

DANIEL CHIZOKA MBANDANGOMA v THE ATTORNEY-GENERAL (1979)
Z.R. 45 (H.C.)

HIGH
HADDEN,
23RD FEBRUARY, 1979
1976/HP/768

COURT
J.

Flynote

Damages - Quantum - False imprisonment - Plaintiff detained, released on police bond and required to report to police on four subsequent occasions.

Criminal law and procedure - Arrests - When can be effected .

Criminal law and procedure - Police bond - Use of for investigations Impropropriety of.

Headnote

The plaintiff was detained on the 24th December 1973, and released shortly thereafter on police bond. He was however required to and did report to the police and at court on at least four subsequent occasions when he was eventually told that further proceedings were being discontinued. The attendance to the police had been arranged to coincide with the occasions when the police wished to see the plaintiff for purposes of investigations.

Held:

- (i) In order to justify the arrest of the plaintiff the defendant must show that at the time of the arrest, the arresting officer had reasonable suspicion that the plaintiff had committed the offence with which he was charged.
- (ii) The arrest of the plaintiff was unlawful. The police can only arrest persons for offences and have no power to arrest anyone in order to make inquiries about him.
- (iii) It is improper for the police to detain persons pending further investigations without bringing them before court as soon as practicable, but it is equally improper to require persons released on bond to present themselves at the police station for the same purpose.

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- (iv) An award of K750 for unlawful imprisonment would be given.

Cases referred to:

- (1) Wiltshire v Barrett, [1966] 1 Q.B. 312.
- (2) Shauban Bin Hassien and Others v Chong Fook Kan and Another [1969] 3 All E.R. 1626.
- (3) R. v Houghon and R. v Franciosy, The Times, 23rd June, 1978.

Legislation referred to:

Criminal Procedure Code, Cap. 160 s. 33.

Magistrates Courts Act, 1952 (England) s. 38 (4).

For the plaintiff:

N. Kawanambulu, Shamwana & Co.

For the respondent: R.C. Nzerem, State Advocate.

Judgment

HADDEN, J.: The plaintiff claims damages for trespass to premises and false imprisonment following his detention by the police at Mongu on the 24th December, 1973.

Detective constable Simubemba received information as a result of which he instituted enquiries which resulted in the plaintiff being arrested on a charge of theft by public servant. After receipt of the information Simubemba together with other police officers visited a shed near Mongu which contained building materials which the plaintiff intended to use in the construction of a house. Further enquiries were made by the police and at 1530 hours on the 24th December 1973, the plaintiff was arrested and then released on police bond in the sum of K30. The plaintiff subsequently on several occasions attended court and at the Mongu Police Station on the instructions of the police and in due course was advised that all further proceedings were being discontinued.

In order to justify the arrest of the plaintiff the defendant must show that at the time of the arrest the arresting officer had reasonable suspicion that the plaintiff had committed the offence with which he was charged. Lord Denning, M.R. , in *Wiltshire v Barrett*, (1) when considering the arrest of a plaintiff on the ground that he was unfit to drive through drink, at p. 322 valid:

"I prefer to approach the case in this way: the constable is justified if the facts, as they appeared to him at the time, were such as to warrant him bringing the man before the court on the ground that the man was unfit to drive through drink. In other words, such as to warrant him thinking that the man was probably guilty. It is for the jury to find, in case of dispute, what were the facts as they appeared to the constable at the time, that is to say, the grounds on which he formed his option; and then it is for the judge to rule whether those facts were such as to warrant him forming that option, that is to say, whether those grounds, considered objectively, afforded reasonable cause."

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Reasonable suspicion cannot be equated with prima facie proof as there are many circumstances which must be taken into consideration. *Shaaban Bin Hussien and Others v Chong Fook Kan and Another* (2), was a decision of the Privy Council in an appeal from the Federal Court of Malaysia. An occupant of a car was killed and another injured when a log of wood fell off a passing lorry. The next day at about 0900 hours the respondent, the lorry driver, and his attendant were arrested for the offence of reckless or dangerous driving causing death. During the day of their arrest they were questioned by the police who decided that the driver and attendant had been at the scene of the accident at the relevant time. The police suspected that their alibis were false. It was held that at the time of arrest it was reasonable for the police to suspect that one of the persons arrested was the driver of the lorry from which the log of wood fell, but the police did not at the time have reasonable suspicion that the driver was driving recklessly or dangerously. It was only when an alibi was given, which the police thought was false, that it could be said that a reasonable suspicion arose which would have justified the arrest. The court found that the arrest was premature. At p. 1629 Lord Devlin said:

