

REPORTABLE

Case Number : 342 / 99

**IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

In the matter between

DEVRAJ GOVENDER

Appellant

and

**THE MINISTER OF SAFETY
AND SECURITY**

Respondent

Composition of the Court :

**HEFER ACJ; SMALBERGER ADCJ;
OLIVIER, SCOTT AND CAMERON
JJA**

Date of hearing :

16 MARCH 2001

Date of delivery :

1 JUNE 2001

SUMMARY

Section 49 (1) of the Criminal Procedure Act 51 of 1977 - use of lethal violence to prevent a suspect from fleeing; constitutional construction of reasonableness; new approach.

JUDGMENT

OLIVIER JA

[1] This is an appeal, with the leave of the learned trial judge, Booysen J, against an order issued by him in the Durban and Coast Local Division of the High Court absolving the defendant (now the respondent) from the instance, with costs.

[2] In the action, the appellant ('plaintiff'), the father of his minor son, Justin, claimed damages from the defendant as a result of serious injuries sustained by Justin when he was shot in the back by a policeman, Inspector Cox. The shot fractured Justin's spine; he is now a paraplegic. The cause of action arose at Durban on June 16, 1995.

At the time Justin was a matriculant, aged 17 years.

[3] The fact that Cox fired the shot that injured Justin is not in

dispute. Nor that Cox at the time was acting within the course and scope of his employment. It is also not in issue that Cox fired the shot with the intention of wounding Justin. The only element remaining to found a delictual cause of action against Cox, and consequently vicarious liability on the part of the respondent, is that of wrongfulness.

[4] The respondent's case is that the action taken by Cox, although *prima facie* wrongful as a violation of Justin's constitutional rights, was justified, and therefore not wrongful, Cox having acted within the scope and ambit of section 49 (1) of the Criminal Procedure Act 51 of 1977 ('the Act'). The crux of the defence is that Justin was involved on the particular evening in the theft of a motor vehicle; Cox was attempting to arrest him; Justin was, despite oral warnings and a warning shot, fleeing from Cox, who was pursuing him, armed with a service hand-weapon and that the latter then fired the shot, it being reasonably necessary to prevent Justin from fleeing. This defence raises questions relating to

the interpretation of section 49 (1) by our courts and the application of a number of constitutional principles enshrined in the Constitution of the Republic of South Africa Act 200 of 1993 ('the Interim Constitution').

The factual scene

[5] The factual findings made by Booyens J at the end of the trial were not placed in issue in this appeal. These findings can be summarised as follows :

- (1) The owner of the stolen car ('the BMW') had parked it at a shopping complex in Tarndale Road, Durban, on the evening in question. There it was stolen.
- (2) Justin and two of his friends, Julian and Kugin, of approximately his own age, spent the first part of the evening together, drinking beer and trying to find dagga (cannabis) to smoke. Eventually they ended up on foot at the shopping complex where the BMW was parked. There they met one Bilal who had apparently stolen

the keys of the BMW. The four of them got into the BMW and drove off.

(3) Justin and his friends were aware that the car was stolen. Bilal later got out of the car, taking with him a leather jacket and an angle grinder which were in the boot of the car.

(4) Justin was the driver of the stolen vehicle.

(5) In the meantime, the owner of the BMW had reported the theft of his car. Cox and Sergeant Hillcoat were on patrol duty in a police vehicle. Hillcoat was driving. They saw the BMW turning from Stanley Copley Drive into Alpine Road. In doing so, the car went off the road and struck a water meter and the wall of a block of flats. It then proceeded along Alpine Road. The police officers

thought that the driver of the BMW was drunk. They switched on the siren and blue lights of the police car and gave chase. The BMW failed to stop. Cox then called the control room on the

police radio and was informed that the BMW had been stolen earlier that evening. He was given no further details. The chase continued at high speed.

- (6) The BMW turned into a parking area in Harbottle Street, spun around 180 degrees, and came back straight at the police car. Cox then saw the driver and one other person get out of the car and start running away. Hillcoat had to stop the police vehicle. Cox alighted first and pursued the two suspects up Harbottle Road and shouted: 'Stop! Police! Stop!' Because the suspects ignored the warning, he fired a warning shot into a grass bank, and then again shouted to them to stop. By then they were running in Chapel Street.

- (7) When Cox alighted from the police vehicle, the two suspects were about twenty to thirty metres from him. The passenger ran ahead of the driver (Justin) and both were outpacing Cox. The

passenger then disappeared to the right around the corner of a building. Justin kept on running away and was then about fifty metres from Cox.

- (8) Cox was convinced that he would not be able to catch Justin, and fired at him, while still running. He aimed at Justin's legs.
- (9) Justin fell down. Cox went up to him and Justin admitted that the vehicle had been stolen in Asherville.
- (10) Justin was unarmed and, as stated earlier, a matriculant, aged 17 years and still at school.
- (11) Hillcoat was unsuccessful in finding the second suspect. A policeman from the dog unit, together with his dog, arrived later to try to trace the second suspect, but with no success.

