IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: AR126/2018

In the matter between:

PHUMLANI NDLOVU Appellant

and

THE STATE Respondent

JUDGMENT

Vahed J (Jappie JP concurring):

[1] Being a law-enforcement official these days is not easy. The popular expression "…damned if you do and damned if you don't…" can be applied to most of one's important policing activities or one's decisions not to adopt a particular course of action. The nub of the appellant's case (he was a policeman) is that he was damned by the court *a quo* because he acted and adopted a particular course of action.

[2] The appellant was convicted of murder in the Regional Court in Durban on 14 July 2017. On 15 January 2018 he was sentenced to serve a term of imprisonment of 10 years. His appeal against both the conviction and sentence is with the leave of the court *a quo*.

[3] We have received expansive and comprehensive heads of argument from Ms *Hemraj* SC, who with Mr *Nicholson* appeared for the appellant, and from Mr *Chetty* who appeared for the respondent. The heads of argument have assisted us greatly and I borrow freely from them.

[4] The facts are these:

[5] The appellant was a constable in the South African Police Service. On 29 September 2013 he booked on duty at the Cato Manor Police Station at 18h00 that evening. He was in the uniformed section, not attached to any specialised unit. On that day he was assigned to be a "van driver" and was paired with constable Nzama and they were generally on crime prevention duty, assisting in the charge office and attending to complaints lodged by the public. He and Nzama alternated the driving duty during that shift which was to be a 12-hour period, ending at 06h00 on the morning of 30 September 2013.

[6] Protest action by members of the Cato Crest community, Cato Crest being a section of the suburb of Cato Manor, was underway. They were upset with the Ethekwini Municipality's clearing of informal settlements and a march was underway, commencing during the early hours of the morning of 30 September 2013. Receiving the call to duty over the police radio, the appellant and Nzama were dispatched to the scene, and after some time they found themselves facing the crowd in Harcombe Gardens (a public road in Cato Manor). Depending on which witness account one accepts, the crowd consisted of anything between 300 to 500 strong in number. Nothing turns on the variance in this estimate.

[7] A confrontation developed and the crowd became violent. Other policemen were also on the scene. The police fired a total of 5 shots, two by the appellant. A young lady situated apparently somewhere near the front of the crowd was fatally injured. The bullet which killed her was, upon forensic ballistic examination, linked to the appellant's police issue firearm. That led to the charge, and the conviction and sentence referred to earlier.

[8] In his plea the appellant raised private defence and necessity.

[9] The state led the evidence of two eye witnesses, Ngidi and Mthethwa. The other state witnesses testified as to their observation of the scene after the shooting as to the forensic ballistic evidence. The appellant testified in his defence and Nzama assisted him as a witness to the events that occurred.

[10] Ngidi stated that he was one of the protestors. They were burning tyres demonstrating their rage at 04h15 in the morning because the municipality had demolished their houses the day before. Their intention was to invite the municipality to come to the scene and interact with them. The deceased was marching alongside him at the front of the crowd and that they were not armed at all. They were holding each other's hands as they were marching. Upon seeing the police, they took another route soon after which two police vans appeared in front of them. The occupants alighted and without saying anything to them, cocked their firearms and fired at them. He heard two gunshots being fired and fled after he heard the gunshots. He then realized that the deceased had been lying injured on the ground.

[11] Under cross examination he said no one in the crowd was aware of any of them being armed but that if any person marching with them had a firearm he would not have known but he would have heard the explosion. After burning the tyres they were marching, “toyi-toy’ing” and running, playing jokingly and holding one another’s hands, walking and singing into Harcombe Gardens. His description of the march is reminiscent of the “flower-power” protest marches in the United States in the 1960’s. (In fact, reading this aspect of his evidence, one can almost hear the strains of *Kumbaya*, the 1920’s spiritual song made popular by *The Seekers* and by *Joan Baez* during the folk music revival of the 1960’s).

[12] Ngidi continues under cross-examination that he was about four meters away from the police when the policemen suddenly jumped out of their vehicles and fired at them asking them what they wanted but firing at the same time. At the time the visibility was somewhat restricted because both the police vehicles shone their bright lights at them and they had difficulty identifying the policemen. He was asked if he recalled if the crowd were in possession of bricks, stones or sticks and his response was to the effect that as they had no other means of trying to block the roadway the protesters picked up stones in order to form the barricade on the road and burn the tyres. He said that when the police fired at them it was into the crowd. It was put to him that it was highly improbable that trained officers would fire live ammunition into a crowd apparently for absolutely no reason but he was adamant that that was the manner in which the incident took place. When It was put to him that five shots had been discharged by the police Ngidi was adamant that it was only two shots. He also denied damaging the police vehicle or that the crowd caused any damage to it.