"In any case of wrongful arrest it is important to identify at the outset the precise time of arrest, not only for the purpose of art. 5, cl. 3, of the Constitution, which provides that an arrested person shall be informed as soon as may be thereafter of the grounds of his arrest, but also because it is the time when the existence of a reasonable suspicion must be proved." and at p. 1630:

"Suspicion in its ordinary meaning is 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. When such proof has been obtained, the police case is completed it is ready for trial and passes on to its next stage. It is indeed desirable as a general rule that an arrest should not be made until the case is complete. But if arrest before that were forbidden, it could seriously hamper the police. To give power to arrest on reasonable suspicion does not mean that it is always or even ordinarily to be exercised. It means that there is an executive discretion. In the exercise of it many factors have to be considered besides the strength of the case. The possibility of escape, the prevention of further crime and the obstruction of police enquiries are examples of those factors with which all judges who have had to grant or refuse bail are familiar. "

Simubemba was the officer investigating the report; that the plaintiff had stolen building materials belonging to the Public Works Department. Following the receipt of the report he arranged for the Public Works Department Stores Officer at Mongu to inspect the material and the latter confirmed that some of the property belonged to his department. This occurred either on the 20th or the 21st December, the discrepancies in the date not being material. On the 21st a statement was then taken from

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an Executive Engineer of the Public Works Department and further statements were obtained before the plaintiff was arrested on the 24th after he had made a statement under warn and caution and had shown the police a voucher which he claimed authorised him to have possession of a water tank which was part of the suspected stolen property. At first Simubemba believed the information he had received from his informer and said that the reason for doing so was because he saw the building material at the site the plaintiff was erecting his house. Simubemba arrested the plaintiff before he had completed his investigations because, as he said, he feared the plaintiff might interfere with them and because the plaintiff had not satisfied him that he, the plaintiff, was the owner of the property. When he examined fifty-one corrugated iron sheets Simubemba said he noticed they were old, and he disbelieved Mvula who had claimed that the iron sheets belonged to Government. Simubemba then realised that Mvula had not been telling the truth. Another reason why Simubemba did not accept Mvula's word was because the plaintiff had produced proof that some of the building material did in fact belong to him. Simubemba preferred the information that he had received from his informer to that received from Mvula, but became hesitant to believe even that provided by his informer when the plaintiff produced documentary evidence to support his claim that ten of the eleven doors found at the site were his. Simubemba's inquiries with regard to the alleged stolen property became limited to the eleven doors and one water tank, and finally to one door and the tank. Finally Simubemba said that after the plaintiff had been released on police bond he continued with his investigations and periodically altered the return date on the bond to

coincide with the occasions when he wished to see the plaintiff again during the course of the investigations that were still continuing.

When Simubemba first saw the building material, and having already received certain information, he had cause to suspect that it could have been stolen. This was confirmed by Mvula. After examining the material Simubemba disbelieved Mvula, and after having been shown certain documents by the plaintiff, Simubemba was hesitant to accept the truth of the original report. The original report had concerned a large quantity of material; the investigation then proceeded with regard to the eleven doors and the tank, and finally it was limited to one door and the tank. The plaintiff had said that the tank had been loaned to him by the Senior Stores Officer at the Public Works Department, Munalula, and that he had promised to pay for the door by the end of that month, that is December 1973. Munalula was not in Mongu at the time the plaintiff was arrested but made a statement to the police on his return on the 2nd January.

The authenticity of the information Simubemba had received from both Mvula and the informer were, on Simubemba's own admission, of doubtful veracity. Simubemba had satisfied himself before the plaintiff's arrest that the information he had received was materially unreliable or false. He nevertheless proceeded to arrest the plaintiff because, as he said, he thought the plaintiff would interfere with the investigations and

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because the plaintiff had failed to satisfy him that he was the owner of the remaining property. The first reason given for the plaintiff's arrest cannot be true because the plaintiff was released on bond shortly thereafter. With regard to the second reason, the test is whether Simubemba had reasonable suspicion that the one door and tank had been stolen. Not only had Simubemba good reason to question the reliability of his information, but no report had been received from the Public Works Department that any of its property was missing, and the plaintiff had given an explanation as to how it came into his possession. When the investigations were concluded several days after the plaintiff's arrest, the prosecutor decided not to institute a prosecution and the police docket was closed by the officer-in-charge.

