional right to remain silent, yet this C was treated as a failure to 'co-operate'. Detective Assistant Superintendent Moleele's answer to the question, in chief, why the appellant was detained until 7.30 am on 17 April was that:

'We decided to detain the plaintiff because the information which we had received D was that the boys from Mongakgotla family are the ones who committed the robbery, and we had not arrested anyone from the family and we were continuing with the investigations of the robbery on the information we received.'

Later the witness explained that he decided to release the appellant:

'because we had arrested two other young men from Mongakgotla, being Kitso E and Tetlo Mongakgotla. And the evidence that we had linked the two and another one by the name of Oshia Kgakollo [sic].'

The last mentioned appears to be the same Oshia Kgakololo Banankoko who had first pointed out the appellant as a Mongakgotla to the police. He F and the other two Mongakgotlas were charged and convicted of the robbery.

It was put to Detective Assistant Superintendent Moleele that,

after he had failed to locate Tetlo, he told the appellant that he was going to detain him because he was going to tell Tetlo that 'you were looking for him and G thereafter it would make it difficult for you
to locate Tetlo'. Moleele denied this and persisted in the attitude that, although having the right to remain silent, the appellant was obliged in law to give an account of his movements at the time of the robbery. This was why he had not believed the appellant's denial of involvement in the robbery. It clearly played a part in his decision to detain the appellant as well as reflecting a mistaken belief on Moleele's part that he was legally entitled to detain an arrested person H who had not 'co-operated'.

The court a quo held that it was not unreasonable for the police to have taken the appellant into custody for questioning and then to have detained him after his refusal to answer their questions while they pursued their lines of inquiry. In my view, the finding that he was 'taken into custody for questioning' is a misdirection, since it overlooks the evidence of Moleele

that the appellant was 'cautioned' and told that he was a suspect in the A robbery case which Moleele was investigating when he was arrested at about 3 pm on 16 April. The finding that:

'nor was it
unreasonable for the police to have detained the plaintiff following his refusal to answer their questions, while they pursued their lines of enquiry' B

is another misdirection. He was entitled to refuse to answer questions, since a cautioned suspect could not in law be detained because of such refusal.

Newman J had already found by implication that the arresting officer did have a reasonable suspicion that the appellant had participated in the robbery before making the comments dealt with above. In my view the C suspicion was not
reasonable since it was not based on anything other than a tip-off that the robbery had been carried out by 'members of the Mongakgotla family' and a pointing out of the appellant as a member of that family. Both the police and the court a quo appeared to have laboured under the same impression that silence during 'questioning' of a suspect can lend support to a suspicion of involvement in a crime and strengthen the reasonableness of that suspicion. In my view the hypothesis fails on D both counts. The suspicion was not formed on reasonable grounds at the moment of arrest nor did the appellant's silence thereafter fortify the suspicion. It follows that the arrest and detention for a period of 16½ hours (3 pm to 7.30 am) was unlawful.

What remains is the question of damages. I have had regard to a number E of cases in the courts of this country where awards have been made in similar situations. In Tlharesegolo v The Attorney-General [2001] 2 B.L.R. 730 Collins AJ awarded a sum of P7 500 to the plaintiff for wrongful arrest and detention. The plaintiff was a police constable who had been molested and publicly humiliated by fellow police officers, and detained for about 22ø hours. The judgment contains information useful for police officers since it F deals with an apparent belief held by police officers that they are 'clothed with a legal entitlement to arrest and detain a suspected person without warrant for up to 48 hours'. As Collins AJ demonstrated, s 36(1) of the Criminal Procedure and Evidence Act (Cap 08:02) does not give the police an entitlement to detain for up to 48 hours. What it does do is to oblige the police to apply for a warrant when 48 hours starts to

expire. The first G provision in s 36 clearly stipulates that a person shall not be detained for a longer period than is reasonable.

In Raphoto v The Attorney-General (Civ Case 1664/05), unreported Tafa J awarded P10 000 to a plaintiff who had been roughly handled by police and detained for about four hours before being released. A more serious infringement on personal liberty occurred in Mosaninda v The Attorney-General [1994] B.L.R. 411, where Aboagye J awarded the sum of H P5 000 for the wrongful arrest and detention of the plaintiff for about two days.

The learned judge remarked at p 427 that the amount claimed was:

'on the lower side and would have awarded him a higher amount if the amount had been amended.'

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FOXCROFT JA

The unlawful detention had cost him his work as senior security officer at A the Debswana Diamond Company and he had suffered a good deal of humiliation, embarrassment and disgrace as he was moved around from place to place in handcuffs and leg-irons.

These cases provide a range of awards regarded in earlier decisions in this jurisdiction as appropriate. It appeared from the record that Mr Nnoi, who had also appeared in the court a quo, had calculated the appellant's B claim as a proportion of the award in Tlharesegolo's case (supra). Detention of 16½ hours amounted to P333.39 per hour using Tlharesegolo as the yardstick. This is a wholly inappropriate method of calculation, ignoring many warnings in the South African courts and elsewhere of slavish adherence to previous awards in similar cases. Other cases only provide a guide to those determining new awards and cannot be used as C yardsticks.

The sum of P5 599 suggested by Mr Nnoi in the court a quo elicited a favourable response from Ms Keaikitse, for the respondent, who said:

'If the court finds out that he suffered damages we would be tempted to go with Mr Nnoi's suggestion.'

In this court she appeared to take the same approach and did not suggest D a different figure.

The appellant testified that the cell in which he had spent the night was very dirty and smelly, and that the blankets were dirty as well. He could not sleep 'the whole night' and was not given access to a shower. Nor was he given any food. His main evidence on quantum of damages was that he had not been able to vaccinate cattle and goats at 'our farm' because of E the arrest and that about eight goats had died as a result. In his mind he was entitled to compensation for the loss of the goats, but even on his maximum figure for a goat of P2 000 the total would have been P16 000 and not P25 000. Understandably Mr Nnoi asked the court a quo to ignore his client's calculation. The pleaded claim was related to injuria suffered F through deprivation of personal liberty, not consequential patrimonial loss, quite apart from any other consideration.

In my opinion the amount which would adequately compensate the appellant for his unlawful arrest and the deprivation of his liberty is the sum of P5 000. Accordingly, it is ordered as follows:

(1) The appeal succeeds with costs. G

(2) The order of the court a quo dismissing the plaintiff's action is set aside.

(3) It is further ordered that the defendant shall pay damages for the unlawful arrest and detention of the plaintiff, to the plaintiff in the sum of P5 000, with interest at 10 per cent per annum from the date when this order should have been made by the High Court, namely 25 May 2008, and costs of suit. H

McNally AJP and Kirby AJA concurred.

Appeal upheld.