THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: A347/2013

In the matter between:

JOHANNES KRUGER **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: ROGERS J & RILEY AJ

Heard: **12 DECEMBER 2014**

Delivered: **17 DECEMBER 2014**

JUDGMENT

ROGERS J:

Introduction

[1] The appellant is (or was at all material times) a member of the South African Police Service ('SAPS'). The charge against him arose from an incident which occurred on 22 January 2006 on the road between Elands Bay and Lamberts Bay in which a Mr Eric Bulana ('Bulana') was injured by a shot which struck him in the back. The appellant was charged with attempted murder. There was an alternative charge of causing injury by negligently discharging a firearm in contravention of s 120(3)(a) of the Firearms Control Act 60 of 2000.

[2] The State called Bulana as its only witness. The appellant testified in his own defence and also called Capt Cloete who had conducted an inspection and compiled an incident report. Bulana did not impress the magistrate as a witness. Broadly speaking, the magistrate decided the case on the appellant's version. On that basis, the magistrate found that the bullet which struck Bulana had been fired by the appellant, that the shooting had not been justified by s 49(2) of the Criminal Procedure Act 51 of 1977 and that the appellant was guilty of attempted murder, with fault in the form of *dolus eventualis*. He sentenced the appellant to five years' imprisonment, suspended for five years on appropriate conditions.

[3] With the leave of the magistrate, the appellant appeals to this court against conviction and sentence.

The facts in summary

[4] The following is a summary of the appellant's version, which the magistrate accepted. As at January 2006 the appellant was stationed at Lamberts Bay. He had more than 16 years' service and held the rank of inspector (a rank later renamed warrant-officer). On 22 January 2006 he was on duty in a patrol vehicle with a colleague. He was in uniform. Shortly after 16h00 he received a radio call from an Insp Neethling of the neighbouring Graafwater police station to say that a Graafwater police van was chasing a Toyota Cressida linked to possible drug dealing in the area. The driver (Bulana) was refusing to pull over. Neethling asked whether the appellant could assist in apprehending the vehicle.

[5] The appellant was at the time of this request travelling from Lamberts Bay in a southerly direction towards the bridge over the Sishen/Saldanha railway line. The Toyota, with the Graafwater van in pursuit, was coming towards the bridge from the opposite direction. It was not at this stage a high-speed chase – the appellant's information from the Graafwater van was that they were travelling at about 90 kph on a tar road. The Toyota could carry on straight over the bridge towards Lamberts Bay or could turn left or right onto a dirt service road running parallel to the railway line. Kruger drew up his van on the Lamberts Bay side of the bridge to survey the scene. The Graafwater van radioed him to say that the Toyota was turning right at the bridge in the direction of the township.

[6] Kruger took after them along the service road, overtaking the Graafwater van because he knew the area better. His blue lights were on. Having hooted and come alongside the Toyota, he and his colleague made hand signals to the driver that he should pull over. He said the Toyota was known to the police in the area but he did not at that stage recognise the driver as Bulana, though the latter too was known to him as the police had a profile on him in connection with drug dealing. Bulana saw the appellant's hand signals but refused to stop, instead continuing in the middle of the road. The appellant accelerated past him and then slowed down. The Toyota tried to overtake on his left and then on his right, in response to which the appellant again increased his speed. The Toyota managed to overtake after bumping the back of the appellant's van. The appellant regained control of the van and continued the chase. As he tried again to overtake the Toyota, the Toyota deliberately swerved in front of him, striking the van and almost forcing the appellant off the road. The appellant managed to bring his vehicle back onto the road. The Toyota was travelling on a dust road at about 100 kph, the speed limit being 80 kph.

[7] The appellant concluded that his only option was to shoot at the rear tyres of the Toyota. The crew of the trailing Graafwater van also radioed him to say he should shoot. The Toyota was weaving left and right across the road. The appellant, who was a good shot and achieved high scores in shooting exercises, continued steering with his left hand while shooting out of the window with his right. He did not fire a warning shot because he did not believe it would be seen or heard by the Toyota's driver. He was about five metres from the Toyota. He aimed low. He fired

12 shots in all. He estimated that this was over a period of eight to nine minutes while he was chasing the Toyota. The distance from the bridge to where the chase came to an end was about eight kilometres, the road was straight and at no stage during the shooting incident were there pedestrians or oncoming traffic. At least one of the appellant's shots hit the Toyota's left rear tyre, despite which Bulana drove on. As he fired the last shot he saw the Toyota's back window shatter. He had not aimed at the back window, saying that this must have been a ricochet off the boot. Shortly afterwards the Toyota turned left towards the township. Kruger did not want to fire further shoots because of the danger to the inhabitants.

[8] The Toyota eventually stopped because of the flat tyre. Bulana got out of the Toyota armed with an iron bar and attacked the appellant. The appellant and other police officials subdued him with pepper spray. Bulana's car was searched but nothing suspicious was found in the car or on Bulana's person.

[9] Bulana was handcuffed and taken to a clinic. It was only there that the appellant realised that a bullet had struck Bulana in the back. The bullet was not analysed – Bulana refused to allow it to be removed from his body. No trajectory analysis was done to determine where the bullet which struck Bulana entered the Toyota. At the clinic Bulana asked why he was being arrested. The appellant replied that he was being arrested for reckless or negligent driving and for damaging State property and putting lives at risk. A doctor cleaned the wound and applied a plaster. The appellant then took him to the Lamberts Bay police station.

[10] Bulana was charged with various offences arising from the incident (assault, reckless or negligent driving and driving without a license). He apparently admitted guilt on the charge of driving without a license and was acquitted on the other charges.

[11] The appellant did not fire any of his shots at Bulana and did not intend to hit him. The appellant surmised that one of his shots must have ricocheted. The photographs show that the Toyota's back window had been smashed, which might have been a ricochet (though the appellant had a theory that this particular ricochet

had struck a speaker behind the rear seat and then deflected through the back window from the inside).