[13] Mthethwa testified that he participated in the march and the crowd comprised of about 300 community members who were not armed in any way. After barricading the roads they decided to go and meet their friends and whilst they were marching they noticed the presence of the police. They took another road and whilst they were marching on that road two police vehicles arrived and flashed their headlights. Two gunshots were fired from that direction. They turned around and fled. As they were running back, he saw the deceased lying on the ground. During his evidence in chief he indicated that he wished to apologize because when compiled his statement he identified the shooter because he had heard what people were saying about the identity of the shooter. However, and in fact, when blinded by the flashing bright lights he could not see who was shooting at the time. He said that at the time he made the statement he was confused.

[14] Under cross-examination he conceded that he could not say who the police members were that fired the shots but because some of the persons in the crowd mentioned the name Mganga, he mentioned that information in his statement. He was unable to answer the question as to when it was that he realized that he had incorrectly identified the shooter as someone named Mganga. The contents of his statement were put to him and his response was that the details of the shooter were incorrect but that he was confused at the time. He continued and said that they were singing and marching when the police simply fired shots at them. He said the girls were holding hands and marching in front of all the males. Under cross examination further he said that the crowd was facing the police when the police alighted and he heard gunshots being fired. He heard two gunshots and at the time they were still facing the police. It was put to him that the difficulty with his version was that the deceased was shot from

the back and if he and the crowd were facing the police at the time of the shooting, then somebody from the crowd had shot the deceased. He said that the first shot stuck the girl on the arm and as they turned their backs the second shot caused the death of the deceased. I pause to mention that this aspect is not supported by the medical evidence which records the deceased sustaining a single gunshot wound. He also denied that there was any attack on the police van or that it had sustained any damage.

[15] I also pause to mention that the record reveals that Colonel Mganga was the Station Commander at Cato Manor. He was not on duty that day.

[16] The appellant testified that he discharged his firearm because he considered himself and Nzama to be in grave danger. The discharge of the firearm caused the crowd to move away. He said he thought their lives were in danger because the crowd commenced an attack on them. They damaged the police vehicle in which they were travelling, and there was the sound of a gunshot from the crowd. He discharged his firearm instead of simply leaving the scene because a number of the protesters were in the immediate vicinity of the police van and in close contact with Nzama, and because they could have caused more danger and could have dispossessed Nzama of his firearm. He said that the damage to the windscreen was caused by one or more in the crowd. He said that he did not ask Nzama to reverse and attempt to leave because there was simple no time to do so.

[17] He was cross-examined at length as to why he had not thought of retreating and he repeatedly answered that there was no time to do so.

[18] It was put to him that when he saw a group of some five hundred people armed with bricks, burning tyres and cane knives, instead of performing a monitoring role, he became confrontational. He refuted this suggestion.

[19] He did not see anyone in the crowd discharging a firearm but he did hear the sound of a gunshot. In response to why he thought the gunshot emanated from the direction of crowd, he said that Nzama, who was in his company, had not fired a shot at that stage as he was still inside the police motor vehicle. He said that he had discharged his firearm into the ground because he wanted the crowd attacking them at the van to scatter and disperse thus giving him an opportunity to get away. He was asked why he fired into the ground because of the potential of ricochet and it was suggested that he could have fired a warning shot into the air. He said he was aware of that but there was also the danger of the bullet returning to the ground and not knowing where it was going to land if he fired into the air.

[20] He persisted in his contention that he was defending not just himself but also his colleague Nzama and that both of them were in danger. It was put to him that he could not have been defending himself because the deceased posed no danger to him. He answered that she was part of the crowd that was attacking them. It was also put to him that even if the situation was dangerous or potentially dangerous, he had enough opportunity to move away. He denied this.

[21] The Court *a quo* put a number of questions to the appellant. Most pertinently he was asked that of the five hundred odd people in the group, how many of them were actually at the vehicle, and in its vicinity, placing the appellant's and

Nzama's life in danger. He said that there were about twenty people around the van and seven to eight people around Nzama's door. He was asked by the Court why he did not shoot directly at those people that posed a threat to him and Nzama given that he would be entitled to shoot at them directly. He replied that if he had attempted a direct shot it could have led to Nzama being hurt because they were surrounding him with some actually holding onto him.

