FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ :

PARTIES**:** **VIOLET NELSON**

AND

MINISTER OF SAFETY AND SECURITY

- Registrar: **CA 304/06**
- Magistrate:
- High Court: **EASTERN CAPE DIVISION**

DATE HEARD: **08/06/07**

DATE DELIVERED: **14/06/07**

JUDGE(S): **Jones J, Schoeman J.**

LEGAL REPRESENTATIVES –

Appearances:

- for the Appellant(s): **ADV: M.M. Paterson**
- for the Respondent(s): **ADV: J.D. Huisaman & Mr. Dala**

Instructing attorneys:

- Appellant (s): **NEVILLE BORMAN & BOTHA ATTORNEYS**
- Respondent(s): **MLONYENI & LESELE INC.**

CASE INFORMATION -

- *Nature of proceedings* : **WRONGFUL ARREST AND DETENTION**

Not reportable
In the High Court of South Africa
(Eastern Cape Division) Case No 304/06
Delivered:

In the matter between

VIOLET NELSON **Appellant**

and

MINISTER OF SAFETY AND SECURITY **Respondent**

SUMMARY: Wrongful arrest and detention – appeal – findings of fact – no basis for departing from the magistrate's finding that the police version of the circumstances of the arrest and subsequent detention was acceptable – no basis for a finding that the arrest and detention was unlawful on the police version – appeal dismissed.

JUDGMENT

JONES J:

[1] In the small hours of Saturday, 31 July 2004 the appellant's 18 year old son Romano was taken into custody in Mistletoe Street, Bethelsdorp, Port Elizabeth on a charge of riotous behaviour. He was kept in the police cells at the Bethelsdorp police station until about 10:00 the following morning when he was released after being served with the notice to appear in court on the charge or else to pay an admission of guilt of R50-00. The arrest and detention was done in the course of a wide-spread police operation that night, which was designed to

prevent crime and control drunk and disorderly conduct in the streets of Bethelsdorp. The appellant alleged that her son's arrest and detention was unlawful. She issued summons out of the magistrate's court in Port Elizabeth, claiming damages in the sum of R100 000-00. Her claim was dismissed with costs. This is an appeal against the magistrate's judgment. At the commencement of the appeal we ordered condonation of the late prosecution of the appeal. The appeal on the issue of liability and quantum was then argued.

[2] The onus at the trial was on the respondent to justify the arrest and detention. In order to discharge that onus the respondent relied on the evidence of the arresting officer, Constable Holland who testified to the conduct of Romano which led to his arrest and detention. He said that he came across Romano staggering drunk in the middle of the road, brandishing a bottle of beer, behaving in a riotous and disorderly fashion, and obstructing traffic. To rebut this version, the appellant herself gave evidence, and so did Romano. Romano denied being drunk and disorderly as alleged, and stated that he was walking home in a quiet and orderly manner with a group of friends when the police arrived and arrested them for no apparent reason. The appellant's evidence was that Romano was a model child who does not drink, who never goes out at night (except on this occasion), and that he could not possibly have behaved in the manner described by Holland. The magistrate accepted Holland's evidence and rejected the version of facts put up by the appellant and Romano. In order to succeed on appeal the appellant must satisfy us that the magistrate's conclusion was wrong.

[3] It is not an easy matter for an appellant to persuade a court of appeal that the trial court's findings of fact and credibility were wrong. While the right of appeal involves a re-hearing in the full sense of that term and requires a reconsideration of all of the considerations which make up the trial court's final judgment, it is in the nature of appeal procedure that the court of appeal does not and cannot enjoy the advantages of the trial judge. Unlike a trial judge, who has the benefit of seeing and hearing the witnesses, an appellate court is not steeped in the atmosphere of the trial and does not have the opportunity of assessing the credibility of witnesses in the light of the probabilities, and in the light of the personality and character of the witnesses and how they would be expected to behave in the particular circumstances. For these reasons the courts have emphasised that the trial judge is in the best position to evaluate the oral evidence placed before the court. In the absence of a material misdirection, the court of appeal will not depart from the trial court's findings of fact unless it is convinced from a reading of the record that its conclusions are wrong. It is not sufficient for interference that there be some doubt about their correctness. Those findings will stand unless there is no doubt at all that they are wrong. Thus, in *Kunz* v *Swart and Others* 1924 AD 618 Solomon JA said at 655 that the approach of the appeal court is