[12] The appellant testified that he decided to fire shots because the suspect (the driver of the Toyota) was using his vehicle in a way which was threatening the lives of the police (including the appellant himself) and of the public and was damaging State property (the appellant's police van). He saw it as his duty in the circumstances to bring the Toyota to a halt.

[13] The shooting incident was investigated by Capt Cloete in accordance with SAPS procedure. He concluded that the shooting was lawful. No disciplinary action was taken against the appellant.

Attempted murder and legislative provisions

[14] The elements of the crime of attempted murder are (i) an attempt (ii) to kill another person unlawfully (*actus reus*) (iii) with the intent to kill and with an appreciation that the killing will be unlawful (*mens rea*). The state of mind required for attempted murder is the same as for murder. The difference lies in the *actus reus* - in the case of murder, the act allegedly perpetrated by the accused must have actually resulted in death. As is well known, intent to murder includes a state of mind in which the accused foresaw the possibility of death and was reckless as to whether death ensued, ie *dolus eventualis* (see *S v Combrink* 2012 (1) SACR 93 (SCA) para 17). The same state of mind suffices for attempt to murder (*S v Huebsch* 1953 (2) SA 561 (A) at 567D-568A; *S v Nango* 1990 (2) SACR 450 (A) at 457b-f; Snyman *Criminal Law* 6th Ed at 294).

[15] Ordinarily it is unlawful to kill another person. In certain circumstances the killing might be justified and thus lawful. Our common law recognises certain grounds of justification, for example private defence (often styled self-defence). Legislation may also provide statutory grounds of justification.

[16] The statutory ground of justification of relevance in this case is s 49 of the Criminal Procedure Act, which sets out the circumstances in which force may

lawfully be used in effecting an arrest. In order to fall within s 49, the arrest must itself be lawful. Since the appellant and his colleagues did not have a warrant, they could only arrest Bulana if one or other of the circumstances set out in s 40(1) of the Criminal Procedure Act was satisfied. Of potential relevance are the following grounds for warrantless arrest in s 40(1): that Bulana was committing or attempting to commit an offence in the appellant's presence (para (a)); that Bulana was reasonably suspected of committing or having committed a drug offence (para (h)); that Bulana was wilfully obstructing the appellant and other officers in the execution of their duties (para (i)).

[17] Section 49 was amended with effect from 18 July 2003 (by s 7 of the Judicial Matters Second Amendment Act 122 of 1998) and then with effect from 25 September 2012 (by s 1 of the Criminal Procedure Amendment Act 9 of 2012). In its original form the section read thus:

'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.

(2) Where the person concerned is to be arrested for an offence referred to in Schedule 1 or is to be arrested on the ground that he is reasonably suspected of having committed such an offence, and the person authorized under this Act to arrest or to assist in arresting him cannot arrest him or prevent him from fleeing by other means than by killing him, the killing shall be deemed to be justifiable homicide.'

[18] In this form, s 49(1) dealt with non-deadly force while s 49(2) dealt with deadly force. Section 49(1) in that form was considered in *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA). The court held that, in the light of constitutional values, the traditional view of reasonableness (which assessed the 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 suspect to the safety and security of the police officers, other individuals and society as a whole. In so doing, one should give full weight to the fact that the suspect is, for example, young or unarmed or of slight build or could be brought to justice in some other way. On this test, the use of force necessary for the objects stated in s 49(1) may nevertheless be unreasonable (para 21). The court held, further, that where a suspect is fleeing from arrest, the 'reasonably necessary' test will generally speaking exclude the use of a firearm unless the arrestor has reasonable grounds for believing that the suspect poses an immediate threat of serious bodily harm to the arrestor or members of the public or has committed a crime involving the infliction or threatened infliction of serious bodily harm (para 24).

[19] This interpretation of the original s 49(1) was endorsed by the Constitutional Court in para 39 of *Ex parte Minister of Safety and Security & Others: In re Walters & Another* 2002 (4) SA 613 (CC). However, the Constitutional Court held that s 49(2), which dealt with deadly force, was unconstitutional. The premise of this decision appears to have been that whereas the 'reasonably necessary' criterion (as interpreted in *Govender*) saved s 49(1) from constitutional invalidity, there was no such criterion contained in s 49(2). The latter sub-section instead permitted deadly force in relation to all Schedule 1 offences where the suspect could not be arrested or prevented from fleeing without using deadly force. The use of Schedule 1 as the governing criterion failed the fundamental objective of achieving proportionality, since the Schedule listed a 'widely diverging rag-bag of' offences, ranging from really serious crimes to relatively petty offences and included offences that did not constitute any kind of physical threat, let alone violence (para 41; see also the interpretation of *Walters* in *Minister of Safety and Security v Folo & Others* [2007] 1 All SA 149 (SCA) paras 8-10).

[20] Following the Constitutional Court judgment in *Walters*, the amendment of s 49 (by way of s 7 of Act 122 of 1998) was brought into force with effect from 18 July 2003. It is this amended form which is applicable in the present case. The new s 49(1) now contained two definitions applicable to the new s 49(2), which dealt with non-deadly force and, in terms of a proviso, deadly force. The new section read as follows:

'(1) For purposes of this section –

(a) "arrestor" means any person authorised under this Act to arrest or to assist in arresting a "suspect"; and

(b) "suspect" means any person in respect of whom an arrestor has or had a reasonable suspicion that such person is committing or has committed an offence.

(2) If an arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance to prevent the suspect from fleeing: Provided that the arrestor is justified in terms of the section in using deadly force that is intended or is likely to cause death or grievous bodily harm to a suspect, only if he or she believes on reasonable grounds –

(a) that the force is immediately necessary for the purposes of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;

(b) that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or

(c) that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life-threatening violence or a strong likelihood that it will cause grievous bodily harm.'