[22] Nzama testified that he was on duty in the same vehicle as the appellant when they received a complaint of public violence at 03h00 in the morning on 30 September 2013. On arrival at the scene they saw the burning tyres and rocks forming a barricade in the road. He saw members of the community "toyi-toy'ing" on the scene. He called for backup and for a special unit known as Public Order Policing ("POP") to assist. The POP members arrived and whilst they were there, he and his colleagues were monitoring the situation. He said that some of the members of the public that were "toyi-toy'ing" had spears, iron rods, stones and tyres. The crowd changed direction and he and his colleagues decided to go in the same direction so as to monitor the situation and to see what was taking place. As he turned the corner the crowd began to throw stones at them. He tried to reverse but there was a vehicle behind him. One of the "toyi-toy'ing" members struck the windscreen on the driver's side with a brick cracking the windscreen and the splinters of glasses fell onto their faces. He turned his head to fend off the pieces of glass and when he looked up again, he found three community members on his side of the vehicle. One of them broke the driver's side window with a brick and the window was completely shattered. Another grabbed hold of him by his epaulettes and tried to pull him out of the window whilst the other was trying to open the door. One of them eventually succeeded in opening the

door whilst the other was trying to pull him out of the window. He was trying to protect his service firearm which was holstered on the right side. He was trying to resist being removed from the vehicle.

[23] Nzama testified further that Constable Mdletshe tried to assist him and protect him while those persons were struggling with him at the door trying to pull him out of the vehicle. He heard a shot being fired and it sounded like it was from a distance away. There was a shot fired by Constable Mdletshe because the crowd did not want to obey. He said that at that moment they could have taken him out of the vehicle. He managed to pull out his firearm and fired twice into the ground. That is when the crowd started to retreat. He got back into the vehicle and reversed to the BP service station. He said that he knew that the appellant had fired a shot as well but he was unable to say between appellant and Mdletshe who fired the first shot. He said that it was about a minute from the time the windscreen was cracked until he was able to reverse to the BP service station because everything was happening very fast. He discharged his firearm because their lives, and particularly his life, were in danger and he had no other means to get away from the people that were at the door.

[24] Under cross examination Nzama was asked why, if he regarded his life to be in danger, he did not just shoot at the crowd. He said that, although they were throwing stones at the police, not all of the people who were “toyi-toy’ing” were a danger to him. He said those in his immediate vicinity posed a threat. He said that he fired into the ground because he could not risk using his firearm with an outstretched arm towards the assailants because he was afraid that one of them could grab the firearm. For him there was no other alternative but to discharge his firearm to get away

from the scene and he maintained that the incident occurred in a very short space of time.

[25] In assessing the defence version the court *a quo* found the appellant's version highly improbable. This was with particular reference to the appellant's evidence that the crowd was violent, that the vehicle had been damaged, and that at that stage he believed that Nzama was in danger when he was being pulled from the police van. The court *a quo* also found it improbable that the appellant heard a gunshot and thought that Nzama could have been assaulted or killed and that this then necessitated his firing two warning shots into the sand to deter the crowd. The court *a quo* also found that in the light of the defence expert forensic witness agreeing that there was no ricochet of the fatal bullet, it was highly improbable that on the accused's version that one of the shots that he said he fired into the ground would have entered the back of the deceased. Accordingly, the learned magistrate *a quo* found that it could not be self-defence if at that stage the crowd had turned and commenced to flee.

[26] As part of his assessment the learned magistrate *a quo* also took into account the fact that the police report indicated that the firearms were "…pointed at the feet…", apparently contradicting Nzama's evidence that the police (presumably including the appellant) had their firearms pointed with arms outstretched with the barrel facing forward. This was notwithstanding Nzama's evidence to the effect that he did not see the appellant firing. As a consequence, the learned magistrate *a quo* found that the only inference to be drawn was that the accused fired the shots into the crowd and could have forseen the possibility that someone could die as a result thereof. The court below thus found that the appellant's version that he fired twice into

the ground highly improbable and rejected it as false beyond a reasonable doubt. The court below reinforced that rejection by concluding that the appellant attempted to distance himself from admitting that he fired into the crowd whereas on his own version he would have been justified in so doing. The learned magistrate *a quo* reasoned that appellant's reluctance to make that admission was because he did fire into the crowd when they were running away from the scene and that accounts for the probabilities as to how the deceased was shot in the back.

