Case No 275/89

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE MINISTER OF LAW AND ORDER — Appellant

AND

ABDUL AZIZ KADER — Respondent

CORAM: HOEXTER, E M GROSSKOPF, STEYN, KUMLEBEN, F H GROSSKOPF, JJA

HEARD: 10 September 1990

DELIVERED: 27 September 1990

J U D G M E N T

E M GROSSKOPF, JA

The respondent, who was an awaiting trial prisoner in Pollsmoor Prison near Cape Town, applied as a matter of urgency to the Cape Provincial Division for an order, inter alia, directing the Minister of Law and Order (the present appellant) and the Officer Commanding Pollsmoor Prison to release him from custody forthwith. The appellant opposed the application. After a hearing before SELIGSON AJ, the release of the respondent was ordered and the appellant was directed to pay the respondent's costs. With leave of the court a quo the appellant now appeals to this court.

The circumstances of the case appear from the founding and opposing affidavits filed in the court a quo. These were not entirely harmonious, but it was common cause before us that, where there are conflicts of fact, the matter is to be decided on the version testified to by the appellant's witnesses. On this basis the relevant facts are as follows (in my exposition

I gratefully adopt some passages from the judgment a quo).

The respondent was originally arrested and detained on 17 June 1986 pursuant to section 29 of the Internal Security Act, no. 74 of 1982. The reason for this was his alleged complicity, as an executive member of a Muslim organization in the Western Cape known as "QIBLA", in a conspiracy between QIBLA and the Pan African Congress ("PAC"). This allegedly involved the smuggling of weapons into the Western Cape, and the recruitment of persons for military training abroad, with a view to promoting a revolutionary take-over of the Republic of South Africa and the forcible overthrow of its government. Details were provided in the appellant's affidavits of the respondent's alleged acts of participation in these activities, but it is not necessary to repeat them herein.

During questioning after his arrest the respondent made a statement to the police, and intimated that he was prepared to give evidence as a state witness against the other persons allegedly involved in the QIBLA/PAC conspiracy. For the purpose

of his evidence he attended several consultations with the prosecutor in charge of the case. Seven alleged conspirators appeared in connection with this matter in the Regional Court, Pretoria, from December 1986 onwards. Because he was regarded as a state witness, the respondent was not one of the accused.

On 17 November 1987 the respondent was to commence his evidence. He refused to do so. The State continued with other witnesses (there were about 125 state witnesses in all) in the hope that the respondent might change his mind. By January 1988 it became clear that he remained adamant, and the authorities decided to charge him separately for his participation in the QIBLA/PAC activities. A dossier was opened on 13 January 1988, and Warrant Officer Steenkamp of the Security Police told the respondent that he was investigating a case of contravening section 54 of the Internal Security Act against him. In the meantime the trial against the other seven alleged conspirators continued and they were convicted during October 1988.

The respondent's refusal to testify led to an enquiry

under section 189 of the Criminal Procedure Act, no. 51 of 1977. Pursuant to this enquiry the magistrate held that the respondentdid not have a just excuse for his refusal and sentenced him to two years' imprisonment on 18 July 1988. However, on 23 February 1989 the magistrate's finding and sentence were set aside on appeal by the Transvaal Provincial Division on the basis of psychiatric evidence relating to the respondent's condition. Immediately after the judgment on appeal a major in the Security Police told the respondent's attorney that it was intended to prosecute the respondent in terms of section 54 of the Internal Security Act.

Later on the same day, i.e., 23 February 1989, at about 20h30, the respondent was released from Pollsmoor Prison where he had been serving the sentence imposed by the magistrate. As he and his attorney were about to leave the prison grounds, they were approached by W.O. Steenkamp. Steenkamp placed his hand upon the respondent's shoulder and told him:

"Aziz, ek arresteer jou vir 'n oortreding van artikel

54 van die Wet op Binnelandse Veiligheid."

On Friday 24 February 1989 the respondent appeared before the regional magistrate in Wynberg. At this appearance the magistrate had before him a document reflecting the charge against the respondent as

> "Dat die beskuldigde skuldig is aan 'n oortreding van Artikel 54(1) van Wet 74 van 1982."