[21] Section 49 was again amended with effect from 25 September 2012 by s 1 of Act 9 of 2012. There is only one aspect of the current section I need mention. The phrase 'deadly force' is now defined in s 49(1) as meaning 'force that is likely to cause serious bodily harm or death and includes, but is not limited to, shooting at a suspect with a firearm'. Section 49(2) has been consequentially amended by deleting the words which previously appeared after 'deadly force', namely 'that is intended or is likely to cause death or grievous bodily harm to a suspect'.

[22] Prior to the 2003 amendment, the distinction drawn in s 49 was between instances of force resulting in death and of force not resulting in death. The amended section (this applies both to the 2003 amendment and the 2012 amendment), on the other hand, distinguishes between 'deadly force' and other

force. It is clear that in the current version of s 49 ‘deadly force’ is not limited to cases where death actually ensued. I think that this is also the proper interpretation of s 49 in its intermediate form (the one applicable here). The 2012 amendment simply places this beyond doubt. Such an interpretation is consistent with the legislative object of ensuring that force which is likely to cause serious bodily harm or death is not resorted to save in the special circumstances prescribed in the proviso to s 49(2). The justification for force which is likely to cause serious bodily harm or death should not depend on whether, fortuitously, the force did or did not result in death. The focus is on the character of the force, not its actual result.

[23] It follows that even in cases where the suspect was not killed, the accused, if charged with attempted murder or assault, will need to establish the special justification required for the use of deadly force if the force he applied was intended or likely to cause death or grievous bodily harm.

[24] Force will be deadly if it was ‘intended’ or ‘likely’ to cause death or grievous bodily harm to a suspect. Consistent with our law relating to intention in the context of *dolus*, the word ‘intended’ should be interpreted as including a state of mind in which the arrestor foresees that the force he is applying may cause the death of or grievous bodily harm to the suspect and is reckless as to whether or not death or grievous bodily harm ensues. The word ‘likely’ means that death or grievous bodily harm is probable. I do not find it necessary in this case to decide whether ‘likely’ means ‘more probable than not’; the word ‘likely’ often bears this meaning though may also mean ‘reasonably possible’ (see, eg, *Bristol Laboratories Inc v Ciba Ltd* 1960 (1) SA 864 (A) at 870F-G).

Onus in regard to justification

[25] Where an arrestor uses force, the State may bring a criminal charge against the arrestor if it considers that the force was not justified. The charge in such cases might be murder, attempted murder or assault. It was authoritatively held, in relation to s 49(2) in its original form and its statutory predecessors, that where deadly force was used, the onus rested on the accused to prove on a balance of probability that the force was justified by the section (see *R v Britz* 1949 (3) SA 293 at 303-304; *S v*

Swanepoel 1985 (1) SA 576 (A) at 586H-588F; *S v Barnard* 1986 (3) SA 1 (A) at 5H-I). This is, of course, a departure from the normal position that the State must prove all the elements of the crime beyond reasonable doubt, including the unlawfulness of the act. For example, where an accused person claims to have acted in private defence, this ground of justification must be negatived by the State beyond reasonable doubt. In the cases just mentioned, the placing of the onus on the accused in relation to force used to effect an arrest was considered to be warranted by the fact that s 49(2) and its predecessors authorised the use of deadly force even where such force might be unreasonable. Protection for the unreasonable use of deadly force might too easily be obtained if the onus rested on the State to prove beyond reasonable doubt that deadly force was not justified. The lawmaker must thus have intended to place the onus on the accused to justify his conduct on a balance of probability.

[26] Whether the same applied to non-deadly force falling under the old s 49(1) was not, as far as I am aware, the subject of any reported judgment in the criminal context. In civil claims for damages it has always been recognised that the burden rests on the arrestor (see the minority judgment of Botha JA in *Macu v Du Toit en 'n Ander* 1983 (4) SA 629 (A) at 647A-E, which is not inconsistent with the majority judgment on this point) but the same would not necessarily apply in criminal cases. The justification for placing the onus on the accused in respect of the old s 49(2) might be regarded as absent in the case of the old s 49(1), particularly as that sub-section was interpreted in *Govender*. And subsequent to the amendment of s 49 in 2003 to address the constitutional flaws identified in *Walters*, it might be said that the justification for placing the onus on the accused has also fallen away in respect of deadly force (see Burchell *Principles of Criminal Law* 3rd Ed at 318—320, who argues that the onus should be on the State).

[27] On the other hand, the lawmaker can be taken to have been aware, when it amended s 49, of the interpretation placed on the section insofar as onus is concerned. If a change in regard to onus was intended, one might have expected this to be dealt with explicitly. Furthermore, the balancing of constitutional interests is not necessarily inconsistent with the continued placing of the onus on the accused when it comes to using force to effect an arrest. As against the fair trial rights of

accused persons (s 35) are fundamental rights such as life (s 11), human dignity (s 10), freedom and security of the person (s 12) and freedom of movement (s21) and the Constitution's injunction that public administration must be governed by the democratic values and principles enshrined in the Constitution, including high standards of professional ethics, accountability and transparency (s 195). Furthermore, and at least in relation to deadly force, the placing of the onus on the accused appears to be fortified by the amended wording: 'Provided that the arrestor is justified… in using deadly force…, only if he or she believes on reasonable grounds…' (my emphasis).

[28] The nature of the onus that rested on an accused in terms of the old s 49 depended on whether the force had or had not resulted in death. Where the charge was one of murder, the State needed to prove beyond reasonable doubt that the deceased's death was caused by force applied by the accused. Once that was proved, the accused bore the onus to prove on a balance of probability that the killing was justified in accordance with the criteria laid down in the old s 49(2).