If Simubemba did not think Mvula was telling the truth and was hesitant to accept the information he had received from his informer, these facts were not such as to warrant him forming an opinion that the plaintiff had probably stolen the door or tank. The reasonableness of his suspicion with regard to most of the building material had proved to be unfounded and there was in the circumstances all the more cause to suspect that the rest of the information he had received was similarly unreliable.

The court finds that the arrest of the plaintiff on the 24th December, 1973, was not based on reasonable suspicion and was therefore, unlawful.

The court considers it expedient to comment on the use of a police bond for the purpose of securing the periodic attendance of a person charged with an offence at a police station while investigations are proceeding. The prescribed form requires the person charged to appear before a specified court, and not at a police station, on a stated date and time and on any other or subsequent date required

by the court, and not by the police, to answer the charge. Under s. 33 of the, Criminal Procedure Code the release on bond of a person arrested without a warrant is mandatory if it does not appear practicable to bring the person concerned before an appropriate competent court within 24 hours of his being taken into custody' unless the offence is one of a serious nature. Where a person is retained in custody he must be brought before such court as soon as practicable. Section 33 reads:

"(1) When any person has been taken into custody without warrant for an offence other than an offence punishable with death, the officer in charge of the police station to which such person shall be brought may, in any case and shall, if it does not appear practicable to bring such person before an appropriate competent court within twenty-four hours after he is so taken into custody, inquire into the case, and, unless the offence appears to the officer to be of a serious nature, release the person, on his executing a bond, with or without sureties, for a reasonable amount, to appear before a competent court at a time and place to be named in the bond; but, where any person is retained in custody, he shall be brought before competent court as soon as

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practicable. Notwithstanding anything contained in this section, an officer in charge of a police station may release a person arrested on suspicion on a charge of committing any offence, when, after due police inquiry, insufficient evidence is, in his opinion, disclosed on which to proceed with the charge.

(2) In this section, 'competent court' means any court having jurisdiction to try or hold a preliminary inquiry into the offence for which the person has been taken into custody."

Section 38 (1) of the Magistrates Courts Act, 1952 provides:

"Where a person is taken into custody for an offence without warrant and is retained in custody, he shall be brought before magistrates' court as soon as practicable."

The Court of Appeal in *R. v Houghton* and *R v Franciosy* (3), dealt with a case where the accused had been detained for four days during which period he was not permitted to communicate with anyone, while police investigations were being, carried out. Lawton, L.J., in delivering the judgment of the court pointed out that the police can only arrest persons for offences and had no power, save under the, Prevention of Terrorism (Temporary Provisions) Act, 1976, to arrest anyone so that they could make enquiries about him. Having made an arrest for a specific offence, they could hold the arrested person in custody while they made inquiries; but when they had enough evidence to prefer a charge they should do so without delay and comply with s. 38 (4) of the 1952 Act. Not only is it improper for the police to detain person pending further investigations without bringing them before a court as soon as practicable but it is equally improper to require persons released on bond to represent themselves at a police station for the same purpose.

The plaintiff also claims damages for trespass following the police search of the plaintiff's shed in which the building material was being stored. The evidence shows that the plaintiff co-operated with the police throughout the period they were investigation the alleged offence; he produced the documentary evidence he could to show that the building material was rightfully in his possession

and the evidence of the police witnesses was that the plaintiff permitted them to inspect the material in the shed. On the evidence the court is not satisfied that it has been established that the plaintiff did not willingly permit the police to search the premises in question and for this reason the claim in trespass fails.

The plaintiff was detained at 1530 hours on the 24th December 1973, and released shortly thereafter on police bond. He was however required to and did report to the police and ad court on at least four subsequent occasions when he was eventually told that further proceedings were being discontinued. The evidence does not show that the police acted in contumelious disregard of the plaintiff's rights and will not therefore award him exemplary damages. The court feels that a proper award in damages for the unlawful imprisonment of the plaintiff would be the sum of K750 and judgment is awarded in favour of the plaintiff for that amount.

Judgement for the plaintiff
