Bb 109/92

/CCC CASE NO 597/90

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

DIRA LETSIE APPELLANT

and

ROBERT THOMSON McCALLUM RESPONDENT

CORAM: VAN HEERDEN, NESTADT et GOLDSTONE JJA

DATE HEARD: 21 MAY 1992

DATE DELIVERED: 1 JUNE 1992

J U D G M E N T

NESTADT, JA:

Shortly after midnight on 2 August 1985, the appellant, a 38 year-old mine worker, was shot in the back by the respondent. The appellant sustained a contusive injury to the spinal cord. He now suffers

from permanent paraplegia. Alleging that the shooting constituted an unlawful assault, the appellant sued the respondent for damages. The respondent's defence of the action was based in the main on a plea that the shooting was justified in terms of sec 49(1)(b) of the Criminal Procedure Act, 51 of 1977. The action came to trial in the Transvaal Provincial Division before WEYERS J. By this time quantum had been agreed in the sum of R525 000. So only the merits arose for decision. After hearing evidence, the trial judge dismissed the claim. He held that the respondent had discharged the onus of proving that the shooting was lawful. The matter is now on appeal before us with the leave of this Court.

WEYERS J had before him two conflicting versions of the circumstances of the shooting. In this regard he was faced with a credibility issue. This he

resolved in favour of the respondent. Subject to one possible qualification (which I refer to later) there is no warrant for interfering with this finding. This appeal must therefore be decided on the basis of the respondent's version of what happened that night. It was to the following effect. He was asleep in the bedroom of his house in Orkney. His wife woke him. She reported to him that according to their maid a strange man was on their property and that he was attempting to kill her. The maid lived in a room opposite the kitchen at the back of the house. In between was a yard. The respondent got out of bed and having armed himself with a .32 revolver, proceeded through the door of the kitchen into the yard. There he saw the figure of a man. It was at the door of the maid's room. The man was rattling and kicking the door. This was the appellant. The respondent, standing now

about a pace into the yard and about seven paces away from the appellant, asked him what he was doing there. There was no reply. The respondent repeated the question. Still the appellant did not answer. Instead he turned round and ran towards the gate of the yard. This gave egress to the garden area of the property and in particular to a concrete pathway running from what I call the eastern side of the house (which is the dining-room) towards the boundary fence on the west. On the southern side of the path (which is about eight metres in length) is the gate and wall of the yard and (proceeding west) the front and back of two adjoining garages. Between the side of the second (western) garage and the boundary fence is a lane which takes one to the southern (fenced) boundary of the property. As I say, the appellant ran towards and through the gate of the yard. He then turned to his

left and ran in a westerly direction along the pathway towards the boundary fence. The respondent followed him out of the yard. He wanted to apprehend him. He had been trespassing. The appellant also thought that the respondent was trying to break into the maid's room with the intention of harming her. The appellant shouted to the respondent to stop "or I will shoot". The respondent failed to respond. The appellant saw him continuing to run towards the north-western corner of the second garage. It was at this stage that the respondent shot the appellant. The respondent was then standing about five metres away from the appellant on the eastern side of the pathway (ie next to the house). The appellant was about two metres from the corner. He was still running. The respondent shot the appellant once. He describes what his intentions were and the manner in which he fired in the following terms:

"Where did you aim? -- I aimed as I thought to his right.
COURT: With what elevation? -- I had the gun at waist height when I fired.
Pointed it upwards or? -- Pointing it slightly downwards...
(W)hat was your intention with the firing of the shot, what purpose did you have in mind? -- I intended the shot to be a warning shot.
Did you intend to hit the plaintiff... -- No, the purpose of firing the shot as a warning shot was for him to stop...
Now, I take it, Mr McCallum, that you must have been pointing in his direction, having regard to where you in fact shot him? -- I was pointing in the general direction to his right slightly...
It stands out in your mind, that you deliberately tried to avoid shooting him by pointing to his right? -- That is right...
I pointed the gun towards his right. I did not consciously aim at him or to injure him...
I pointed the gun at him slightly to his right. When you fire a gun, the gun might swing to either way and this was a most unfortunate thing that happened."