[29] On the assumption that there has been no change in the incidence of onus, the nature of the onus resting on an accused in terms of s 49 as amended in 2003 depends on whether or not the force he used constituted 'deadly force'. As I have said, the focus is on the character of the force rather than its actual result. If an accused is to bear the special onus placed on him by the proviso to s 49(2), it is for the State to prove beyond reasonable doubt that the force which the arrestor used was 'deadly force', ie force intended or likely to cause death or grievous bodily harm to a suspect. Unless the State proves this beyond reasonable doubt, the accused can justify the force he applied with reference to the general criteria set out in the main part of s 49(2).

[30] Accordingly, and in relation to the *actus reus* elements of the charge against the appellant, it was for the State to prove beyond reasonable doubt that the appellant shot Bulana. If the State proved this, and if the State additionally proved beyond reasonable doubt that the force used by the appellant constituted 'deadly force', it was for the appellant to prove on a balance of probability that the shooting was justified as deadly force by the proviso to s 49(2). If the State failed to prove

beyond reasonable doubt that the force used by the appellant constituted 'deadly force', it was for the appellant to prove on a balance of probability that the shooting was justified in accordance with the criteria set out in the main part of s 49(2).

Mens rea and the onus in that regard

[31] Thus far I have been considering onus in relation to justification, ie the *actus reus*. However, the *mens rea* element must also be considered. The form of fault required on a charge of murder or attempted murder is *dolus*. As mentioned earlier, the state of mind so styled comprises two elements: (i) an intention to kill (I shall call this factual intent); and (ii) a simultaneous appreciation that the killing is unlawful (knowledge of unlawfulness). The second of these components was authoritatively held in *S v De Blom* 1977 (3) SA 513 (A) to require not only knowledge of the facts from which the conclusion of unlawfulness flows but also knowledge of the relevant legal prescript (at 528H-532D; and see Burchell *op cit* at 502-507). Ordinarily the onus rests on the State to prove both factual intent and knowledge of unlawfulness beyond reasonable doubt (*De Blom* at 532E-H).

[32] In many cases knowledge of unlawfulness is uncontentious because there is no suggestion of a justification for the killing and because persons of sound mind can be taken to know that it is unlawful to kill someone in the absence of legal justification. In such cases, if *mens rea* is in issue, the focus would usually be on factual intent. Factual intent is not limited to the case where the very result which the accused was seeking to achieve is the death of the victim. It also encompasses a state of mind in which the accused foresees that the death of another may result and is reckless as to whether or not death ensues (*dolus eventualis*).

[33] Where, however, an accused raises a ground of justification or claims that at the time of the relevant act he believed his conduct was justified in law, it becomes necessary to determine not only whether the killing was justified (part of the *actus reus* inquiry) but also whether – even if the killing was not objectively justified – the accused at the relevant time had an appreciation of the unlawfulness of the killing (part of the *mens rea* inquiry). As I have said, it is ordinarily for the State to prove knowledge of unlawfulness where this is in issue.

[34] Thus, if an accused person claims to have been acting in private defence, the court – even if finds that the accused's defensive act was an unreasonable response – will need to decide whether the State has proved beyond reasonable doubt that the accused knew that his response was unlawful (see *S v Motleleni* 1976 (1) SA 403 (A) at 407C-D); *S v Dougherty* 2003 (2) SACR 36 (W) paras 28-40). There is a correlation here between the onus of proof in regard to the *actus reus* and *mens rea*: the State bears the onus of negativing beyond reasonable doubt the justification ground of private defence and of establishing beyond reasonable doubt the accused's knowledge that his act was not justified on grounds of private defence. If knowledge of unlawfulness is not proved beyond reasonable doubt the accused could nevertheless, in the case of killing, be convicted on culpable homicide if a reasonable person in his position would have realised that the killing was not justified (*S v Ntuli* 1975 (1) SA 429 (A) at 436F-437D*; S v De Oliveira* 1993 (2) SACR 59 (A) at 63g-64a). This position, pre-dating *De Blom*, was also held to apply to a genuine but negligent error in judgment by a police official in using lethal force to effect an arrest (*R v Koning* 1953 (3) SA 220 (T) at 231G-233G).

[35] In the case of force used to effect an arrest, however, the onus to establish the justification under s 49 rests on the accused on a balance of probability. The courts have recognised it would be logically inconsistent with this position to place on the State the burden of proving beyond reasonable doubt that the accused knew or should have known that the force used was not justified by s 49. Accordingly, and as with the *actus reus*, there is a bifurcated onus in regard to *mens rea*. In the case of murder, for example, just as the State must prove beyond reasonable doubt that the accused killed the deceased, so must the State prove beyond reasonable doubt that the accused had the factual intent to do so. But just as the accused has to prove on a balance of probability that the killing was justified under s 49 (if he persists with justification), so he must prove on a balance of probability that he lacked knowledge of unlawfulness (see *Barnard supra* at 8E-9C).

[36] Although the passage from *Barnard* just cited was framed with reference to fault in the form of negligence, Van Heerden JA was dealing in general with the element of fault in so far as it bore on the elements of s 49(2). The same untenable situation as the one he postulated in his hypothetical example at 8G-I would arise if

the State bore the onus of proving that the accused knew that his conduct was not justified by s 49. The State could only prove beyond reasonable doubt that an accused person knew his conduct was not justified by s 49 by proving inter alia that the conduct was as a fact not justified by s 49. This is confirmed by the Appellate Division's judgment in *S v De Ru* [1995] ZASCA 139 where EM Grosskopf JA said the following at pp 10-11 (I translate from the Afrikaans):