The respondent was not asked to plead and he was remanded in custody to 16 March 1989 to enable both the State and the defence to place representations before the attorney-general relating to the question whether a certificate under section 30 of the Internal Security Act should be issued prohibiting the release of the respondent on bail.

On 2 March 1989 the respondent launched the present proceedings.

It was common cause, both before us and in the court a quo , that the appellant bore the onus of justifying the detention of the respondent. The court a quo held that he had

failed to discharge this onus in two respects. First, it was held, the appellant had not shown that the respondent had been lawfully arrested. And, second, even if the arrest had been lawful, the respondent's further detention after his appearance in court on 24 February was held unlawful because the attorney-general had not, as required by section 64 of the Internal Security Act, authorized in writing the prosecution of the respondent for an offence referred to in section 54 of that Act. I shall consider these findings in turn.

I deal first with the arrest. As I shall show later, there was some debate before us on whether an irregularity in the respondent's arrest would necessarily have entailed that his detention pursuant to the magistrate's order on 24 February was unlawful. However, it seems logical and convenient first to consider whether the arrest was indeed vitiated by any irregularity, and I turn now to that question.

On behalf of the appellant W.O. Steenkamp testified that he had acted pursuant to section 40(1)(b) of the Criminal

Procedure Act in arresting the respondent. This sub-section reads:

> "(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 ... ."

Schedule 1 to the Act, in addition to listing a number of specific offences, also refers to "any offence (with one immaterial exception) the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine." In his affidavit W.O. Steenkamp stated that, when he arrested the respondent, he was satisfied that the respondent had committed a contravention of section 54 of the Internal Security Act. Section 54 created the offences of terrorism (sub-section (1)); subversion (sub-section (2)); sabotage (sub-section (3)), and a further offence which may be broadly described as assisting persons who are suspected of having committed or intending to commit terrorism, subversion or sabotage (sub-section (4)). Although the offences under section 54 are not specifically

mentioned in the First Schedule to the Criminal Procedure Act, the penalties prescribed by the Internal Security Act clearly bring these offences within the category of those for which the punishment may be a period of imprisonment exceeding six months. Accordingly it was common cause that W.O. Steenkamp was entitled to arrest the respondent pursuant to section 40(1)(b) of the Criminal Procedure Act if he reasonably suspected the respondent of having committed a contravention of section 54 of the Internal Security Act. And it was also common cause that Steenkamp's assertion that he did in fact reasonably suspect the appellant of having committed such a contravention had to be accepted for the purposes of the case. There was accordingly no dispute before us concerning the right of Steenkamp to arrest the respondent. What was in issue, was the lawfulness of the manner in which the arrest was effected. Section 39(2) of the Criminal Procedure Act provides, insofar as it is relevant, that "(t)he person effecting an arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the

accused person of the cause of the arrest ..."

If this provision is not complied with, detention pursuant to the arrest would normally be unlawful. See Ngqumba en Andere v. Staatspresident en Andere 1988(4) SA 224 (A) at pp. 265 G to 266 B (this case dealt with an arrest under the emergency regulations, but its reasoning applies equally to section 39(2) of the Criminal Procedure Act); and Brand v. Minister of Justice and Another 1959(4) SA 712 (A) at p. 718 A (a decision under section 26 of the previous Criminal Procedure Act, no. 56 of 1955, which does not differ materially from section 39(2) of the present Act).

Now in the present case, it will be recalled, W.O. Steenkamp told the respondent "... ek arresteer jou vir 'n oortreding van artikel 54 van die Wet op Binnelandse Veiligheid." Is this a sufficient compliance with section 39(2)?

The reason for the requirement that an arrested person should be told the cause of his arrest is that he is entitled to know why he is deprived of his freedom, if only in order that he

may without a moment's delay take such steps as will enable him to regain it (Christie and Another v. Leachinsky (1947) 1 All ER 567 (HL) at p. 575 C). This requirement is a matter of substance, not technicality. As was said in Brand's case, supra, at p. 718 C:

> "Section 26 (of the 1955 Act) manifestly does not require the arrested person to be informed of the ipsissima verba of the charge which is later to be proffered against him. What is required is that the arrested person should in substance be apprised of why his liberty is being restrained."

