THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 342/2020

In the matter between:

MXOLISI MANANGA **FIRST APPELLANT**

THANDO NGQOYI **SECOND APPELLANT**

MAVA MANANGA **THIRD APPELLANT**

and

MINISTER OF POLICE **RESPONDENT**

Neutral citation: *Mxolisi Mananga and Others v Minister of Police* (Case no 342/2020) [2021] ZASCA 71 (04 June 2021)

Coram: ZONDI and MAKGOKA JJA, and EKSTEEN AJA

Heard: 7 May 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to have been 10h00 on 04 June 2021.

Summary: Criminal law and procedure – delict – unlawful arrest and detention – arrest, without a warrant, on a charge of assault GBH - s 40(1)*(b)* of the Criminal Procedure Act 51 of 1977 – whether arresting officer held a reasonable suspicion that appellants had committed an offence listed in Schedule 1 to the Act - assault, when a dangerous wound is inflicted – what constitutes a dangerous wound.

ORDER

On appeal from: Eastern Cape Division of the High Court, Mthatha (Ndamase AJ sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Eksteen AJA (Zondi and Makgoka JJA concurring)

[1] The appellants were arrested on 20 March 2015 by Warrant Officer Siphiwo Qunta (Warrant Officer Qunta) of the South African Police Service (SAPS) without a warrant, on charges of assault with intent to do grievous bodily harm (assault GBH) and they were detained until 23 March 2015. They contended that their arrest and subsequent detention was wrongful and unlawful and they issued summons against the respondent (the Minister) in the Eastern Cape Division of the High Court, Mthatha (the high court), for damages. The Minister admitted that the appellants were arrested without a warrant, but denied that it was wrongful or unlawful. He contended that the arrests had been effected 'in terms of s 40(1)*(b)* of the Criminal Procedure Act 51 of 1977 as they were [reasonably] suspected of having committed an offence referred to in Schedule 1 (assault, where a dangerous wound is inflicted)'. The high court upheld the Minister's defence and dismissed the appellants' claim. The appeal is with leave of this Court and

it was considered without oral argument, in terms of s 19*(a)* of the Superior Courts Act, 10 of 2013.

[2] The events which gave rise to the arrests were as follows. On 15 March 2015, in the Ncora administrative area, in the district of Cofimvaba, in the Eastern Cape, Ncedile Duel Sambunjana (the complainant) was allegedly assaulted by a number of assailants, including the appellants. He was severely beaten and sustained, *inter alia*, five lacerations on his head and a fractured wrist. As a result of his injuries he proceeded first to the nearby clinic to seek medical assistance, from where he was transported by ambulance to the Cofimvaba Hospital. There his head wounds were sutured and he was transferred to a hospital in East London for the assessment of his wrist. At the East London hospital his wrist was immobilised in a plaster of Paris cast before he was again returned to Cofimvaba. In Cofimvaba he was admitted and kept in hospital until 19 March 2015. Upon his discharge, he proceeded first to a doctor to obtain a J88 medical report,[1] and then to the SAPS to lay a charge of assault GBH. A docket was opened in which the complainant recorded these events and identified his assailants.

[3] Warrant Officer Qunta, who was stationed at the Cofimvaba Police Station, reported for duty on 20 March 2015 when the docket was allocated to him for investigation. He perused the contents of the docket and, as a result thereof, proceeded to Ncora to interview the complainant. He found the complainant 'severely injured'[2] and he observed the wounds to his head and the broken arm. During the interview the complainant identified further

[1] The standard medical form commonly utilised in police investigations.
[2] The terminology used by Qunta in evidence.

witnesses to the assault and, accordingly, Warrant Officer Qunta proceeded to interview them and to take statements from them. Thereafter, he arrested the appellants and charged them, accordingly. On Monday 23 March 2015 the prosecutor at Cofimvaba Magistrate's Court (the magistrate's court) decided to release the appellants until the other identified assailants had been arrested. They were subsequently traced and also charged. At the time of the hearing of the appellants' civil claim in this matter in the high court, the criminal proceedings in the magistrate's court were partly heard.

[4] The basis of the appellants' case, as pleaded, was that their arrest and subsequent detention was unlawful because the arrest was effected without a warrant and without 'justifiable cause in law'. Thus, the parties agreed at the pre-trial meeting that the only issues for determination were:

'1. Whether the members of [the SAPS] had [reasonably] suspected that the plaintiffs had committed an assault, where a dangerous wound was inflicted. . . .