'It is trite law that the onus rests on the accused to prove the ground of justification set out in s 49(2) (see …). It was submitted on behalf of the appellant, however, that s 49(2) has to do with unlawfulness – this does not detract from the State's burden of proving the other elements of the crime and, in particular, *mens rea*. This argument is in my view an over-simplification. It is naturally so, in principle, that s 49(2) only comes into play where facts have been proved which would, in the absence of the sub-section, show that a crime was committed. Where the charge is one of murder, the State would thus have to prove that the accused intentionally killed the deceased. To that extent, at least, the State must also prove *mens rea*. On behalf of the appellant, however, it was argued that the State must go further – the State must prove knowledge of unlawfulness. The answer to this argument, in my opinion, is to be found in the *Barnard* case supra at 8E to 9C. In the present case the appellant's actions could only be regarded as lawful as a result of the provisions of s 49(2). No other ground of justification is conceivable in the light of the facts. If one assumes that absence of knowledge of unlawfulness can be raised in regard to the requirements of s 49(2), it follows almost as a matter of course that the accused bears the onus. Reliance on the absence of knowledge of unlawfulness would in such circumstances involve indirectly reliance on the sub-section. An accused who cannot show that he is in fact protected by s 49(2) would hardly be entitled to a discharge merely because there is a reasonable doubt as to whether or not he was aware that he did not enjoy such protection.'[1]

[37] Although the state of mind comprehended by the phrase *dolus eventualis* is usually employed with reference to factual intent, it may also be relevant to knowledge of unlawfulness. In other words, a person may foresee that his conduct will be unlawful and be reckless as to whether or not it is unlawful (*S v Hlomza* 1987 (1) SA 25 (A) at 31H-32F; Snyman *op cit* p 204). There may, for example, be direct factual intent (for example, where a person deliberately fires a shot into the head of

[1] It appears to me, with respect, that the view expressed on this question by the learned authors of Burchell o*p cit* at 322-323 overlooks the authority of *Barnard* and *De Ru*.

an attacker intending to kill him) but reckless knowledge of unlawfulness (where the person firing the shot foresees that deadly force may not be justifiable self-defence but is reckless as to whether or not his conduct is lawful).

The conduct of the trial

[38] Before I proceed to a consideration of the issues indicated by the above analysis, I should observe that the prosecutor and accused's legal representative did not, in their leading and cross-examination of witnesses, focus with any precision on the requirements of ss 40 and 49 of the Criminal Procedure Act. As far as I can see, s 49 was not even mentioned during the evidence though I accept that the legal representatives had it in mind. There also does not seem to have been an appreciation, either in the evidence or submissions to the magistrate, of the distinction between justification as part of the *actus reus* inquiry and a belief that conduct is justified as part of the *mens rea* inquiry or as to the incidence of onus.

Did the appellant shoot Bulana?

[39] The State was required to prove beyond reasonable doubt that the bullet which struck Bulana was fired by the appellant. In the court *a quo* the appellant's counsel argued that there was no proof to this effect. This argument was rightly not raised on appeal. There was no suggestion that any police official other than the appellant fired any shots during the car chase or afterwards. The appellant accepted that any of the shots fired by him could notionally have ricocheted and struck Bulana. The circumstantial evidence thus established beyond reasonable doubt that Bulana was struck by one of the bullets fired by the appellant.

Was the shooting justified by s 49?

[40] A threshold enquiry, in relation to justification under s 49, is whether Bulana's arrest was lawful. Since there was no warrant, a lawful arrest required one of the grounds set out in s 40(1) to be present. I have mentioned the grounds that might be relevant in the present case. Where a suspect has committed an offence in the presence of officer A or where officer A has a reasonable suspicion that the suspect

has committed a relevant offence, officer B may lawfully assist A in effecting the arrest even though the offence was not committed in B's presence and even though B himself has no grounds for suspicion.

[41] Part of the onus which rested on the appellant in the present case was to show that he used force in the course of a lawful arrest. Insofar as the lawfulness of Bulana's arrest depended on things which happened in the presence of, or which were reasonably suspected by, Neethling or other officers, the appellant needed to adduce evidence of those matters. Since no such evidence was led (neither side called Neethling or the officials from the Graafwater van), the appellant could not rely on those matters.

[42] On the appellant's version, Bulana bumped into the police van on several occasions. This arguably constituted the commission of an offence in the appellant's presence. On the other hand, it may be said that the bumping of the vehicles occurred in the course of the chase in which the appellant was attempting to bring Bulana's vehicle to a halt. That was arguably part of the process of an arrest and for which some prior justification was needed. Unless the car chase was part of a lawful arrest, it might be said that Bulana was entitled to resist being pulled off the road. (Bulana's version was that he had been stopped several times that day by the Graafwater policemen, that they had abused him and threatened to shoot him and that he was scared, which is why he later refused to stop. There was no gainsaying evidence from the Graafwater police officials though the magistrate was sceptical of Bulana's version.)

[43] The appellant's evidence was that, prior to the firing of any shots, he drove alongside the Toyota and signalled to the driver to pull over. The appellant was not a member of the public but a uniformed police officer in a police van. In terms of s 3I(b) of the National Road Traffic Act 93 of 1996 any traffic officer (this includes a SAPS member) may require a driver to stop his vehicle. In terms of s 89(1), non-compliance is an offence. Furthermore, in terms of s 11(2)(a) of the Drugs and Drug Trafficking Act 140 of 1992 a police official may, in the exercise of his powers under that section, require any vehicle to be stopped. Again, non-compliance is an offence – see s 16.

[44] It may therefore be said that Bulana, by refusing to pull over, committed one or both of these offences in the appellant's presence. I am somewhat dubious about this and the appellant did not himself so contend . As to the National Road Traffic Act, the power may only be exercised for purposes of that Act. At the time the appellant signalled to Bulana to pull over, he was not intending to exercise powers under the National Road Traffic Act but was assisting in the arrest of a person allegedly suspected of drug dealing. As to the Drugs and Drug Trafficking Act, the power to require a vehicle to be stopped may only be exercised for the purposes set out in s 11(1). Those purposes require that a police official should have reasonable grounds for suspecting various things. The appellant himself did not have those grounds. In order to show that the offence described in s 11(2)(a) was committed in his presence and that an arrest on this basis was thus lawful, the appellant had to show on a balance of probability that Neethling or some other police official whom the appellant was assisting had reasonable grounds for suspecting one or other of the matters set out in s 11(1).