It appears therefore that the respondent never intended that the appellant should be struck. In this sense the shooting was in the nature of an accident. The respondent collapsed where he was shot. He was later

taken to hospital.

The requirements to be satisfied for sec 49(1)(b) to afford a defendant protection from the consequences of using force to arrest a person who is fleeing from arrest are (i) that the defendant was authorised to arrest such person; (ii) that he was attempting to do so; (iii) that the person he was seeking to arrest was fleeing "when it is clear that an attempt to arrest is being made"; and (iv) that the defendant in order to effect the arrest used such force "as may in the circumstances be reasonably necessary... to prevent the person... from fleeing." I shall assume, despite argument to the contrary by Mr Cook on behalf of the appellant, that (i) and (ii) were satisfied. That leaves (iii) and (iv) for consideration. I deal firstly with whether the respondent established the former, ie that it was clear to the appellant that the

respondent was attempting to arrest him. On a proper interpretation of the section this means that in a given case the arrestee knew of the attempt to arrest him prior to the use of the force necessary to overcome his flight. More particularly it means in my opinion that he must have had a reasonable opportunity after becoming aware of the attempt to arrest him, to desist from flight. This is because, as VAN HEERDEN JA held in S vs Barnard 1986(3) SA 1(A) at 7 E, the person on the point of being arrested must flee with the intention of foiling the attempt to arrest him. Did this happen in casu? The first and only indication to the appellant that the respondent was attempting to arrest him was what may be called the respondent's oral warning, ie his command that the appellant should stop (running away). It is questionable whether the respondent's evidence is truthful in this regard. But I shall assume that it

is. I assume also that the warning was heard by the appellant and would have made him aware of the respondent's intention to arrest him. Even so, I do not think the evidence justifies a finding that the requirement under consideration was satisfied. The respondent was cross-examined on the point. His evidence reads:

> "Well, let us just get some clarity on that, Mr McCallum. When you said 'Stop or I will shoot', whereabouts was the plaintiff situate on EXHIBIT C, the plan? How far from the point where he was shot...I would say two metres...
> And then, what? You gave him about one second to respond because if he was running, you only gave him about a second to respond, not so?-- Yes, I should say that is correct."

So the appellant was left very little time within which to react and stop fleeing. But it would seem that even the estimate of a second is an exaggeration. As I have said, the respondent stated that when he shot the appellant, they were an approximate distance of five metres apart. Yet he concedes that this is the

distance they were from each other when he gave the oral warning. Moreover, he said the following in his trial before a regional magistrate (he was charged with having attempted to murder the appellant but was acquitted; however, by consent, the record of the proceedings was admitted in evidence):

> "I shouted to him, stop or I will shoot and with that, there was a shot fired...
> I tried to explain to the Court that things happened so fast and I asked him to stop or I would shoot, that is when the shot went off."

I interpret this evidence to mean that shout and shot were virtually simultaneous. But if there was a pause between the two, it was plainly an unreasonably brief one. On a conspectus of this part of the case I remain entirely unpersuaded that the appellant was afforded a sufficient opportunity before he was shot to heed the oral warning. It follows that on this basis alone the respondent was not entitled to the protection of sec

49(1)(b) and that the shooting of the appellant was unlawful.

This conclusion really makes it unnecessary to deal with the other issue referred to in (iv) above, viz whether the force used by the respondent was reasonably necessary. As however I hold a firm view on this part of the case as well, I propose to deal with it. It is true that when he was shot the appellant was close to the corner of the garage and was therefore on the point of disappearing from the respondent's view; that if the appellant then escaped, and seeing that the respondent did not know him and had little chance to identify him, it is unlikely that he would later have been able to be traced and arrested; that being younger than the respondent (who was 61) he was probably the more agile of the two; that the respondent had little time within which to consider what to do; and that the incident