2. Whether the plaintiffs were wrongfully and unlawfully arrested by members of [the SAPS].

3. Whether the detention of the plaintiffs which flows from the arrest by members of the [SAPS] was wrongful and unlawful and therefore had no justification.'

[5] As I have explained, the Minister admitted the arrests, and subsequent detention, and contended that the arrests were justified and therefore lawful, in terms of s 40(1)*(b)* of the Criminal Procedure Act (the CPA). Section 40(1)*(b)* provides:

'(1) A peace officer may without warrant arrest any person-

. . .

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.'

An assault (or an assault GBH) is not listed, as such, in Schedule 1. Schedule 1 provides for an arrest without a warrant in respect of an assault only when a dangerous wound has been inflicted.

[6] The Minister's plea is a confession and avoidance, which attracts the onus to prove the justification pleaded, that is, the lawfulness of the arrests in terms s 40(1)*(b)*, on a balance of probabilities.[3] In order to discharge this onus the Minister was required to establish: (i) that Warrant Officer Qunta is a peace officer; (ii) that he in fact entertained a suspicion; (iii) that the suspicion which he held was that the suspects (the appellants) had committed an offence which is referred to in Schedule 1 (in this case, an assault in which a dangerous wound had been inflicted); and (iv) that the suspicion rested upon reasonable grounds.[4] Once these jurisdictional facts have been established the arrestor has a discretion whether or not to carry out an arrest.[5] In the present matter the exercise of the discretion to affect the arrest was not in dispute.

[7] Warrant Officer Qunta was a peace officer by virtue of his office. As I have said, a charge of assault GBH had been made against the appellants and a docket had been opened. He had before him the content of the docket which included a statement by the complainant, in which he recounted his ordeal, and a medical report of a doctor reflecting the injuries which he had sustained. Having perused the docket, and acquainted himself with the contents thereof,

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[3] *Mabaso v Felix* [1981] 2 All SA 306 (A); 1981 (3) SA 865 (A); *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) at 589E-F; *Lombo v African National Congress* [2002] 3 All SA 517 (A); 2002 (5) SA 668 (SCA) para 32.

[4] *Duncan v The Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H (*Duncan*); *Minister of Safety and Security v Swart* [2012] ZASCA 16; 2012 (2) SACR 226 (SCA) para 20.

[5] *Duncan* at 818H-J; *Minister of Safety and Security v Sekhoto and Another* [2010] ZASCA 141; [2011] 2 All 157 (SCA) paras 6 and 28.

he proceeded to interview the complainant and he observed his injuries. The complainant, as I have said, referred him to further witnesses and he proceeded to interview them. He manifestly held a suspicion that the appellants had perpetrated the assault upon the complainant.[6] However, s 40(1)*(b)* of the CPA requires more. On behalf of the appellants, it was submitted that the Minister had failed to establish that Warrant Officer Qunta had reasonable grounds to suspect that a dangerous wound had been inflicted in the assault.

[8] As adumbrated earlier, an assault GBH, which is the offence of which the appellants had been charged, is not listed in Schedule 1 of the CPA as an offence for which an arrest without a warrant may be justified by s 40(1)*(b)*. Such an assault may be brought within the ambit of Schedule 1 of the CPA when a 'dangerous wound' has been inflicted. In respect of an assault, the section requires the Minister to establish, on a balance of probabilities, that the arresting officer held the suspicion, on reasonable grounds, that such a wound had been inflicted. It is not necessary to establish as a fact that the inflicted wound was dangerous.[7] 'Suspicion' implies an absence of certainty or adequate proof. Thus, a suspicion might be reasonable even if there is insufficient evidence for a *prima facie* case against the arrestee.[8]

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[6] This court has endorsed and adopted Lord Devlin's formulation of the meaning of 'suspicion': 'Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; "I suspect, but I cannot prove". Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end.' *Duncan* at 819I; *Minister of Law and Order v Kader* 1991 (1) SA 41 (A) at 50H-I; *Powell NO and Others v van der Merwe N.O and Others* [2005] 1 All SA 149 (SCA); 2005 (5) SA 62 (SCA) para 36.

[7] *Rex v Jones* 1952 (1) SA 327 (E) at 332 (*Jones*).

[8] *Duncan* at 819I – 820B.