> 'to rehear the case and to form our conclusion on the facts as well as on the law. And if we are satisfied that the Judge in the Court below came to a wrong conclusion on the facts we should not shrink from overruling him. But before doing so, we must be quite satisfied that he was wrong; if we merely have a reasonable doubt as to whether he was right, then I do not think we should be justified in reversing his decision'.

This is all trite. See *Bitcon* v *Rosenberg* 1936 AD 380, 385-7; *Rex* v *Dhlumayo And Another* 1948 (2) SA 677 (A) 705 and the classic statement of the law which follows; and *Taljaard* v *Sentrale Raad vir Koöperatiewe Assuransie Bpk* 1974 (2) SA 450 (A) at 452A-B).

[4] The trial magistrate has not committed any material misdirection in his evaluation of credibility or his assessment of the facts. Mr *Paterson* argued on behalf of the appellant that Holland's recollection of the events of the evening was unreliable because it was not properly supported as to detail by his police statement, by notes in his pocket book (which had been lost), by other documents completed by other policemen, or by the evidence of a fellow policeman who was with him at the time of the arrest but who was not called as a witness. Counsel therefore submitted in his heads that his evidence should be evaluated in the light of the cautionary rule with regard to single witnesses. If the failure to apply the cautionary rule is intended to be an allegation of a misdirection, it is without substance. While it is, of course, axiomatic that evidence which stands alone must be evaluated in that light, there was no duty to apply the well-identified cautionary rule relating to single witness evidence which is applied in criminal trials to assist the court in determining whether there is proof beyond reasonable doubt. Mr *Paterson* makes other sweeping criticisms of the respondent's case which, on closer examination, were found to be groundless and which were frequently based on faulty logic. For example, he found 'corroboration' for the appellant's case in negative features like the absence of confirmatory detail for Holland's evidence in the documents, which somehow became converted into proof positive of their converse. When all is said and done, the magistrate was aware that there were before her two conflicting versions by two witnesses who testified directly to the events of that night. She also had before her the appellant's evidence, insofar as it had bearing on the facts in dispute. She weighed the versions against each other in the light of the probabilities. She concluded that the version of Holland was the more credible and probable version, and hence the acceptable version. A reading of the record does not give rise to any doubt in my mind about the correctness of her conclusion. Her credibility findings and the findings of fact which arise from them must therefore stand.

[5] Mr *Paterson* argued that even if the magistrate's findings of fact stand,

they do not justify the conclusion that Romano's arrest and subsequent detention were lawful. The justification put up by the respondent was that the arrest was justified by section 40(1)(a) of the Criminal Procedure Act 51 of 1977 which permits a policeman to arrest a person without warrant if that person commits an offence in his presence. The respondent's case was that, on Holland's evidence, Romano had committed the offences of being drunk, disorderly, being a nuisance to other persons, using abusive and insulting language, acting in a riotous manner, and using intoxicating liquor in a public street in contravention of Cape Ordinance 20 of 1974 and the regulations promulgated thereunder. Mr *Paterson* nevertheless argued that the respondent had failed to prove

- that the crime of 'riotous behaviour' (the offence alleged in the notice to attend court on a criminal charge) was an offence in terms of our statute or common law;

- that the magistrate regarded the offence charged as immaterial to the plea of justification put up by the respondent, and held that the arrest was lawful on another charge, namely drunkenness;

- that, if an offence was indeed proved, its trivial nature did not, in the light of the constitutionally protected right to freedom and security of the person as enshrined by section 12 of the Constitution of the Republic of South Africa Act, 1996, justify Romano's arrest, and certainly did not justify his subsequent detention in the police cells until 10:00 the following morning.

