

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

Case No: A5035/08

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

8 May 2012

EJ Francis
EJ FRANCIS

In the matter between

CHARLES SHILA

First Appellant

MALEKA MGANGA

Second Appellant

PAULOS MAKOMBOTHI

Third Appellant

and

THE MINISTER OF SAFETY AND SECURITY

First Respondent

CAPTAIN BOTHA

Second Respondent

J U D G M E N T

FRANCIS J:

1. The three appellants were arrested on 12 October 2003 by the second respondent, Captain Botha on suspicion of them having taken part in an armed robbery or for being accomplices in the said robbery. They and other suspects were arrested, without warrants of arrest, and were detained until 31 March 2004 when the charges against the appellants were withdrawn.

2. The appellants instituted a claim for wrongful arrest, detention and malicious prosecution against the Minister of Safety and Security and Captain Botha. Their claims were consolidated and were dismissed by Goldblatt J, having found that the arresting police officers had sufficient reason to reasonably suspect the appellants of being accomplices in a robbery that had taken place at the premises of Bell Equipment in Jet Park.

3. The appeal is with leave of the court *a quo*. Several grounds of appeal have been raised. It is not necessary to repeat those grounds of appeal here since the crucial issue that arises in this appeal is whether Captain Botha, the arresting officer, had a reasonable suspicion that the appellants were accomplices in the robbery.

4. Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (the CPA) deals with arrests without a warrant, and provides as follows:

“40. Arrest by peace officer without warrant

(1) *A peace officer may without warrant arrest any person –*

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

5. The following essential jurisdictional facts have to be present to justify an arrest without a warrant:
 - 5.1 the arresting officer must be a peace officer;

 - 5.2 the arresting officer must entertain a suspicion;

5.3 the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and

5.4 the suspicion must be based on reasonable grounds.

(*Duncan v Minister of Law & Order* 1986 (2) SA 805 (A) at 818G-H, and *Minister of Safety & Security v Sekhoto & another* 2011 (1) SACR 315 (SCA) at paragraph 6.)

6. It is trite that the *onus* rests on the arresting officer to prove the lawfulness of the arrest. The reasonableness of the suspicion of an arresting officer acting under section 40(1)(b) of the CPA, must be approached objectively. The question, therefore, is whether any reasonable person, confronted with the same set of facts that Captain Botha was confronted with, would form a suspicion that the appellants had committed a robbery, which is a Schedule 1 offence. In other words, the issue in this appeal is whether, based on the facts known to Captain Botha, at the time when he observed the appellants on 12 October 2003, in Griffiths Road, reasonably suspected that they were part of a group intending to rob Bell Equipment.

7. The salient facts of this matter are as follows. Captain Botha was contacted by employees of a security company who had received information that a robbery had been planned at Bell Equipment on 6 October 2003. As a result of the information Captain Botha arranged with members of the police and the security company to keep the premises of Bell Equipment under surveillance. Later that day, information was received from an informant that the robbery was no longer going to take place since the robbers had failed to secure trucks for the robbery. The police surveillance was then called off. Later in that week Captain Botha received information that the robbery was now to take place during the evening of 12 October 2003, and that three trucks were to be used in the robbery.

8. On 12 October 2003, Captain Botha arranged with members of the South African Police Services (SAPS) flying squad and dog unit to provide the necessary back up. He as well as employees of the security company positioned themselves at a strategic point to observe Bell Equipment's premises. Whilst observing the premises, they received a telephonic call from a person within the premises informing them that four robbers had arrived in a truck and that they were busy loading tyres in a truck, by using a forklift. Shortly thereafter they received a call stating that the robbers were leaving the premises in a truck. It was at this point in time that Captain Botha gave instructions to descend on the robbers. He instructed the members of the flying squad and dog police unit to assist. Whilst Captain Botha and the security company employees were travelling towards the truck, they observed two trucks that were about to turn into Beryl Street which leads to the Bell Equipment premises. The truck coming out of the premises stopped alongside the first truck, and after realising that the police were approaching them, decided against turning into Beryl Street. Captain Botha was travelling in an unmarked police vehicle and the three security employees were travelling in a double cab *bakkie*. They drove across Griffiths Road, in the opposite direction, to prevent the trucks from getting away. They were able to prevent the truck that came out of the premises as well as one of the other trucks from getting away. One of the trucks almost collided with them and sped away at high speed. A shoot out ensued and members of the flying squad and dog unit arrived on the scene with police flashing lights on. They pursued the fleeing truck and eventually stopped it some distance away. The occupants were taken to where the other two trucks had been brought to a standstill. The suspects were arrested and charged with robbery. The charges were later withdrawn against the appellants and a fourth suspect who was also a plaintiff in this matter, but who died before the trial.

9. The appellants' version was that the second and third appellants were travelling behind a male customer in order to collect furniture somewhere in Jet Park. En route the truck broke down. The customer waited and then drove off. The second appellant called his employer who arranged for a mechanic to come and assist him. The mechanic, the first appellant, arrived in a truck and managed to repair it. The first appellant got into the truck that had broken down and they decided to return to Yeoville, where they had come from. They initially led the way but because the truck could not travel fast, decided to follow the truck that had come to assist them. Two vehicles approached at high speed. They were unable to get away but the second truck did sped away. A shoot-out ensued. They were ordered out of their truck and firearms were pointed at them. Their cellular telephones were inspected and nothing incriminating was found on them. They were accused of robbery and were arrested and detained. Another truck was stopped by the police, which was loaded with tyres. They informed the police that they did not know the occupants of the truck on which tyres were found but knew the occupants of the truck that had fled, and were later arrested. Their explanation that the truck had broken down and had been fixed fell on deaf ears. The charges were later withdrawn against them.
10. There was understandably some measure of confusion about who was found in which truck. The third appellant said that he was found in the truck that had broken down, of which the second appellant was the driver. He testified that the third person in the truck, in fact was the first appellant, who had been summoned to assist in repairing the truck. The police witnesses all maintained that third appellant was found in the truck that had evidently been involved in the robbery at Bell Equipment. The court *a quo* found that the respondents' version, on this aspect, was contradictory and found that the second appellant was not in the truck that had come out of Bell Equipment's premises.