[9] On behalf of the appellants, it was contended that the fracture to the wrist was not a wound as envisaged in the schedule. In the interpretation of a statutory provision language must be considered in the context in which it appears, in the light of the ordinary rules of grammar and syntax. Where a provision is open to more than one interpretation, a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results.[9] Whilst a 'wound' refers more often to a cut or laceration penetrating the skin, it is not necessarily so. It is described in *The New Shorter Oxford Dictionary* (1993) as 'an injury to body tissue caused by a cut, a blow, hard or sharp impact . . .; an external injury'.

[10] Applying the established approach to interpretation, no logical reason commends itself for excluding an arrest without a warrant where a dangerous injury (in the sense of endangering life or limb) has been inflicted to the body of the victim with a blunt instrument, while permitting it when the injury is inflicted with a sharp object causing a laceration. It is the potential consequence of the injury which justifies an arrest without a warrant. Therefore, both the fracture of the wrist and the lacerations to the head of the complainant were wounds as envisaged in the schedule.

[11] I turn to consider whether the wounds were dangerous, as contemplated in the schedule. In *Jones*, Jennett J remarked:

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[9] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

'It seems to me that by a dangerous wound is meant one which itself is likely to endanger life or the use of a limb or organ. The officer effecting the arrest has only to have reasonable grounds for suspecting that such a wound has been inflicted.'[10]

Whether he had reasonable grounds for his belief must be approached objectively.[11]

[12] The high court held that the Minister had discharged the onus resting on him. Regrettably, the presentation of the case on behalf of the Minister left much to be desired. As adumbrated earlier, Warrant Officer Qunta had in his possession a docket including a statement, presumably taken on oath, from the complainant, and a J88 form. These documents, on their own, could have gone some way to discharging the onus resting on the Minister, yet, astonishingly, neither was introduced in evidence.

[13] Nevertheless, Warrant Officer Qunta testified that he first acquainted himself with the contents of the docket. It related to a charge of assault GBH and it identified the appellants, amongst others, as the perpetrators. He then proceeded to Ncora to interview the complainant because he appreciated that he could not arrest the appellants without an investigation to verify the information contained in the docket. Upon seeing the complainant, he perceived that he had been 'severely injured' and noted the fractured arm and the injuries to his head. Warrant Officer Qunta did not describe the injuries which he observed in any finer detail, but, as I have said, the complainant testified that he had sustained five lacerations to his scalp, which had been

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[10] *Jones* at 236; *Bobbert v Minister of Law and Order* 1990 (1) SACR 404 (C) at 409E-H; *De Klerk v The Minister of Police* [2018] ZASCA 45; [2018] 2 All SA 597 (SCA) (*de Klerk*) para 10.

[11] *R v Van Heerden* 1958 (3) SA 150 (T) at 152D-E; *Wiesner v Molomo* 1983 (3) SA 151 (A) at 159B.

sutured, and that his wrist had been fractured and immobilised in a plaster cast. These are the injuries which Warrant Officer Qunta observed.

[14] The complainant testified that, following the assault, he bled profusely and was 'dehydrated', to the extent that he was unable to speak, and that he was admitted to hospital for approximately four days. It is not apparent from the evidence of Warrant Officer Qunta that the content of the docket revealed the extent of the blood loss sustained. However, in explaining the reason for the arrest, Warrant Officer Qunta testified that he decided to arrest the appellants as a case of assault had been opened and that the complainant had been detained in hospital for a period of four days. He considered it imperative to look for the assailants by virtue of the 'nature of his injuries'.

[15] As I have explained, it was the appellants' contention, that the evidence did not establish that Warrant Officer Qunta had reasonable grounds to suspect that the wounds were dangerous. Warrant Officer Qunta, so the argument went, did not refer in his evidence to Schedule 1 of the CPA nor to s 40(1)*(b)* thereof and did not state that '[he] arrested the appellants because [he] had a suspicion that the wounds were dangerous'. He could not have determined, so the argument proceeded, from merely looking at the complainant that he had sustained dangerous wounds, and he could not have satisfied himself, as a medical officer could, that the wounds were dangerous.

[16] The appellants misconstrue the nature of the inquiry. It is not required of a police officer to examine the wounds of a victim, as a doctor would, nor would that be appropriate. He is merely required to have regard to the facts and circumstances at his disposal, and, where reasonably possible, to satisfy

himself of the merit thereof. If, on a consideration thereof, there are reasonable grounds to suspect that a dangerous wound has been inflicted, he is entitled to arrest the suspect without first obtaining a warrant.