Section 49 (1) of the Criminal Procedure Act :

- [6] The section reads as follows :

'49 **Use of force in effecting arrest**

(1) If any person authorized under this Act to arrest or to assist in arresting another, attempts to arrest such person and such person -

(a) resists the attempt and cannot be arrested without the use of force;

or

(b) flees when it is clear that an attempt to arrest him is being made, or resists such attempt and flees; the person so authorized may, in order to effect the arrest, use such force as may in the circumstances be reasonably necessary to overcome the resistance or to prevent the person concerned from fleeing.'

[7] In the present case, the trial court found that the action taken by Cox was reasonably necessary (in the words of section 49 (1)) to prevent Justin from escaping and thus found that Cox had acted lawfully:

'It seems to me that at common law and in terms of Section 49(1) the Courts approach each case on its own facts and circumstances in the general context of our society and, of course, also the Constitution in deciding in each particular case whether the degree and type of force applied was the minimum force possible, reasonable, necessary and

proportionate, such as to justify a reliance upon Section 49 (1). It cannot in my view be contested that in terms of criminal offences, two of the most prevalent and present dangers to South African society are the theft of motor vehicles and the closely related offence of the hijacking of motor vehicles. Many lives are lost in seeking to prevent the escape of motor vehicle thieves and their apprehension. In this case the stolen vehicle had to be followed at high speed, and in the end the police had to avoid colliding with the vehicle which had been turned in such a way that it bore down upon the police vehicle. In my view the force used was reasonable and necessary and proportionate to the offence of motor vehicle theft. The public interest involved in the use of deadly force as a last resort to arrest a fleeing car thief relates primarily to the serious nature of this crime, its increasing prevalence throughout this country, and the public's interest in the apprehension, prosecution and punishment of car thieves. In the result in my view the shooting was justified by Section 49 (1).'

- [8] On behalf of the appellant it was argued that this approach is flawed. It loses sight of the constitutionally protected rights to which even a fleeing suspect in the position of Justin is entitled. These rights, according to the Interim Constitution (applicable in this case) include a right to life (section 9); a right to physical integrity (section 11 (1)); a

right to protection of his or her dignity (section 10); a right to be presumed innocent until convicted by a court of law (section 25 (3) (e)) and the right to equality before the law and to equal protection of the law (section 8 (1)). Section 49 (1) of the Act self-evidently imposes a limitation on these rights. The question then is whether the limitation it imposes as properly interpreted passes the tests laid down in section 33 (1) of the Interim Constitution. Is section 49 (1) of the Act,

- (i) reasonable; and
- (ii) justifiable in an open and democratic society based on freedom and equality; and
- (iii) not negating the essential content of the rights in question; and
- (iv) as far as the rights to dignity and to be presumed innocent are concerned, also necessary?

[9] That depends in the first instance on the proper interpretation of section 49 (1). In this Court, the appellant did not attack the

constitutional validity of the section. He requested the Court to interpret it or 'read it down' so as to comply with the correct constitutional standard.

[10] With the enactment first of the Interim Constitution and later of the Constitution and the vast changes it brought about to the juristic landscape, came a need for a method of interpreting legislation in a manner new to South African lawyers. I can do no better than to repeat and at the same time support the new approach as set out by Langa D P in his judgment in the Constitutional Court in *Investigating Directorate : Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others* : *In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit N O and Others* 2001 (1) SA 545 (CC) in paragraphs [21] and [22] as follows :

'Interpreting statutory provisions under the Constitution

[21] Section 39 (2) of the Constitution [the provision in the Interim Constitution was section 35 (3)] provides a guide to statutory

interpretation under this constitutional order. It states:

"When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights"

This means that all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.

[22] The purport and objects of the Constitution find expression in section 1, which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.'

[11] This method of interpreting statutory provisions under the

Constitution requires a court to negotiate the shoals between the Scylla of the old-style literalism and the Charybdis of judicial law-making. This requires magistrates and judges

- (a) to examine the objects and purport of the Act or the section under consideration;
- (b) to examine the ambit and meaning of the rights protected by the Constitution;
- (c) to ascertain whether it is reasonably possible to interpret the Act or section under consideration in such a manner that it conforms with the Constitution, *ie* by protecting the rights therein protected;
- (d) if such interpretation is possible, to give effect to it, and
- (e) if it is not possible, to initiate steps leading to a declaration of constitutional invalidity (see also *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) at para [85]; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs*

and Others 2000 (2) SA 1 (CC) at para [23] - [24]; *S v Bhulwana*;

S v Gwadiso 1996 (1) SA 388 (CC) at para [28]).

