IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

Case no CA24/2019

Date heard: 29/06/2020

Date delivered: 04/08/2020

In the matter between

NOMOCHINA GQUNTA **APPELLANT**

And

MINISTER OF POLICE **RESPONDENT**

JUDGMENT

ROBERSON J:

[1] It is common cause that on Saturday 9 January 2016 at about 08h45 the appellant, a 40 year old woman, was arrested without a warrant by a member of the respondent for allegedly stealing two packets of cigarettes from her employer, Pick 'n Pay, Walmer, Port Elizabeth. She was first detained at Walmer police station and thereafter detained at Humewood police station until Monday 11 January 2016. On that day she appeared in court and was released on warning.

[2] She subsequently instituted proceedings against the respondent in the Port Elizabeth magistrate's court, claiming damages for wrongful arrest and detention. Her claim was dismissed and she now appeals against that decision.

[3] In her particulars of claim the appellant alleged that the arresting officer had failed to exercise his discretion properly in that he failed to consider less invasive means of procuring the appellant's presence at court. It was also alleged that the further detention was wrongful in that the arresting officer and other officials at Walmer police station had failed to apply their minds thereto, that there were no reasonable and/or objective grounds justifying the appellant's subsequent detention, that she was not brought before court as soon as reasonably possible, and that she could have been released on bail in terms of s 59 (1) (a) of the Criminal Procedure Act 51 of 1977 (the CPA).

[4] For the purposes of the appeal the appellant no longer contested the lawfulness of her arrest but persisted in her claim for damages for wrongful detention from 23h50 on 9 January 2016 until 09h00 on 11 January 2020. According to police records the appellant's address was verified by the investigating officer at 23h50 on 9 January 2020, hence the calculation of the period of alleged wrongful detention.

[5] As already mentioned the appellant was arrested on 9 January 2016 at her place of employment. The police had been called after the appellant was seen on CCTV taking the cigarettes, and the cigarettes had been found in her handbag in her locker.

[6] The respondent bore the onus to justify not only the arrest but also the appellant's detention until her release on 11 January 2016.

[7] Only the arresting officer and his partner testified on behalf of the respondent. Their evidence covered the period from the arrest to the time the appellant was taken to the police station and handed over to the official who was in charge of the

cells. According to the arresting officer it was the duty of the investigating officer to release the appellant on bail.

[8] The appellant testified that Detective Sergeant Magoda interviewed her around 21h40 on 9 January 2020. Amongst other questions, he asked for her address which she provided. The "Bail Information Address Verification" form which was completed by Magoda indicated that he had spoken to Ms Lungelwa Gqunta at the address given by the appellant and that the address was verified. The appellant testified that Ms Lungelwa Gqunta is her sister with whom she resided. The form also indicated that the appellant had two children age 19 and 10 years, had no previous convictions and had no outstanding warrants of arrest. Magoda signed the form at 23h50 on 9 January 2020.

[9] The appellant said that at no stage was she told that she could apply to be released on bail or on warning.

10] Section 59 (1) (a) of the CPA provides:

> **"59 Bail before first appearance of accused in lower court**
>
> (1) *(a)* An accused who is in custody in respect of any offence, other than an offence referred to in Part II or Part III of Schedule 2 may, before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, in consultation with the police official charged with the investigation, if the accused deposits at the police station the sum of money determined by such police official."

[11] The offence of theft is contained in Part II of Schedule 2 of the CPA, but subject to the value involved being in excess of R2 500. In the present matter it was

not in dispute that the value of the stolen cigarettes was less than R100. The appellant was therefore an accused as envisaged in s 59 (1) (a).

[12] In his judgment the magistrate referred to the provisions of s 59 (1)(a) of the CPA but did not consider its application. He merely found that the jurisdictional requirements for an arrest in terms of s 40 (1) (b) of the CPA had been met and that the appellant had been brought to court within 48 hours.

[13] In *Mvu v Minister of Safety and Security* 2009 (2) SACR 291 (GSJ) the plaintiff, a long serving police officer, had been lawfully arrested on a charge of malicious injury to property. This offence is not included in Part II or Part III of Schedule 2. After his arrest the plaintiff was detained overnight in the police cells and released on warning the next day, in the afternoon. Counsel for the parties were agreed that the second defendant, the arresting officer, should have released the plaintiff on warning or arranged with a commissioned officer for his release. The detention of the plaintiff was therefore found to be unlawful. After referring to the fact that counsel were in agreement in the matter, Willis J (as he then was) went on to say the following:

> "Counsel for both sides requested that I should deliver a 'reportable' judgment in order to encourage a wider awareness that where a lawful arrest has been made, it does not follow automatically that such person is to be detained until he or she may be brought to court at the earliest opportunity: a proper discretion is always to be exercised as to whether detention is indeed appropriate."

[14] In *Setlhapelo v Minister of Police and Another* [2015] ZAGPPHC 363 (20 May 2015) Rossouw AJ stated the following at paragraphs [38] – [41]:

> "(38) Section 60(1)(c) of the CPA stipulates that if the question of the possible release of the accused on bail is not raised by the accused or the prosecutor, the

court shall entertain from the accused whether he or she wishes that question to be considered by the court. In the light hereof, and guided by the provisions of s 60(1)(c) of the CPA, I am of the view that once the jurisdictional facts for the consideration of police bail in terms of s 59(1)(a) of the CPA are present, the police has a constitutional duty to ascertain as soon as reasonably possible after the arrest whether the arrestee wishes bail to be considered. If the arrestee wishes to apply for police bail, the senior police official, in consultation with the investigating police official, must consider bail as a matter of urgency. A failure to inform the arrestee of his constitutional right to apply for bail or a failure to consider bail or any unreasonable delay in the process could, depending on the circumstances of the case, render the arrestee's further detention until his first appearance in court unlawful.