11. It is not necessary for purposes of this judgment to decide whether the third appellant was in the truck that had robbed the premises. There are, however, strong indications that he was in that truck since the evidence indicated that he was not employed by the owner of the truck that was driven by the second appellant. He testified that he was picked up at a certain point and that he was asked to accompany the second appellant. The second appellant, however, did not in his evidence mention exactly where he had picked him up.
12. The court *a quo* found that the robbery at Bell Equipment had been proved on a balance of probabilities and that some of the robbers had left the premises in a closed truck which stopped at the intersection of Beryl Street, leading from Bell Equipment and Griffiths Road. The learned Judge further found, on the facts that two closed trucks slowly and clearly together, attempted to turn up into Beryl Street, just before the police arrived on the scene. When the police arrived at the scene, the leading truck drove away at high speed and failed to stop even though it was clearly being pursued by the police. The three appellants were in the truck that was stopped and none of them then, or thereafter, explained why the empty truck was travelling in Griffiths Road. It was reasonable to believe that the truck which had failed to stop and sped away did not do so for an innocent reason and that the occupants of the accompanying truck therefore must similarly not have been mere innocent bystanders. After their arrest neither the appellants nor the owners of the two trucks explained to the police the reason for the two trucks being in Griffiths Road. The court *a quo* found that the facts I have alluded to, sufficiently established a reasonable suspicion of the appellants being accomplices in the robbery. I can find no fault with the reasoning. The court *a quo* further refrained from making any findings as to the truth or otherwise of the reasons given by the appellants for their presence in Griffiths Road, save to remark that they adduced no independent or objective evidence in support of their version of events, nor did they put forward this version at the time when

one would have expected them to do so. The appellants alleged that they had given an innocent explanation but this was rejected by the learned Judge. Finally, the learned Judge held that nothing further transpired after the arrests of the appellants, which could disturb the original reasonable suspicion which existed and that their continuing detention accordingly, was based on reasonable grounds.


13. The appellants' version was that they had informed Capain Botha at the scene of the reason for their presence there which is that their truck had broken down and that it was repaired by a mechanic who arrived with the truck that had fled the scene. The explanation in my view was palpably false. Their evidence moreover, is marked by major discrepancies concerning *inter alia* the identity of the person whose furniture they supposedly were supposedly to collect. None of them were moreover able to give exact details concerning the mysterious customer. One would have expected the "customer" having been present when the truck broke down, at least, to have stopped and make enquiries. There was no evidence to this effect. On the appellants version he just drove off. The third appellant was not employed by the owner of the truck. On his version he had to wait at a certain point to be collected, before delivery of the furniture. The second appellant did not in his evidence mention where he had met the third appellant on his way to collect the furniture. The third appellant, likewise, did not mention where he was picked up. As already indicated, it would appear that he was a passenger in the truck that had been involved in the robbery. On the evidence as a whole there was simply no acceptable explanation given for their presence in the vicinity of Bell Equipment's premises, at that point in time when the robbery was executed. It is moreover clear from the evidence that the appellants knew the driver of the truck that sped off. They could not get away as their truck still had mechanical problems. The appellants must have seen the two marked vehicles that had arrived on the scene with police lights switched on. In this regard the second appellant testified:

'Why did you stop right there?...My car had a mechanical problem that it why it could not move very fast. My only option was to stop, but I was a bit shaken because I saw them shooting at Hussein.

Now if your motor vehicle did not have a mechanical problem would you have stopped?...I would not have stopped.

Why not? .. Because they were firing shots and that is why I should not have stopped.'


14. Quite understandably the initial reaction of a driver confronted by unknown people travelling in unmarked vehicles would be to get away. The position would be different once the driver knows that the police are in pursuit: there would simply be no reason to flee unless, of course, a possible arrest is anticipated, which is exactly what happened in this case.
15. The probabilities arising from the facts of this matter clearly favour the version of the police witnesses: the information furnished by the informant to Captain Botha turned out to be correct. The initial plan was called off and it later did in fact occur on 12 October 2003. Three trucks were involved. There were at least seven occupants in the three trucks and I find it highly improbable that they would have been scared off by four 'hijackers', as the appellants would have it. It is apparent that they had simply fled because of the police presence.
16. For the above reasons the court a quo in my view, correctly held that the defendants successfully discharged the *onus* on them that the arrest, detention and prosecution of the appellants were lawful.
17. The appeal accordingly must fail.
18. In the result the appeal is dismissed with costs.


 EJ FRANCIS
 JUDGE OF THE HIGH COURT

I agree.


 FHD VAN OOSTEN
 JUDGE OF THE HIGH COURT

I agree.


 RS MATHOPO
 JUDGE OF THE HIGH COURT

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**DATE OF HEARING
 DATE OF JUDGMENT**

**29 MARCH 2012
 8 MAY 2012**