[27] The learned magistrate *a quo* was critical of Nzama in two principle respects. Firstly, the POP unit did not follow the crowd on that day and if the crowd was as volatile and badly behaved as described by Nzama it was expected that they would have followed the crowd. Secondly, if, according to Nzama, the police (ie Nzama, the appellant and their companions) followed the crowd to prevent crime, why, given their description of the divers crimes being committed in their presence, was it that they were unable to effect any arrests?

[28] Significantly, the learned magistrate *a quo*, failed to deal with the appellant's, and more particularly Nzama's, belief that his (ie. Nzama's) life (or at least his safety) was under threat. Ms *Hemraj* submitted that in omitting to do so, the court *a quo* did not deal with the circumstances created thereby that required appellant to have acted as he did. This must be an essential and a preliminary part of the enquiry into whether appellant acted lawfully. The court *a quo* ignored the appellant's and Nzama's evidence in this regard and, so it was submitted, misdirected itself in this respect. That argument resonates with me.

[29] Against that background Ms *Hemraj* submitted that it was highly improbable that the appellant and the other policeman present would have behaved in the manner testified to by the state witnesses in full view of witnesses almost all of whom were strangers. This was particularly so if one considers that on the respondent's version of events there appears to have been no apparent cause for the appellant and the other policemen to discharge their firearms. She submitted further that if indeed the crowd was simply marching and singing and not in possession of any weapons at all (and behaving peacefully), then it makes the appellant's behaviour all the more bizarre.

[30] It is appropriate mentioning at this juncture that the respondent's version of the events was totally at odds with the objective evidence, particularly with regard to the behaviour of the crowd, the debris of objects (used as weapons) left in its wake, whether they were facing the police or in the process of turning and fleeing at the moment the shooting commenced, and the attack on the police vehicle and Nzama.

[31] In *S v Van Der Meyden* 1999 (1) SACR 447 (W) (which was quoted with approval at para [11] in *S v Heslop* 2007(1) SACR 461 (SCA) the Court said:

> "What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored."

[32] Contrary to that principle the court *a quo* failed to take into account the respondent's eye witnesses testimony and the improbabilities inherent in their versions.

[33] In *S v Shackell* 2001 (2) SACR 185 (SCA) the following was said:

> "It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of the standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If an accused's version is reasonable possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonable possibly be true."

[34] The learned magistrate's criticism of Nzama's evidence is on two levels, viz, that if the crowd was so volatile and badly behaved, the POP did not follow the crowd but that Nzama said they followed the crowd to prevent any crime being committed. However, he was unable to effect any arrests of persons causing public violence, damaging police vehicles and throwing stones. In my view the criticism is not justified given the circumstances and is also not dispositive of Nzama's credibility as to the attack upon his life.

[35] The learned magistrate failed to deal with whether in fact Nzama's life was in danger from the people who were at his door, who had damaged the windscreen and who were trying to pull him out of the vehicle. In omitting to do so, he does not

deal with the circumstances created that required the appellant to have acted as he did. This must be an essential and preliminary part of the enquiry into whether the appellant acted lawfully. In my view the learned magistrate ignored both the appellant's and Nzama's evidence in this regard and misdirected himself.

[36] In *Heslop* the following was said at para [22]:

> "It goes without saying that it is a requirement of the fair trial guaranteed by s 35(3) of the Constitution of the Republic of South Africa, 1996 that, if a court intends drawing an adverse inference against an accused, the facts upon which this inference is based must be properly ventilated during the trial before the inference can be drawn."

[37] The evidence as to the circumstances surrounding the shooting was canvassed in detail during Nzama's evidence in chief. Scant regard was paid to that evidence. The court *a quo* instead seeks to draw the inference that appellant fired the shots into the crowd and could have seen the possibility that someone could die as a result thereof. The appellant's version that he fired twice into the ground was regarded as being highly improbable and was rejected as being false beyond a reasonable doubt. The learned magistrate draws this inference in part from Nzama's evidence that the barrel of the firearm was facing forward and that the appellant's shots were not directed at his side, although Nzama could not see in which direction appellant had fired.