(39) Furthermore, an arrestee's right to a prompt decision is a procedural right independent of whether the right to liberty actually entitles the arrestee to bail. (Magistrate Stutterheim v Mashiya **2004 (5) SA 209** (A) par 16).

(40) Section 60(4)-(9) of the CPA provides guidelines as to what are factors for, and what are factors against, the grant of bail. Whether and to what extent any one or more of such factors are found to exist and what weight each should be afforded is left to the good judgment of the presiding judicial officer. (S v Dlamini par 43). In seeking to establish the presence of such factors the judicial officer should act as pro-actively and inquisitorially as may be necessary. (S v Dlamini par 101). I am of the view that these guidelines and procedure to the extent that they are relevant and applicable to the particular situation should also be followed by the police official considering bail in terms of s 59(1)(a) of the CPA.

(41) The exercise of a discretion to grant or refuse bail must also be objectively rational and the same considerations as set out above in respect of the exercise of a discretion to arrest are mutatis mutandis applicable."

[15] No police officials, other than the arresting officer and his partner, testified. There was therefore no evidence that a police official of or above the rank of a non-commissioned officer, in consultation with the investigating officer, had explained the appellant's right to apply for bail, had considered the granting of bail, or had exercised any discretion at all. In the circumstances it should be concluded that the further detention was unlawful.

[16] In any event, in my view an objectively rational exercise of discretion in the circumstances would have resulted in the appellant's release on bail. Her address was verified, she had two children, one of whom was a minor, she had no outstanding warrants of arrest, and no previous convictions. The offence was relatively petty and it was highly unlikely that the appellant would have been sentenced to direct imprisonment. She would have more likely received a fine with an alternative of imprisonment, possibly suspended. In all these circumstances it would have appeared that the appellant was not a flight risk, and detention until she appeared in court was therefore not justified.

[17] In the respondent's heads of argument it was submitted that the officer vested with the discretion may well have taken into account the prevalence of shoplifting, and the fact that the appellant had stolen from her employer and the theft had been observed on camera. In these circumstances, so it was submitted, the officer may have exercised his discretion against the appellant's release. It was further submitted that it would not have been practical to release her late on a Saturday night. These submissions were quite properly not pressed in argument. They are, in the absence of evidence from the appropriate official, speculative. In his heads of argument the respondent also placed reliance on the poor quality of the appellant's evidence. It is so that she was not an altogether honest witness. She denied

stealing the cigarettes but later admitted doing so, she disavowed her signature on the form containing her constitutional rights, and she acknowledged attending a NICRO counselling programme but pretended not to know why she had attended the programme. However, these defects are in my view irrelevant to the question of her right to be released on bail in terms of s 59 (1) (a) of the CPA.

[18] The question of quantum remains. The detention from 23h50 on 9 January 2020 to 09h00 on 11 January 2020 amounts to just under 33 hours. The appellant said that the floor of the cell was dirty, as were the blankets she was given. Her children were aware that she had been arrested and detained. When asked how she felt about being incarcerated she said that she felt bad. Counsel for the appellant suggested R80 000.00 whereas counsel for the respondent suggested a minimum of R35 000.00 but not much more.

[19] Any wrongful deprivation of liberty is inherently serious and traumatic, but one can take into account individual factors in different cases, for example the conditions and length of detention, the treatment by police officials, the state of health of the person detained, both physical and emotional, and the psychological after effects. The appellant's evidence on the aspect of quantum was scant but I accept that she suffered emotionally, particularly because her children were without her, and that the conditions in the cell were unpleasant and unhygienic. I have considered the awards in the various cases referred to by counsel for the appellant, as well as awards in other cases. Given the particular circumstances of this case I am of the view that an amount of R50 000.00 is an appropriate award.

[20] The magistrate's judgment must therefore be set aside. It was submitted on behalf of the appellant that the costs order in the magistrate's court should allow a

fee for counsel on a higher scale, at twice the tariff. In my view such a costs award is not warranted. This was not a complex matter and, as submitted on behalf of the respondent, much of the trial was taken up with the claim for wrongful arrest, on which the appellant did not succeed.

[21] Interest on the substituted order should run from the date of the magistrate's judgment.

[22] The following order will issue:

[22.1] The appeal succeeds with costs.

[22.2] The magistrate's order dismissing the appellant's claim with costs is set aside and substituted with the following order:

"Judgment is granted in favour of the plaintiff for payment of R50 000, together with interest thereon at the prescribed rate from 6 September 2019 to date of payment, and costs of the action, including the costs of counsel."

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J M ROBERSON
JUDGE OF THE HIGH COURT

MALUSI J

I agree

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JUDGE OF THE HIGH COURT

Appearances (via Webbex)

Appellant: Adv M du Toit, instructed by Carol Geswind Attorneys, c/o NN Dullabh & Co, Makhanda.

Respondent: Adv B Boswell, instructed by the State Attorney, c/o Netteltons Attorneys, Makhanda.