[12] The objects and purport of subsections 49 (1) and (2) of the Act are obvious. It is fundamentally to protect the safety and security of all persons. The state has the duty to preserve the criminal justice system's effectiveness as a deterrent to crime.

'A state has a systemic interest in insuring that suspects are brought to justice through a trial and possible punishments. If suspects were able to flee successfully from arrest on a more or less regular basis, the threat of punishment would be weakened and the efficiency of the criminal justice system as a deterrent to crime undermined.'

(Floyd R Finch Jr, *Deadly Force to Arrest : Triggering Constitutional Review*, 11 (1976) Harvard Civil Rights - Civil Liberties Law Review, 361 at 372.)

A failure by the state to preserve the effectiveness of the criminal justice system will end in lawlessness and a loss of the legitimacy of the state itself.

[13] As against this, the state has a duty to protect the rights of all its citizens, including fleeing suspects. A person fleeing from the police has, usually, not yet been convicted of an offence. The presumption of innocence must be respected in such a case. But even an escaping convicted person has all the other constitutional rights mentioned above. Neither the fleeing suspect nor the escaping convict becomes an outlaw.

[14] The question then is how the interest of the state and the rights of the fleeing suspect (or escaping convict) can be brought into balance. The answer lies in applying the Constitutional test : when is a statutory provision allowing the wounding of a fleeing suspect under certain circumstances reasonable and justifiable in an open and democratic society based on freedom and equality? This enquiry involves a close scrutiny of the circumstances under which section 49 (1) of the Act allows the wounding of a fleeing suspect.

[15] Section 49 (1) of the Act permits

' ... the use of such force as may in the circumstances be reasonably necessary to overcome the resistance or to prevent the person concerned from fleeing.'

[16] The threshold requirement laid down in section 49 (1) as interpreted until now is extremely low. It does not expressly qualify the nature and extent of the force which may be used. At least, that was how our Courts have interpreted the section and, on that basis, correctly criticised it (see *inter alia R v Britz* 1949 (3) SA 293 (A) at 303 - 304; *Mazeka v Minister of Justice* 1956 (1) SA 312 (A) at 316 A - C; *Matlou v Makhubedu* 1978 (1) SA 946 (A) at 957 C - F). In the light of the criticism against the section, *viz* that it too easily allowed police officers and even members of the public to use unspecified force simply to overcome a suspect's resistance or escape, this Court raised the threshold by requiring, in *Matlou v Makhubedu*, *supra*, proportionality between the degree of force used and the seriousness of the crime of which the victim is suspected.

[17] But, so argued the appellant, even this threshold requirement is too low and does not comply with the Constitutional standards of reasonableness and justifiability. Those standards, so it was submitted, at the very least require a further factor to be taken into account, *viz* whether the suspect poses an immediate threat or danger of serious physical harm to the police officer pursuing him, or a threat of serious physical harm to others. Counsel for the appellant *inter alia* relied upon the decision of the U S Supreme Court in *Tennessee v Garner* (471 (1985) U S 1). In that case the Tennessee statute provided that if, after a police officer had made clear his or her intention to arrest a criminal suspect, the latter flees or forcibly resists, '... the officer may use all the necessary means to effect the arrest ...' - terms not very different from section 49 (1) of our Act. In that case the plaintiff's son - 17 or 18 years old, unarmed and slightly built - was apparently fleeing from the scene of a housebreaking late in the evening. The fugitive stopped at a

chain link fence. A police officer at the scene called out: 'Police! Halt!', and took a few steps towards the fugitive. The suspect then began to climb over the fence. The officer, who was convinced that if the fugitive made it over the fence he would escape, shot at him. The bullet hit the plaintiff's son in the back of the head with fatal consequences. The

Court held in relation to the use of **deadly** force :

'Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so ...Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been give.'

The majority held the statute in question to be invalid insofar as it purported to give the police officer who shot the plaintiff's son the

authority to act as he did.

[18] The 'threat' or 'danger' requirement as described above is used in other constitutional states, eg in Canada (we have been supplied with an unreported judgment by Hawkins J in *The Queen v Douglas Lines*, Ontario, 13 April 1993 and section 25 (4) of the Canadian Criminal Code); in Germany (*Bundesgerichtshof* (1992) 5 St R 370/92, BGH St 39/1); in England (*Reference under s 48 (A) of the Criminal Law (Northern Ireland) Act 1968* (1 of 1975), [1976] 2 All ER 937 (HL) at 947 d); in the European Court of Human Rights (*McCann and Others v UK* [1996] 21 EHRR 97 at para 192) and the *United Nations' Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (para 9).