[38] Ms *Hemraj* submitted that the inference was not only incorrectly drawn but was also not the only inference that could be drawn from the circumstances. That submission is undoubtedly correct.

[39] In *S v Steyn* 2010 (1) SACR 411 (SCA) the following was said at para [21] (footnotes omitted):

> "Whether a person is obliged to flee from an unlawful attack rather than entitled to offer forceful resistance, is a somewhat vexed question. But in the light of the facts in this case, it is unnecessary to consider the issue in any detail. It could not have been expected of the appellant to gamble with her life by turning her back on the deceased, who was extremely close to her and about to attack her with a knife, in the hope that he would not stab her in the back. … That being so, the appellant cannot be faulted for offering resistance to the deceased rather than attempting to flee from him."

[40] In similar vein, the criticism directed at the appellant and Nzama for failing to retreat is unwarranted.

[41] In para [18] in *Steyn* the Court said the following (footnotes omitted):

> "It is indeed so that when an accused raises a plea of private defence, the court's initial enquiry is to determine the lawfulness or otherwise of the accused's conduct and that, if found to be lawful, an acquittal should follow. At the same time, however, it is clear from its judgment that the court a quo specifically turned its attention to the question of lawfulness of the appellant's conduct and, in considering that issue, the courts often do measure the conduct of the alleged offender against that of a reasonable person on the basis that reasonable conduct is usually acceptable in the eyes of society and, consequently lawful."

[42] Ms *Hemraj* submitted that the learned magistrate *a quo* committed a misdirection when he did not embark upon the initial enquiry to determine the lawfulness or otherwise of the appellant's conduct in the light of the danger presented to both Nzama and the appellant by the crowd of people surrounding the vehicle. There is much merit in that submission. Indeed, in para [19] in *Steyn* the court went on to say the following (footnotes omitted):

> "Every case must be determined in the light of its own particular circumstances and it is impossible to devise a precise test to determine the legality or otherwise of the actions of a person who relies upon private defence. However, there should be a reasonable balance between the attack and the defensive act as 'one may not shoot to kill another who attacks you with a flyswatter'. As Prof J Burchell has correctly explained '…modern legal systems do not insist upon strict proportionality between the attack and defence, believing rather that the proper consideration is whether, taking all the factors into account, the defender acted reasonably in the manner in which he defended himself or his property'."

[43] In *S v Pakane and Others* 2008 (1) SACR 518 (SCA), at para [19], Maya JA said the following (footnotes omitted):

> "The thrust of the second appellant's defence at the trial was that he fired shots at the figure in the belief that his life and those of his colleagues were in danger. The defence thus raised in answer to the murder charge was that of a private defence, alternatively putative private defence. The requirements of these defences are trite. In the case of private defence use of force is justified if it is reasonably necessary to repel an unlawful invasion of person, property or other legal interest. The test of whether the accused acted justifiably in defence is objective."

[44] In learned magistrate *a quo* placed great emphasis on two answers elicited from the appellant under cross examination, namely that when it was suggested to

him that the bullet found in the deceased had emanated from his firearm, the appellant replied that he was not able to dispute that fact. He also said he was unable to dispute the evidence that the defect on the bullet was not as a result of a ricochet. When it was put it to him that he fired the shot that killed the deceased, he replied that it was a finding which he could not dispute as he had fired shots downwards and he had no intention of killing the deceased.

[45] It was submitted that the learned magistrate placed undue emphasis on that evidence as the import of what appellant was saying was simply that he did not have the kind of expert knowledge to challenge the evidence of the expert state witnesses, and that these answers did not lay the foundation for any adverse criticism nor did they point to the guilt of appellant by inferential reasoning. I agree.

[46] On that score also, the injuries sustained by the deceased with regard to bullet entry wound and bullet track are entirely unhelpful. It would be speculative to suggest that one of any combination of factors in such a volatile and dynamic situation was conclusive. More so, as they were not canvassed during the trial.

[47] In *S v Trainor* 2003 (1) SACR 35 (SCA) the following passage is instructive:

> "[12] In dealing with the requirement (when assessing a claim of private defence) that there must be a reasonable connection between an attack and a defensive act, C R Snyman in *Criminal Law* 4th ed states the following at 107:
>
> > 'It is not feasible to formulate the nature of the relationship which must exist between the attack and the defence in precise, abstract terms. Whether this requirement for private defence has been complied with is in practice more a question of fact than of law.'