And in Ngqumba's case this court held that no more was required than that the arrested person be told "die kern, of aard, van sy gedrag wat die oortreding geskep het" (at p. 267 B).

But even a failure to provide such a minimum of information might possibly not lead to the illegality of the arrested person's detention in circumstances where he - for instance, a thief who is caught red-handed - necessarily must know why he has been arrested. See Brand's case, supra, at p. 718 A. Minister of Law and Order and Another v. Parker 1989(2)

SA 633 (A) was such a case. Here also there was an arrest under the emergency regulations, but, as already noted, the same principles apply to section 39(2) of the Criminal Procedure Act. The facts were as follows. Captain Van Schalkwyk, a police officer, visited the premises of the printing business carried on by one Allie Parker and his wife, the respondent. There he found a large number of pamphlets and printing plates. What then happened is described in the judgment as follows (at p. 642 D-E):

> "He found the contents of the pamphlets in general of an inflammatory nature inasmuch as they were provocative of public disorder and unrest by propagating acts of violence. They were in substance subversive documents intended to be disseminated by activists. Van Schalkwyk put the tenor of their contents to Allie Parker whose reaction was that he associated himself fully with their contents and supported the objectives set forth in the pamphlets. Van Schalkwyk then arrested Allie Parker in terms of reg 3 of the emergency regulations."

From this it appears that Van Schalkwyk did not in terms apprise Allie Parker of the cause of his arrest, and the respondent's counsel relied on this fact to attack the validity of Allie Parker's detention. The court dealt with this argument

as follows (at p. 642 F-G):

> "It overlooks the fact that Allie Parker was caught red-handed (in flagrante delicto) in the very act of printing subversive pamphlets which constituted a security risk during the prevailing state of emergency. He was forthwith confronted with their subversive character by Van Schalkwyk. His arrest was made uno contextu with the confrontation, thereby furnishing the nexus between his act of printing the subversive pamphlets and his arrest. The particular circumstances made it accordingly clear that the reason for his arrest was the act of printing the subversive pamphlets. In the circumstances Allie Parker necessarily knew why he was arrested."

Parker's case was, of course, decided upon its own facts, and I quote the case only as an illustration of the principle that the nature and extent of the information which the arrestor is required to impart to the arrested person depends on the circumstances of the case, and, in particular, on the extent of the arrested person's knowledge concerning the cause of his arrest (see Ngqumba's case, supra, at p. 266 B-C). Against this background I now turn to the circumstances of the present case.

On the accepted version of the facts the respondent, after his initial arrest on 17 June 1986, co-operated with the

police in their preparation of the prosecution against his alleged associates in the QIBLA/PAC conspiracy. He gave the police a statement which is described by his attorney as a "statement or 'confession'". Clearly, despite the inverted commas, this statement was of a self-incriminatory nature - the respondent's attorney testified that in view of the manner in which the statement had been procured, reliance on it in proceedings against the respondent would be ill-considered. Steenkamp denied that there had been any impropriety in the obtaining of the statement, and it is Steenkamp's version which, it is common cause, must prevail. We must accept, therefore, that the respondent had given a statement implicating himself in the alleged conspiracy, and it seems clear that the contents of the statement, as amplified in the consultations to which I have already referred, would have formed the basis of the evidence which it was contemplated he would give against his alleged co-conspirators. The respondent's attorney said in his affidavit that the respondent had been offered an indemnity if he would

testify. And it is only because of his status as a potential state witness that he was not charged in the same proceedings as his alleged co-conspirators. In short: the respondent had admitted his participation in the alleged QIBLA/PAC conspiracy and this had led to an understanding between him and the police that he would testify on behalf of the state against his alleged co-conspirators in return for an indemnity against prosecution (presumably in terms of section 204 of the Criminal Procedure Act). The content of the evidence which he would give had been fully canvassed between him and the prosecuting authorities.