[6] The first difficulty that I have with Mr *Paterson*'s argument is that to succeed it must be premised on a factual foundation, which, in this case can only be the facts found proved by the magistrate. The appellant's argument does not even get off the ground because it has no proper factual foundation. It looks at statements in the evidence in isolation instead of looking at the evidence as a whole. The result is that it misinterprets the facts to the point that they do not bear resemblance to the facts testified to by Holland, which, of course, form the basis of the magistrate's conclusion that the arrest and detention were lawful. Mr

Paterson went so far as to submit that the only reason on the facts for Romano's continued detention was the fact that Romano swore at the police, and that even if his initial arrest was justified, this could never have justified his being kept in detention for a further 9 hours, especially where his release could easily have been authorised by telephoning an appropriate police official to make the necessary arrangements. That proposition takes a selected statement from Holland's evidence out of the context of the entire factual complex which makes up the defence of justification for the arrest and the subsequent detention, and misrepresents the defence completely. Another example of taking statements out of context and misinterpreting them is Mr *Paterson*'s allegation that the magistrate was wrong in considering that the offence for which Romano was arrested was immaterial to the plea of justification, and finding justification on another basis. Holland gave evidence that he could have arrested Romano for drunkenness or riotous behaviour, but that he decided to arrest him on a charge of riotous behaviour. The magistrate remarked in the course of her judgment that 'it is not clear though immaterial as to why Mr Holland decided to charge Mr Nelson with subsection 2(b) instead of subsection 2(a) or public drunkenness for that matter, which in the eyes of this court would have perfectly fitted the circumstances as shown by Mr Holland'. She goes on to say that the precise charge may be irrelevant because the ultimate charge will be formulated by the prosecutor in the light of the facts disclosed in the docket. The magistrate does no more than say that it is immaterial *why* Holland chose to bring one charge instead of another, and that either charges would have been justified by the facts. She was correct. This was acknowledged by Holland. She does not say that the

justification pleaded in the defendant's plea is immaterial in the sense that the defendant can rely on a completely different ground of justification, which is what Mr *Paterson*'s argument suggests. As it is, the ground of justification was the same. It was the entire factual complex, which, it turns out, could have resulted in a number of alternative charges. In the circumstances, it matters not that only one charge was laid although the factual complex would have justified other charges as well.

[7] Mr *Paterson*'s heads argue that there is no offence of riotous behaviour known to our law. This is patently wrong and was not advanced before us at the hearing of the appeal. It is an offence to 'act in a riotous manner' in contravention of regulation 26(2)(b), and Romano was charged with 'oproerige gedrag' (riotous or disorderly behaviour) in the original document giving him notice to appear in court on a criminal charge, an offence which is frequently encountered in the courts – commonly as part of the combined contraventions of being drunk and disorderly. The dictionary meaning of the word 'riotous' in this context is 'wanton, dissolute, extravagant; marked by excessive revelry; noisy, tumultuous, unrestrained; characterized or marked by rioting or disturbance of the peace; taking part in or inciting a riot or tumult; turbulent' (OED). A number of these expressions fit well Holland's description of Romano's behaviour that night. In his police statement Holland recorded that Romano 'was oproerig gewees, hy was 'n gevaar vir himself en ander gewees'. In the course of his evidence he described what happened in more detail:[1]

> 'we saw a person in the middle of the road, with a beer bottle in his hand seemingly drunk. There was oncoming traffic that was backed up could not pass because of that person. I then stopped and approached the person he became aggressive and using swear words. This person said the police can't do anything to him and was smelling of liquor. I took bottle and noticed that it was half filled and threw it away. I saw he was a danger to himself and to public. I saw that he acted in a riotous behaviour, . . . he was very noisy in a residential area and shouted loudly swearing that is why I arrested him for riotous behaviour walking in street with open beer is also unlawful, he was also staggering with liquor smell with red eyes. It is an offence to drink in

1 This part of the record was reconstructed verbatim from the handwritten notes of the magistrate, the original tapes having been lost. Hence the staccato and ungrammatical nature of the quotation.