[45] However, I shall assume in the appellant's favour that he established on a balance of probability that he was entitled to arrest Bulana, or to assist in the latter's arrest, without a warrant. On that assumption, the next question is whether the State proved beyond reasonable doubt that the force used by the appellant was deadly force, this being relevant to the nature of the resultant onus resting on the accused in terms of s 49(2). The State could do so either by proving that the force was 'intended' to cause death or grievous bodily harm (regardless of whether or not the force was 'likely' to have that effect) or that it was 'likely' to do so (even though the accused did not 'intend' the force to have that effect).

[46] In my view, the State proved beyond reasonable doubt that the appellant used force that was 'intended' to cause death or grievous bodily harm to Bulana. I do not say that death or grievous bodily harm was more likely than not or even that it was 'likely'. And I certainly do not say that death or grievous bodily harm was the result which the appellant wished to bring about. However, death or grievous bodily harm was certainly more than a remote possibility. The appellant fired 12 shots at the Toyota over a period of eight to nine minutes. He conceded in his evidence that he was aware that any bullet could ricochet and cause harm to the driver (see also

R v Hedley 1958 (1) SA 362 (N) at 363G-H). The risk of ricochets and harm to innocent bystanders is one of the reasons he did not fire shots after Bulana turned into the township area. The appellant was driving on a gravel road at about 100 kph, steering with one hand and firing with the other at a target which was also moving at 100 kph. The last training the appellant had in shooting from a moving vehicle was in 1995, and in that exercise the target was stationery and the shooter a passenger. Most of his practice was at the shooting range with static targets. Although the appellant was a good shot, it was quite possible, even though he aimed low, that a shot might go astray. Indeed, one does not know in the present case that the shot which struck Bulana was a ricochet as distinct from a misdirected shot.

[47] Furthermore, the appellant was deliberately shooting at the rear tyres of the Toyota. Even if the appellant did not foresee the possibility that a shot might hit the driver, he must have foreseen the possibility that, if he succeeded in hitting the tyres, Bulana would lose control of the vehicle and suffer serious injury or even die. By continuing to shoot over eight to nine minutes, the appellant must have reconciled himself to these possible outcomes.

[48] On this basis, the appellant bore the onus of proving on a balance of probability that he had reasonable grounds for believing one or more of the matters set out in paras (a) to (c) of the proviso. He did not succeed in doing so. As to (a), I am prepared to accept that Bulana, in an endeavour to avoid arrest, drove his vehicle in a manner which, as events actually unfolded, posed a risk of imminent grievous bodily harm to the appellant and his colleague. However, the subsequent use of deadly force (the firing of the shots) was not ‘necessary’ for purposes of protecting the appellant or his colleague. The appellant could simply have refrained from trying to force Bulana to pull over and instead continue to follow him. Indeed, the appellant’s evidence is that he only started firing shots after the last occasion on which Bulana had bumped the police van and the appellant had resumed his following position behind the Toyota. The appellant did not fire the shots in order to stop Bulana crashing into the police van but because he had been unable to force Bulana off the road with his van.

[49] As to (b), the appellant had no grounds for believing that there was a substantial risk that Bulana would cause imminent future death or grievous bodily harm if his arrest was delayed. All the appellant knew was that Bulana and the vehicle were suspected of involvement in drug dealing.

[50] As to (c), if one assumes (though there is no evidence to this effect) that Bulana was continuing to commit some or other drug offence while driving the Toyota and that such offence was thus 'in progress', the drug offence was not of a forcible and serious nature and did not involve the use of life-threatening violence or strong likelihood of grievous bodily harm. The same is true if one assumes that Bulana was continuing to commit an offence of failing to stop and that such offence was thus 'in progress'.

[51] Thus far I have assessed the justification defence on the basis that the State proved beyond reasonable doubt that the appellant used deadly force. If I am wrong in finding that the appellant used deadly force, I consider that the appellant nevertheless failed to establish on a balance of probability that the force he used was justified by the main part of s 49(2), ie that the force was reasonably necessary and proportional in the circumstances to prevent Bulana from fleeing. In the first place, it was not shown that force was reasonably necessary to apprehend Bulana in his vehicle. The appellant and his colleagues in the other van could have continued to follow Bulana. If it really appeared that Bulana would outrun them or be able to continue driving until they ran out of petrol, they could summons other assistance to set up a roadblock. It was at any rate not shown that this was not possible.

[52] But even if firing shots at the Toyota was the only way in which to apprehend Bulana in the vehicle, the force was still not proportional in the circumstances. The difficulty which the appellant has in discharging the burden of proof in this regard is that one cannot assess proportionality without knowing precisely what it is that Bulana was alleged to have done. There was no evidence on that score. The firing of 12 shots at the Toyota was not proportional to a general suspicion that Bulana was using the vehicle in the course of drug dealing. Bulana and his address were known to the police as was the Toyota. If the police reasonably suspected that

Bulana was actually carrying drugs in the vehicle, it is true that he may have been able to dispose of the drugs unless the police caught him red-handed. Even so, I do not consider the firing of 12 shots, though aimed at the tyres of the Toyota, was proportional to that risk.

[53] I thus consider that the magistrate correctly found that the firing of the shots was not justified.

Mens rea – factual intent

[54] The State was required to prove beyond reasonable doubt that the appellant had factual intent. I have already found that the State proved beyond reasonable doubt that the appellant used force that was 'intended' to cause death or grievous bodily harm. For purposes of attempted murder, however, the question specifically is whether it was proved beyond reasonable doubt that the appellant foresaw the possibility that Bulana might be killed (not merely suffer grievous bodily harm) and was reckless as to whether or not that occurred. I am satisfied that the State did prove this. Both death and grievous bodily harm were reasonably possible outcomes, even if neither was more probable than not and even though death would have been less likely than grievous bodily harm. The appellant must have foreseen both possibilities and reconciled himself to these possible outcomes in his determination to apprehend Bulana.