Ultimately, of course, the respondent refused to testify. When W.O. Steenkamp then told him that he was being arrested for a contravention of section 54 of the Internal Security Act, he must have known that the cause of his arrest was his alleged complicity in the QIBLA/PAC conspiracy - the matter which had formed the basis of everything which had happened between him and the police. In this regard W.O. Steenkamp's uncontradicted evidence was:

> "Ter aanvulling meld ek dat die applikant op daardie stadium (i.e., at the time of his arrest) reeds deeglik bewus was dat 'n saak vir oortreding van artikel 54 soos gemeld afsonderlik teen hom ondersoek word aangesien ek dit reeds sover terug as ongeveer Februarie 1988, gedurende die tyd toe die artikel 189 ondersoek teen hom aanhangig was, dit meegedeel het. Hy was verder bewus daarvan dat die ondersoek teen hom verband gehou het met sy aktiwiteite in die QIBLA/PAC sameswering en dat dit nou ineengeweef was met die saak waarin hy sou getuig en die feite waarmee hy heeltemal vertroud mee was."

It is also not without significance that the respondent did not suggest in the papers filed on his behalf that he was unaware of the cause of his arrest. A similar failure by the arrested person was accorded some weight in Parker's case, supra, at p 642 G-H.

My view accordingly is that, in the circumstances of the present case, the respondent was sufficiently apprised of the cause of his arrest. It follows that his detention pursuant to his arrest was lawful.

It will be recalled that, after his arrest, the respondent appeared before the magistrate on 24 February 1989.

The appearance before the magistrate was pursuant to section 50(1) of the Criminal Procedure Act, which provides as follows, insofar as it is relevant:

> "A person arrested with or without warrant shall as soon as possible be brought to a police station ... and, if not released by reason that no charge is to be brought against him, be detained for a period not exceeding forty-eight hours unless he is brought before a lower court and his further detention, for the purposes of his trial, is ordered by the court upon a charge of any offence ..."

There then follow provisions permitting the extension of the period of 48 hours in circumstances which are not relevant for present purposes.

On 24 February the matter was remanded to 16 March 1989, or, to use the language of section 50(1), the further detention of the respondent until 16 March was ordered by the court. It was while the respondent was so detained by virtue of the magistrate's order that the application in the present matter was brought. As I adumbrated earlier, Mr. Brand, who appeared for the appellant, submitted that once a magistrate had issued

an order for the further detention of an arrested person in terms of section 50(1), such order provided lawful authority for his detention even if his original arrest may have been invalid or unlawful. In support of this contention he relied on Abrahams v. Minister of Justice and Others 1963(4) SA 542 (C). In view of my conclusion that the arrest was lawful it is not necessary to consider the correctness of this contention.

It follows from what I have said that the first ground upon which the court a quo held that the respondent's detention was unlawful was, in my view, erroneous.

Section 50(1) of the Act also features in the second ground upon which the court a quo found in the respondent's favour. This finding rested on the interaction between section 50(1) of the Criminal Procedure Act and section 64 of the Internal Security Act. The latter section reads as follows:

> "No prosecution for an offence referred to in section 54 shall be instituted without the written authority of the attorney-general."

It is common cause that, although the respondent was

arrested and detained with a view to his eventual trial for a contravention of section 54 of the Internal Security Act, the attorney-general had at no time given his written authority for the institution of a prosecution against the respondent for such a contravention. The court a quo held that the absence of this authority did not invalidate the arrest, and this finding was, correctly in my view, not questioned on appeal. The court did, however, regard the absence of the attorney-general's authority as fatal to the lawfulness of the respondent's detention under section 50(1) of the Criminal Procedure Act. In this regard the court said:

> "In my judgment, on the facts of this case, a prosecution has been instituted against the applicant in the Regional Court having regard to the charge which has been preferred against him and the order for his continued detention pursuant thereto. As a matter of common sense, the Applicant is being prosecuted on a charge hence his continued detention. By reason of the provisions of Section 64 this prosecution is not valid. The order of the Regional Magistrate for the Applicant's further detention is consequently based upon a charge which has no validity in law. It must follow therefore that the Applicant's continued detention beyond the statutory forty-eight hour period

is unlawful, even if the initial arrest was lawful."