[19] Should this approach be adopted in determining the test for unlawfulness in our law in respect of the interpretation of section 49 (1) of the Act? I am of the view that it must. It seems to me to represent a

rational and equitable way of balancing the interests of the state, society, the police officers involved, and of the fugitive. It represents, in the final instance, a proper mechanism for balancing collective against individual interests. It is, in my opinion, far better than simply weighing up the seriousness of the offence against the degree of force used, because the latter does not adequately protect the interest of the fugitive, nor does it sufficiently define the circumstances in which police officers in the interests of society are permitted to use force. Is it really appropriate or equitable where an offence committed or presumably committed is of a serious but non-violent nature, eg fraud, to allow a police officer to use potentially lethal force, such as the firing of a shot, at the suspect who is endeavouring to escape and who is unarmed and poses no immediate or foreseeable physical threat to anyone? Or the converse : can it be said, that if the offence is of a non-serious or non-violent nature, but the suspect is armed and poses a threat to the police

officer concerned or other citizens, that potentially lethal force may not be used?

[20] *Tennessee v Garner* dealt with the use of deadly force in the sense that the plaintiff's son in that case was killed. But would any other test have been logical or valid if the son had been injured and not killed? The firing of a shot at a suspect is potentially fatal, and the lawfulness of the act does not depend on the more or less fortuitous result thereof. The question, whether the suspect posed a danger of the kind described, would be, in my view, equally apposite in the wounding of a suspect.

[21] I am of the view that in giving effect to section 49 (1) of the Act, and in applying the constitutional standard of reasonableness the existing (and narrow) test of proportionality between the seriousness of the relevant offence and the force used should be expanded to include a consideration of proportionality between the nature and degree of the

force used and the threat posed by the fugitive to the safety and security of the police officers, other individuals and society as a whole. In so doing, full weight should be given to the fact that the fugitive is obviously young, or unarmed, or of slight build, etc, and where applicable, he could have been brought to justice in some other way. In licensing only such force, necessary to overcome resistance or prevent flight, as is 'reasonable', section 49 (1) implies that in certain circumstances the use of force necessary for the objects stated will nevertheless be unreasonable. It is the requirement of reasonableness that now requires interpretation in the light of constitutional values. Conduct unreasonable in the light of the Constitution can never be 'reasonably necessary' to achieve a statutory purpose.

[22] Applying this broader approach, I am of the view that the shooting of Justin was unlawful. If one were to apply the test of proportionality between seriousness of the offence and the force used, it may correctly

be said that the theft of a motor vehicle is a serious offence and having regard to the high incidence of this offence in our country, one that should be combatted vigorously. Against that, the use of a firearm to shoot at another person is also a serious, inherently lethal, matter. But it is when the broader approach of proportionality between the threat posed by the fugitive and the degree and nature of the force used, is applied, that the scale is tipped in favour of Justin. He was unarmed and Cox did not see a weapon in his possession. He was 17 years old and it must have been obvious to Cox, when he commenced the pursuit of the fugitives, that they were mere youths. There was no allegation of hijacking, assaults or other acts of physical violence having been perpetrated by Justin or the other passengers in the car. Nor was there any threat or danger to the police or members of the public. Under these circumstances, what interest of society was so pressing that it justified the violation of Justin's physical integrity? Can it be said that in

our law the protection of property (via the criminal law system) is invariably more important than life or physical integrity? Surely not. It has not been shown by the respondent, on whom the *onus* rests, that the identity of the occupants of the stolen vehicle could not have been established by proper investigative procedures, eg fingerprinting of the vehicle, eye witness accounts of the theft, etc.

[23] Can section 49 (1) of the Act reasonably be interpreted to encompass the approach discussed above? I am of the view that it is eminently possible. The section includes the test of reasonable necessity. That test was already given a wider meaning by this Court in *Matlou v Makhubedu*, *supra*, *viz* proportionality between the force and the crime committed. It does no violence to the section to interpret it so that the 'threat' or 'danger' approach is included - and in my view that should be done.

[24] The words '... use such force as may in the circumstances be

reasonably necessary to prevent the person concerned from fleeing ... ' in section 49 (1) (b) of the Act must therefore generally speaking (there may be exceptions) be interpreted so as to exclude the use of a firearm or similar weapon unless the person authorised to arrest, or assist in arresting, a fleeing suspect has reasonable grounds for believing

- 1 that the suspect poses an immediate threat of serious bodily harm to him or her, or a threat of harm to members of the public; or
- 2 that the suspect has committed a crime involving the infliction or threatened infliction of serious bodily harm.

If section 49 (1) of the Act, thus interpreted, is applied to the facts before us and for the reasons indicated above, I am of the view that Cox acted unlawfully in shooting at and wounding Justin.

Order :

In the result, the appeal succeeds with costs, including the costs of

two counsel, and the matter is referred back to the court *a quo* for the quantification of the damages claimed.

P J J OLIVIER JA

CONCURRING :

HEFER ACJ

SMALBERGER ADCJ

SCOTT JA

CAMERON JA