Mens rea – knowledge of unlawfulness

[55] This being so, the remaining question is whether the appellant proved on a balance of probability that he believed, albeit incorrectly, that his conduct was justified in terms of s 49. If he proved this, I have no doubt that he was negligent (in that a reasonable police officer would have realised that the firing of the 12 shots was not justified) but negligence in that form would not suffice either for attempted murder or assault (though if Bulana had died a conviction for culpable homicide would have been competent).

[56] The question of knowledge of unlawfulness is the part of this appeal which I have found the most difficult, in no small measure because it was not the focus of proper attention in the evidence or argument before the trial court. Perhaps unsurprisingly, therefore, the matter is not addressed in the magistrate's judgment.

[57] At the beginning of his legal analysis, the magistrate said that a police official needed to have reasonable grounds to shoot, that this question was assessed objectively, and that it was no excuse, in the case of an unlawful arrest, for the police officer to say that he acted in good faith. After finding that there were no lawful grounds for warrantless arrest and that the force was in any event unreasonable from an objective perspective, the magistrate proceeded to consider what I have styled factual intent, concluding that the appellant foresaw the possibility that Bulana might be struck by a stray bullet and was reckless as to whether or not death ensued. He ended his judgment by saying that it was not sufficient that the appellant acted in good faith.

[58] The magistrate erred, in my view, in finding that it was irrelevant that the appellant acted in good faith, if by that he meant that it was irrelevant whether or not the appellant genuinely believed he was acting lawfully. It is correct that good faith is not relevant to the justification analysis (except to the limited extent, of course, that an arrestor must, in addition to the other requirements of s 49 read with s 40(1), genuinely hold the beliefs relevant to those sections). But in regard to *mens rea*, a genuine belief by the arrestor that he is acting lawfully precludes a finding that he acted with *dolus*.

[59] The problem is that the magistrate made no specific finding on the appellant's knowledge of unlawfulness and it is not apparent from his judgment that he appreciated that it was for the appellant to discharge the onus of proving on a balance of probability that he genuinely believed he was acting within the bounds of s 49.

[60] The appellant testified that he regarded his actions as lawful. Apart from his evidence in general regarding the incident, he said at one point in his evidence that he had fired shots only because he had seen it as his duty to protect life and

property. Later in his evidence he said that it was his honest opinion that he had acted lawfully and honestly. The tenor of his evidence as a whole was that his conduct had been justified.

[61] I have already concluded that the magistrate was right to find that, objectively speaking, the appellant's conduct was not justified under s 49. The prosecutor's cross-examination of the appellant was not directed at showing that the appellant did not honestly hold the opinion he did but rather that, objectively viewed, the appellant was not justified in shooting. Part of the cross-examination focused on the fact that the appellant himself had no knowledge as to what offence if any Bulana had supposedly committed. The options that were open to him apart from shooting were explored as were his knowledge of the dangers of ricochets.

[62] The prosecutor may well have failed to appreciate that the accused would be entitled to an acquittal on the charge of attempted murder if he proved on a balance of probability that he honestly believed his conduct was justified, even though his belief was wrong. Whatever the explanation, it was never put to the appellant that he could not genuinely have had the belief that his conduct was justified. The appellant's knowledge regarding s 49 and the training if any he had received in that regard were not canvassed in the evidence. One simply does not know what the appellant would have said if these matters had been tested in cross-examination.

[63] The magistrate found as a fact that the appellant foresaw that by firing the shots Bulana might be killed or seriously injured. The appellant was a warrant officer with more than 16 years' experience. The amended provisions of s 49 had been in force for about two and a half years by the time of the shooting incident. I think I may take judicial notice of the fact that the judgments of the Supreme Court of Appeal and the Constitutional Court in *Govender* and *Walters* and the amendment of s 49 were at the time matters of considerable public interest and debate. I would be surprised if police officers entrusted with firearms did not receive instruction on the amendments to the law relating to the use of force in effecting arrests. I would be both surprised and disappointed if an experienced police officer in 2006 thought he was justified in firing 12 shots in the circumstances of the present case (cf *S v Reabow* 2007 (2) SACR 292 (E) paras 20-24).

[64] On the other hand, the shooting incident was investigated by Capt Cloete. His report recorded the appellant's contemporaneous assertion of his belief that he had acted lawfully. Capt Cloete concurred in that view and no disciplinary action was taken against the appellant. While that carries little weight in the objective analysis, it gives one pause for thought when one is asked summarily to reject the appellant's evidence that he believed he acted lawfully.

[65] It is an important principle of our adversarial system that a party may not ordinarily ask a court to reject a witness's evidence as false unless the witness has had the opportunity of defending himself against the imputation. This applies as much to the prosecution in criminal cases as to any other party. In the present case the genuineness of the appellant's belief was not challenged. What is more, because the question of knowledge of unlawfulness did not receive proper attention, we do not have a clear factual finding thereon by the magistrate, though the indications are that he accepted the appellant's *bona fides*.

[66] I have thus come to the conclusion that the appellant, in the absence of challenge, discharged the onus of establishing that he genuinely thought he was acting lawfully. (If, contrary to my assumption, the onus rested on the State to prove that the appellant did not genuinely believe his actions to be justified, this would be an *a fortiori* conclusion.) The conviction for attempted murder must thus be set aside.

Negligent discharge of a firearm

[67] As will be apparent, I consider that the appellant acted negligently in firing as he did. The question is, however, whether he committed the offence of which he was alternatively charged, namely s 120(3)(a) of the Firearms Control Act. Section 96(1) states that no provision of the Act, other than certain provisions not here relevant, applies to 'an Official Institution'. The South African Police Service as contemplated in s 5 of the South African Police Service Act 68 of 1995 is an 'Official Institution' (see s 95(a)(ii) of the Firearms Control Act). Section 5 of the South African Police Service Act states that SAPS consists (I summarise) of its duly appointed members. The appellant was one such member.