> public and carry open half filled liquor. . . . the only conclusion I came up with was that he was acting riotously and I arrested him for riotous behaviour. In my opinion he was also drunk. I could have arrested him for public drunkenness. . . . . I tried to remove the beer from him and he grabbed beer I threw beer away. He was aggressive trying to loosen himself from me saying I must leave him alone. . . . I dispute that he suffered damages for unlawful arrest. I was acting on behalf of the public. It was a residential area and people were sleeping as it was during the night. He was also a danger to himself being in the middle of the road with a half filled beer bottle. It was also for his own safety that I took him to the Bethelsdorp police station.

In my view, it cannot be suggested that Holland overreacted to the situation with which he was confronted. His decision to arrest Romano for being riotous and disorderly in a public street because he was drunk is shown on the facts to have been a reasonable and justifiable action by a police officer in the execution of his duty. There is no reason to doubt the correctness of the magistrate's conclusion.

[8] Furthermore, Romano's disorderly conduct prior to his arrest in my opinion precluded the option, which Mr *Paterson* contended should have been chosen by the police, not to detain Romano in the police cells once he had given his name and address. Mr *Paterson* suggested that he should instead have been released at that stage on notice to attend court on a charge. He relied on a number of authorities[2] which emphasise that arrest is not an appropriate method of securing the attendance of an accused person's attendance at court for a trivial offence where other methods will do as well. He argued that in view of the constitutional entrenchment of the right to freedom and security of the person in section 12 of the Constitution of the Republic of South Africa, 1996, and the principles enunciated in these cases, it is unlawful for the police to arrest a person where it is possible to serve a notice on him to secure his attendance at court, notwithstanding that the arrest may be authorized and permitted by the Criminal Procedure Act 51 of 1977. I do not, however,I have to go into the matter because, on the facts of this case, it was never a reasonable option to release a person in Romano's condition who had behaved as Romano had behaved, in the absence, at any rate, of good reason to conclude that he was no longer drunk, disorderly,

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2 *Willemse* v *Lategan* 1985 SC 335, 337-8; *Nyalasa* v *Dungwa* 1912 EDL 10 and 464, at 465-5; *MacDonald* v *Kumalo* 1927 EDL 293, 310; *Rex* v *Kleyn and another* 1937 CPD 288, 293-4; *S* v *More* 1993 (2) SACR 606 (W) 608E; *Louw and another* v *Minister of Safety and Security* 2006 (2) SACR 178 (T); *Van Niekerk* v *Minister of Safety and Security* Case No 1212/05 SECLD 15 June 2006.

riotous, aggressive and a danger to himself and the public. That he co-operated to the extent of giving his name and address to the police and that he had seemingly calmed down after being taken to the police is not a sufficiently good reason. It is to be expected that people who are drunk and disorderly will revert to their previous pattern of behaviour as soon as the police have turned their back. Indeed, I believe that it would have been irresponsible for the police to have released Romano unless they could be sure that he was no longer dangerous. As Mr *Huisamen* pointed out on the respondent's behalf, persons who are drunk and disorderly, aggressive, and a danger to themselves and the public, commit misconduct of a continuing nature which will cease only after the passage of time. He also pointed to the objects of the police service laid down in section 205 of the Constitution, which impose on the police the duty to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law. He argued, correctly in my view, that the courts should support the police in their efforts to achieve these objects, and, while unlawful police arrests can never be condoned, the courts should not make it unreasonably difficult for the police to carry out their ordinary, but very important, duty to maintain public order by placing unduly restrictive curbs on their discretion to arrest and detain transgressors. There must be a balance between the protection of individual freedoms under the Constitution and the reasonable exercise of police power to maintain public order. In my opinion the facts of this case show that here the police official exercised his powers of arrest and detention reasonably and lawfully.

[9] In view of this conclusion, Romano has not suffered damage and it is not necessary to consider the submissions on quantum. The appeal is dismissed with costs.

RJW JONES
Judge of the High Court
10 June 2007

SCHOEMAN J I agree.

I SCHOEMAN
Judge of the High Court