The reasoning of the court a quo postulates that an order for the further detention of an accused under section 50(1) of the Criminal Procedure Act can only be granted where a valid prosecution has been instituted against him. To test the correctness of this view it is necessary to examine the purpose and effect of section 50(1) in some detail. Section 50(1) serves a twofold purpose. Firstly it seeks to ensure that an arrested person is brought before a court within a short period. In this way it discourages secret and irregular arrests and detentions. The appearance of an arrested person in open court enables him to question in public the manner and circumstances of his arrest and provides him with an opportunity to apply for his release on bail or otherwise (cf. section 50(3) of the Criminal Procedure Act). To achieve this purpose section 50(1) obviously does not require any prosecution to have been instituted against the accused.

But section 50(1) also serves a second purpose. The

authority granted to the court to order the further detention of an arrested person is a limited one. Such further detention may be ordered only "for the purpose of his trial ... upon the charge of any offence". The court must therefore be satisfied that the purpose of the detention is to bring the arrested person to trial upon the charge of an offence. A detention of the arrested person for any purpose other than his eventual trial would be improper. The appearance in terms of section 50(1) does not, however, necessarily, and, indeed, does not normally, represent the commencement of the trial of the arrested person. As it was put in the appellant's heads of argument, section 50(1) is the gateway through which arrested persons pass en route to the court in which they are to be tried. Section 75 of the Criminal Procedure Act lays down that an accused may be tried at a summary trial in one of several courts. If the court in which he appeared for the first time in accordance with any method referred to in section 38 (this includes arrest) has jurisdiction, he may be tried in that court (section 75(1)(a)).

If that court does not have jurisdiction, the accused shall, at the request of the prosecutor, be referred to a court having jurisdiction (section 75(2)). He may then be tried summarily in the court to which he was referred (section 75(1)(b)). And, even if the court in which the accused appeared for the first time does have jurisdiction, the attorney-general or his delegatee may designate some other court, which has jurisdiction, for the purposes of the accused's summary trial (section 75(1)(c)).

This then is the position concerning summary trials. However, in addition to the power which the attorney-general has under section 75 to determine which court would deal with the matter by way of a summary trial, he has the further power under section 123 to instruct that a preparatory examination be instituted against the accused. If this course is followed, the final decision whether to arraign the accused, and, if so, on what charge and before what court, is exercised by the attorney-general only after conclusion of the preparatory examination (section 139).

To sum up: section 50(1) provides the mechanism whereby arrested persons may be brought before a court so that proper dispositions may be made for the manner in which (i.e., whether by way of summary trial or by way of preparatory examination) and the courts in which the proceedings against them are to be continued. And, in the nature of things it will often be impractical or impossible to make a final disposition in regard to these matters at the first appearance of an arrested person in terms of section 50(1). This is self-evident in cases in which the attorney-general decides to hold a preparatory examination, where, as already stated, no decision can be taken on whether the accused is to be arraigned at all, and, if so, before what court and on what charge, until after completion of the preparatory examination.

But even where a summary trial is intended it will often be impractical to make a final disposition at an arrested person's first appearance before court. The powers of a peace officer to arrest without a warrant are set out in section 40(1)

of the Criminal Procedure Act. Such an arrest is permissible in sixteen sets of circumstances which are listed in paragraphs (a) to (p) of section 40(1). In nine of these an arrest is authorized where the arresting officer entertains a reasonable suspicion as to the existence of a specified state of affairs. Now as was said in Shaaban Bin Hussien and Others v. Chong Fook Kam and Another (1969) 3 All ER 1626 (PC) at 1630 C (quoted in Duncan v. Minister of Law and Order 1986(2) SA 791 (A) at p. 819 I-J:

> "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."

It would be only in the simplest cases where the suspicion existing in the mind of an arresting officer can be converted into prima facie proof in the forty-eight hours which is normally the maximum period which may elapse between the arrest and the hearing pursuant to section 50(1) of the Criminal Procedure Act. Compare Ex parte Prokureur-Generaal, Transvaal

1980(3) SA 516 (T) at p. 518 G-H. In many cases a postponement will be necessary to enable further investigations to be conducted, or to give the attorney-general or prosecutor an opportunity to consider and decide on the further conduct of the proceedings, and this must have been known to the legislature when promulgating section 50(1).