took place at night when no help was to hand. And, of course, one must guard against adopting an ex post facto arm-chair approach. Nevertheless, I am of the opinion that the respondent, in shooting the appellant as he did, used excessive means. As I have indicated, the respondent himself did not regard it as necessary to shoot the appellant. His intention was merely to fire a warning shot. I agree with this assessment of what the situation called for. I leave aside the issue whether the respondent would not have had a sufficient opportunity to shoot the appellant in the event of him rounding the corner and proceeding down the lane (which would seem to have been his intention). I rather assume in favour of the respondent that the appellant's flight had to be stopped before this occurred. In my judgment there was time to do so. The appellant was still some two (probably three) metres from the corner.

The respondent did not show that he would not have been able to fire a warning shot and a further shot within the time that it would have taken the appellant to cover this distance. Nor did the respondent establish that an oral threat to shoot the appellant followed by a warning shot would not have halted the appellant. It is just as likely that the firing of a warning shot would have convinced the appellant that the respondent had the means to carry out his threat. Before this he did not know that the respondent had a firearm. If then, as I find, the respondent was not entitled to have shot the appellant, the remaining question is why did he? An analysis of the respondent's evidence fails to reveal any specific explanation for what happened. On this basis, he failed to discharge the onus of showing that he acted reasonably and he is not entitled to the protection of sec 49(1)(b) (cf Matlou vs Makhubedu

1978(1) SA 946(A) at 958 B-C). At best for the respondent, it would seem that his aim was faulty. I have already quoted the respondent's evidence as to how he pointed the firearm and more specifically where he aimed, namely "slightly downwards" and "slightly to (the) right". He does not clarify what this means. But there is no reason why "slightly" should not be given its ordinary meaning of unsubstantially or carelessly (see the Shorter Oxford English Dictionary). Consider also his concession that he was not "an expert shot" and that he knew that his firearm was "a lethal weapon". In these circumstances (which are different to those in R vs Labuschagne 1960(1) SA 632(A)) the respondent took an unwarranted and therefore unreasonable risk that the appellant might be struck. It was a risk that could and should have been avoided. There was no reason why he could not have aimed and shot (whether into the air

or into the ground) more to the right. It would have been safe to do so. There was neither person nor property which was in harm's way. And seeing that the respondent was stationery at the time he had a greater opportunity to properly aim. Our courts have often emphasised the care that must be taken and the skill that must be displayed in the handling and use of firearms. This case provides a tragic illustration of the consequences of these warnings not being heeded. In my opinion on this ground too the respondent acted unlawfully.

This does not quite dispose of the matter. Mr du Plessis, on behalf of the respondent, presented two alternative arguments. One was that the respondent's conduct was not legally blameworthy, ie there was an absence of fault. There is no merit in this point. Whilst there was no dolus on his part (despite the fact

that he intended to fire the revolver), the respondent was plainly negligent. For the reasons already given, he did not observe the standard of care which the law of delict requires, namely that of a diligens paterfamilias. A reasonable man in the position of the respondent, firing only "slightly" to the right, would have foreseen the possibility of the harm that befell the appellant and would have taken reasonable steps to guard against its occurrence; and the respondent failed to take such steps.

The remaining issue is whether, as the respondent pleaded, the appellant was guilty of contributory negligence and whether his damages should therefore be reduced. The short answer to this point is that the shooting was not caused by any unreasonable conduct on the appellant's part. The matter must be tested from the time that the respondent called on him

to stop. As I have already found, the appellant thereafter had an insufficient opportunity to heed the warning before he was shot.

The following order is made:

(1) The appeal succeeds with costs, including the costs occasioned by the applications for leave to appeal to the court a quo and to this Court, but excluding the costs of the application for condonation referred to in paragraph 1 of this Court's order dated 7 November 1990.

(2) The order of the trial court is set aside and the following substituted:

"(1) Judgment is granted in favour of the plaintiff in the sum of R525 000.

(2) The defendant is to pay the costs of suit."

NESTADT, JA

VAN HEERDEN, JA)
) CONCUR
GOLDSTONE, JA)