[13] At 109 the learned author states:

> 'It is submitted that the furthest one is entitled to generalise, is to require that there should be a reasonable relationship between the attack and the defensive act, in the light of the particular circumstances in which the events take place. In order to decide whether there was such a reasonable relationship between attack and defence, the relative strength of the parties, their sex and age, the means they have at their disposal, the nature of the threat, the value of the interest threatened, and the persistence of the attack are all factors (among others) which must be taken into consideration. One must consider the possible means or methods which the defending party had at her disposal at the crucial moment. If she could have averted the attack by resorting to conduct which was less harmful than that actually employed by her, and if she inflicted injury or harm to the attacker which was unnecessary to overcome the threat, her conduct does not comply with this requirement for private defence.'. "

[48] With regard to the defence of necessity, which the court *a quo* did not deal with at any level, the Supreme Court of Appeal in *Maimela and Another v Makhado Municipaility and Another* 2011 (6) SA 533 (SCA) said that necessity, unlike self-defence, does not require the defendant's action to have been directed at the perpetrator of an unlawful attack and that it was not necessary for the defence of necessity to succeed, to show that the persons shot were part of the attacking crowd. There the court discussed the issue as follows (footnotes omitted):

> "It suffices to say that necessity, unlike self-defence, does not require the defendant's action to have been directed at the perpetrator of an unlawful attack. It is invoked where the action, or conduct, of the defendant was 'directed against an innocent person for the purpose of protecting an interest of the actor or a third party (including the innocent person) against a dangerous situation'. And whether

or not the defendant's conduct would be covered by the defence of necessity will depend on all the circumstances of the case.

[17] Professor Jonathan Burchell suggests that for an act to be justified on the ground of necessity the following requirements must be satisfied:

> '(*a*) A legal interest of the defendant must have been endangered, (*b*) by a threat which had commenced or was imminent but which was (*c*) not caused by the defendant's fault, and, in addition, it must have been (*d*) necessary for the defendant to avert the danger, and (*e*) the means used for this purpose must have been reasonable in the circumstances.'

The crux of counsel's argument was that the respondents failed to show that it was reasonable for Nkuna to have fired shots in the direction of Maimela and Davhana, particularly the shots that struck them. It was therefore submitted that the last element of the requirements as formulated by Prof Burchell was not established, because it was not reasonable for Nkuna to have fired randomly in the direction of the crowd, most of whom were not participating in the attack upon him. Counsel's further contention was that even if it was reasonable for Nkuna to have fired randomly into the crowd it was not reasonable for him to have continued firing after the first shot.

…

…I fail to see how it could be argued that it was not reasonable for him to have fired randomly in the direction of the crowd, if indeed he did, when people in that very crowd were perpetrating the murderous attack on him. It may well be, and in all probability is so, that most of the crowd were not close enough to physically participate in the assault. But it is precisely these situations that the defence of necessity seeks to cover."

[49] It was submitted that had the court *a quo* analysed the facts of the case against these dicta it would have come to a different conclusion. In failing to do so, it misdirected itself. In these circumstances, this court is at large to examine the facts

and decide whether appellant acted lawfully. It seems to me, accepting these submissions, that he did.

[50] In *S v Francis* 1991 (1) SACR 198 (A) it was held (borrowing from the headnote) that the powers of a Court of appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial court's conclusion, including its acceptance of a witness' evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness' evidence. A reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony.

[51] Reliance upon *Francis* and upon that theme was the central thesis of the heads of argument put up by Mr *Chetty*, who appeared for the respondent. Those heads of argument underpin the opposition to the appeal with a complete acceptance of the facts as construed by the learned magistrate *a quo* and his analysis of them and of the defences sought to be sustained by them.

[52] In argument before us Mr *Chetty* was hard-pressed, understandably so, to sustain that argument. On my analysis of the case the learned magistrate misdirected himself in a number of crucial aspects. We are thus entitled to interfere.

[53] The appeal is upheld and the conviction and sentence of the court *a quo* is set aside. The finding of the court *a quo* is substituted with an Order that the accused is found not guilty and discharged.

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Vahed J

_____
Jappie JP

Case Information:

Date of Hearing:	22 March 2019
Date of Judgment:	24 May 2019
For the Appellant:	Ms P D Hemraj SC (with W Nicholson) (Instructed by the State Attorney)
For the Respondent:	T V Chetty (Director of Public Prosecutions)