What I have said above shows, I consider, that when section 50(1) speaks of further detention for the purposes of trial being ordered by the court "upon a charge of any offence", this does not contemplate that the matter would be ready for trial at the first appearance of the arrested person, or that a properly formulated charge must then be preferred against him. In this regard I agree with the conclusion reached in Ex parte Prokureur-Generaal, Transvaal, supra. All that the section contemplates is that the purpose of the detention throughout must be to secure the attendance of the accused at his trial upon the charge, which, it is expected, will be preferred against him. It goes without saying that it is the function of the judicial

officer to guard against the accused being detained on insubstantial or improper grounds and, in any event, to ensure that his detention is not unduly extended.

These then, in my view, are the purpose and effect of section 50(1) of the Criminal Procedure Act, and the question is how section 64 of the Internal Security Act affects the operation of section 50(1) in cases where an accused person is held for an alleged contravention of section 54 of the Internal Security Act. Now section 64 provides that "no prosecution ... shall be instituted" without the authority of the attorney-general. What is meant by the institution of a prosecution depends on the context in which the expression is used (cf. Rex v. Priest 1931 AD 492 and Rex v. Friedman 1948(2) SA 1034 (C)). The purpose of section 64 is to ensure that the decision to prosecute a person for a contravention of section 54 is a responsible one, taken by the person who, in terms of section 3 of the Criminal Procedure Act, has the authority to prosecute in the name of the Republic in criminal proceedings. This purpose cannot be achieved if the

attorney-general is required to arrive at a decision on incomplete or preliminary information. Institution of a prosecution in this context cannot, therefore, bear a wide meaning which would include any step in the criminal proceedings against an accused. I do not propose attempting to define it with any precision in the present case. What is required at the very least, in my view, is a decision on the part of the prosecutor, conveyed to the accused in a formal manner, that he is to be prosecuted on a charge defined with some particularity (cf. Rex v. Priest (supra) at p. 495).

It is quite clear, in my view, that proceedings under section 50(1) of the Criminal Procedure Act, and an order for further detention made pursuant to those proceedings, do not by themselves amount to the institution of a prosecution in this sense. Of course, it would be perfectly possible to take steps at the hearing under section 50(1) which would clearly amount to the institution of a prosecution. A charge may be put to the accused, he may be asked to plead, he may be questioned in terms

of section 112 or 115 of the Criminal Procedure Act, evidence may be led, etc. These are permissible courses; but it will be equally open to the court merely to order the further detention of the accused pending a decision on whether, and if so, in what court and on what charge he is to be prosecuted. This is what happened in the present matter. No doubt justice requires that the accused should be informed in such a case why he is being held (see Ex parte Prokureur-Generaal, Transvaal, supra, at p. 519 B-C), and in the present case a pro forma charge was before the court. However, the order for further detention by itself did not, in my view, amount to the institution of a prosecution within the meaning of section 64 of the Internal Security Act.

The final question then is whether the institution of a prosecution is a necessary prerequisite to an order for further detention under section 50(1). From what I have said the answer to this question must be self-evident. The appearance of the arrested person under section 50(1) is the prelude to the

institution of a prosecution against him, which may take place, if at all, at a later time and in a different court. Clearly, in the light of the purpose served by section 50(1), there cannot be a requirement that an order for the further detention of an accused must be preceded by the institution of a prosecution against him, and the section contains no such requirement.

To sum up: proceedings under section 50(1), and an order for further detention under that section, do not per se amount to the institution of a prosecution for the purpose of section 64 of the Internal Security Act, nor is the institution of a prosecution a necessary precondition for action under section 50(1). It follows that in my view it is immaterial that the attorney-general's authority for institution of a prosecution had , in the present case, not been granted in terms of section 64 of the Internal Security Act. The lawfulness of the respondent's detention was not dependent on a prosecution having being instituted against him. The second ground upon which the court a quo decided in the respondent's favour was, accordingly,

in my view, also erroneous.

In view of what I have said above I consider that the appellant discharged the onus of showing that the detention of the respondent was lawful. The appeal should accordingly succeed. The following order is made:

a) The appeal succeeds with costs, including the costs of two counsel.

b) The order of the court a quo is altered to read:
The application is dismissed with costs.

E M GROSSKOPF, JA

HOEXTER, JA
STEYN, JA
KUMLEBEN, JA
F H GROSSKOPF, JA

Concur