[17] The argument advanced on behalf of the appellants stemmed from *Jones* and *de Klerk*. In *Jones* a member of the public had witnessed a fracas in which Jones had assaulted a young girl by striking her with a sjambok. She sustained five abrasions or bruises on the arms, a linear abrasion, 3 inches long, on each breast and a linear abrasion-bruise, 3 inches long, on the upper lip. The witness noted that she was bleeding from the mouth and summoned the police. A constable hastened to the scene where Jones was pointed out to him and was arrested. The complainant had not yet reported the matter; no charge had been made; and a docket had not been opened. The constable had no evidence on oath; had not seen the complainant; and had merely the say so of the witness that Jones had assaulted the girl with a sjambok. Jennett J concluded that: 'He had the right to arrest [Jones] only if he suspected that the appellant had committed one of the offences mentioned in the first schedule to Act 31 of 1917[12] and it is clear that that question was not tested in evidence'.[13] The State had accordingly failed to establish the jurisdictional facts required to justify an arrest without a warrant.

[18] In *de Klerk*, the Minister did not rely on an assault, where a dangerous wound had been inflicted, as justification for the arrest. De Klerk had contended that the complainant in that matter had owed him money. He proceeded to confront the complainant in his office and a scuffle ensued. In

[12] A predecessor to the CPA, in which s 31 read in terms identical to s 40(1)*(b)* of the CPA.
[13] *Jones* at 237.

the course of the scuffle, de Klerk grabbed the complainant and pushed him against the wall causing him to bump into the frame of a wall picture. The glass broke and cut the complainant's back. The cut to the complainant's back was sutured and a medical report was issued. The complainant laid a charge of assault and de Klerk was arrested. De Klerk sued for damages for wrongful arrest. No medical evidence was tendered, the report was entirely illegible, and, because no reliance had been placed on a 'dangerous wound' in the justification pleaded, the nature of the injury was not canvassed in evidence. No reason was demonstrated for the arresting officer to have suspected that the wound may have been dangerous, as that terms have been interpreted in case law (ie a wound endangering life or limb).

[19] The present matter is markedly different. As I have said, Warrant Officer Qunta appreciated that he was not entitled to arrest the appellants until he had satisfied himself that there were reasonable grounds to suspect that the injuries inflicted were dangerous. He had every reason to suspect that the injuries which he observed had been inflicted by the appellants in the alleged assault. The lacerations which he observed were to the scalp. Whether they were inflicted by sharp objects or by blunt force, Warrant Officer Qunta perceived these injuries to be severe. The application of such force to the head, per definition, suggests that the injuries were not trivial and the information at the disposal of Warrant Officer Qunta was that the complainant had been hospitalised for a period of four days in consequence of his injuries. Warrant Officer Qunta observed, too, the injury to the complainant's arm, which had been immobilised in a plaster of Paris cast, and which the complainant advised him, had been fractured. It was an injury which patently endangered the use of a limb.

[20] The question, whether the suspicion of the person affecting the arrest is reasonable, must, as I have said, be approached objectively. Accordingly, the circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable person to form the suspicion that the arrestee had committed a first schedule offence.[14] I agree with Ndamase AJ, that the information before Warrant Officer Qunta in the docket, coupled with his own observations of the injuries, which were objectively proved, demonstrated an actual suspicion, founded upon reasonable grounds, that an assault, in which dangerous wounds had been inflicted, had been committed. The Minister had established that there were reasonable grounds to suspect that both the injuries to the head and the fracture of the wrist, which endangered the use of the limb, constituted dangerous wounds. The complainant's evidence in respect of the nature of his injuries was not challenged and Warrant Officer Qunta was not cross-examined at all. The arrests and subsequent detention were therefore lawful.

[21] In the result, I make the following order:

The appeal is dismissed with costs, including the costs of two counsel.

J EKSTEEN

ACTING JUDGE OF APPEAL

[14] Du Toit et al *Commentary on the Criminal Procedure Act* (2020) Chapter 4 at 3 (Juta electronic version); *R v Van Heerden* 1958 (3) SA 150 (T) at 152D-E.

Appearances:

For Appellants:	M Jozana
Instructed by:	B Makade, Mthatha
	Webbers, Bloemfontein.
For Respondent:	T M Ntsaluba SC (with N Nhantsi)
Instructed by:	The State Attorney, Mthatha
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