[68] Since the heads of argument did not deal with the charge under the Firearms Control Act, we notified counsel in advance of the hearing that we wished to hear argument on the proper interpretation of the exemption in s 96(1) of the Firearms Control Act. The appellant's counsel submitted, unsurprisingly, that the exemption benefited his client. Somewhat surprisingly, counsel for the State conceded that the exemption excluded a conviction on the alternative count. We have thus not had the benefit of full argument for and against an interpretation which would have this result.

[69] The only basis on which s 96(1) might be held not to be applicable in the present case is if the exemption operates in favour of SAPS conceived of as an institution rather than in favour of the individual members who collectively comprise SAPS. However, we do not think that this interpretation is correct. SAPS is not a corporate body. It is a service made up of duly appointed police officers. If the provisions of the Act did apply to SAPS (ie if there was no exemption), it is the individual members rather than SAPS as an institution which would in general be implicated by its provisions and need to comply with them. For example, when s 3(1) says that no person may possess a firearm unless he or she holds a license, it is the individual police officer rather than SAPS as an institution which would need to comply. Similarly, a competency certificate in terms of Chapter 5 of the Firearms Control Act would be concerned with the individual SAPS member, not the institution as such. Section 84 provides that no person may carry a firearm in a public place unless it is carried in a particular way. This is concerned with the conduct of individual people, not an institution. The exemption in s 96(1) must have been intended to have the effect that the individual members of SAPS would not be bound by these and many similar provisions in the Act.

[70] It is true that the concept of an 'employee' in relation to SAPS is introduced by the definition thereof in s 95(1)(b) read with s 98. This is because although s 96(1) exempts the individual SAPS members inter alia from compliance with the general provisions of the Act relating to licensing of firearms and ammunition, the lawmaker nevertheless wished to lay down suitably tailored requirements which would apply specifically to members of 'Official Institutions' in regard to their possession and carrying of firearms. The defining of 'employee' for this purpose

does not justify a conclusion that the 'Official Institution' which benefits from the exemption is a notional entity distinct from its members. On the contrary, it reinforces the view that the exemption in s 96(1) in relation inter alia to the general provisions of the Act concerning the licensing, possession and carrying firearms operates in favour of the very members who are the 'employees' regulated by the specific provisions of s 98.

[71] The question may be raised whether it is appropriate, as a matter of policy, that SAPS members (and members of other 'Official Institutions') should be exempt from the criminal liability created by s 120. However, the exemption in s 96(1) is expressed in general terms. If the exemption were held not to benefit the individual members of SAPS, it would be deprived of all practical utility in regard to the many provisions of the Act in relation to which it was clearly intended to operate. There is no way in which s 120 can, by a process of interpretation, be excised from the scope of the exemption. One might argue that to exempt police members from s 120(3) removes a constraint which might otherwise cause them to use their firearms more responsibly. On the other hand, and at least in regard to the negligent discharge of firearms, it might be said that police members, who in the course of their work have far greater need than the ordinary person to use or consider using their firearms, should not have the spectre of criminal liability looming over their heads whenever in stressful situations they make judgement calls which may later be found by a court to have been negligent. The member (and usually the Minister vicariously) would remain civilly liable for negligently caused injury and damage; and if the injured person dies, the member could still be charged with murder or culpable homicide. Furthermore, a member who negligently discharges his firearm and causes injury would presumably be subject to internal discipline.

[72] The provisions of the Arms and Ammunition Act 75 of 1969, the Act repealed by the Firearms Control Act, do not, by way of historical background, shed much light on the question. Section 45(1) of the Arms and Ammunition Act contained an exemption which operated inter alia in favour of 'any person on behalf of the State', 'any person in his capacity as a person in the service of the State' and 'any person for the purposes of the Defence Act'. The exemption was thus in favour of the individuals rather than a State institution conceived of as a separate entity, which is

also how I interpret s 96(1) of the Firearms Control Act. Section 45(1) of the old Act, like s 96 of the new Act, excluded certain provisions from the operation of the exemption. It is of interest to note that among the provisions to which the exemption did not apply were those contained in s 39, which created the offences and penalties under the old Act. Section 39(1)(l) was the counterpart of the offence created by s 120(3)(a). It follows that under the Arms and Ammunition Act a police member could be charged and convicted for negligently discharging a firearm but that is because the exemption expressly did not apply to s 39. By contrast, the lawmaker in s 96(1), while excluding certain other provisions of the Act from the operation of the exemption, did not exclude s 120.

[73] In order for the exemption in s 96(1) to operate, it is not enough that the person is a police officer. He or she must in the relevant respect have been acting in the course and scope of his or her functions as a police officer. Accordingly, the police officer, while not being subject to the Act in respect of his or her official firearm, would need to comply with the Act in respect of his or her private firearms. Furthermore, the exemption test is not necessarily co-extensive with that for vicarious liability. The test for vicarious liability has in recent years been widened to include conduct with a 'sufficient connection' to the police official's employment, even though the police official may have had no intention, when perpetrating the wrongful conduct, of furthering the interests of the police (see *K v Minister of Safety & Security* 2005 (6) SA 419 (CC) and *F v Minister of Safety & Security* 2012 (1) SA 536 (CC), dealing with rapes perpetrated by police officials). It would not accord with legal policy to regard the police official in such circumstances as functioning as a SAPS member for purposes of the s 96(1) exemption. In the present case, however, the appellant was on duty, he used his official firearm, and he clearly was acting in the course and scope of his duties as a police officer and saw himself as furthering the interests of the police.

[74] I thus conclude that a conviction on the alternative counter is not competent.

Conclusion

[75] The appeal succeeds, and the conviction and sentence are set aside.

Riley AJ:

[76] I concur.

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ROGERS J

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RILEY AJ

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