



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

NOT REPORTABLE

Case no: CA98/2023

In the matter between:

DESNAY HUFKIE

Appellant

and

MINISTER OF POLICE

Respondent

JUDGMENT

Govindjee J

Background and issue

[1] A blue Proton vehicle was hijacked by Warren Rademeyer on 25 February 2015 in Summerstrand, Gqeberha. Constables Blunden and Ntamo observed the vehicle in Schauderville, soon after receiving a radio control report of the hijacking. They attempted to stop the vehicle by using their vehicle's sirens and lights, but, instead of slowing down and stopping, it sped away. A chase ensued and Constable

Blunden, an employee of the respondent, discharged shots in the direction of the hijacked vehicle.

[2] The appellant was a passenger in the hijacked vehicle at the time of the shooting. She was shot in the abdomen and instituted a delictual action for damages against the respondent. The appellant averred that Constable Blunden violated her constitutional rights and acted recklessly and / or negligently by discharging several shots with his firearm in public, without having due regard for the safety of the general public, thereby contravening s 49(2) of the Criminal Procedure Act, 1977¹ (the 'CPA').

[3] The respondent pleaded that the appellant and other co-accused persons, who were suspected of having hijacked a motor vehicle, had unlawfully attacked the police by shooting at them first. The police officials concerned had believed that they were in physical danger and had used the necessary, commensurate, force to repel the attack. In the alternative, the respondent pleaded that the police officers had reasonable grounds to suspect that the appellant was involved in a hijacking case, as she was inside a hijacked vehicle. They had lawfully attempted to arrest the appellant and, once she attempted to prevent and / or escape the arrest, reasonable force had been used to secure the arrest.

[4] The appellant's claim was dismissed by the Regional Court, with each party to pay their own costs. That court adopted the usual approach to resolving mutually irreconcilable versions, based on findings as to credibility, reliability, and the probabilities.² The magistrate concluded that Constable Blunden had honestly maintained his version throughout his testimony, without embellishment. By contrast, the appellant had been evasive and had testified in a manner that was, at times, materially different from the version put to Constable Blunden on her behalf. The court concluded that these material contradictions were indicative of the appellant's misrepresentation as to the events of the evening in question. She had also been vague as to the reason for the hijacker's sudden desire to alight from another vehicle

¹ Act 51 of 1977.

² *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et cie and Others* 2003 (1) SA 11 (SCA).

in which she had been travelling with her boyfriend immediately prior to the hijacking. On the probabilities, the court held that the appellant had been part of the planning and execution of the hijacking. Applying decisions of the SCA and Constitutional Court, an outdated version of s 49 of the CPA, and academic commentary, the court held that the respondent's version that occupants of the hijacked vehicle had fired shots, requiring retaliation, was more probable, so that the actions of the police were justified. As will become apparent, it is this aspect that is crucial for determining this appeal.

[5] Various grounds of appeal were advanced by the appellant. These include misdirections in respect of the magistrate's summary and evaluation of the evidence, including the way the appellant's testimony had been assessed, the credibility findings in favour of Constable Blunden, and the conclusion arrived at on the probabilities. It was submitted that the contents of a shooting incident report, contradicting Constable Blunden's evidence, had been ignored, along with the evidence tendered by a fingerprint expert. Constable Blunden had contradicted himself, and his evidence had also been gainsaid by the testimony of Warrant Officer Botes. The magistrate had erred by concluding that the appellant had played a part in the hijacking and in the assessment of the degree of force used by Constable Blunden.

[6] The appellant, correctly in my view, conceded during argument that the use of deadly force by Constable Blunden, with reference to the proper understanding of that notion in terms of s 49(2) of the CPA, would be proportionate and justifiable if the trial court's assessment of the evidence, particularly in respect of whether the police's shooting was in retaliation, was correct. The converse also applies. Interference with the trial court's evidentiary assessment in respect of whether the police's shooting was retaliatory would result in the appeal succeeding. Whether or not this court should interfere with the findings of fact of the trial court in respect of the shooting incident is the issue to be determined, bearing in mind the onus on the respondent to justify the shots fired by its employees. Put differently, the main question to be addressed is whether the appellant has convinced this court that the

trial court erred in accepting Constable Blunden's evidence that he fired shots in retaliation to shots emanating from the hijacked vehicle.

The trial court's factual findings: A deferential approach?

[7] It is trite that a court of appeal will hesitate to interfere with the factual findings and evaluation of evidence by a trial court, particularly if the factual findings depend upon the credibility of the witnesses who testified at the trial.³ The following explanation for such deference, emanating from foreign law, has been quoted with approval by the Constitutional Court:⁴

'Not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judges, and, unless it can be shown that [the trial judge] has failed to use or has palpably misused their advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.'

[8] Even in drawing inferences, it is the trial court that is considered to be in a better position than the appellate court, in that it may be more able to estimate what is probable or improbable in relation to the particular people observed at the trial.⁵ An appellate court will only interfere where the trial court materially misdirected itself in so far as its factual and credibility findings are concerned.⁶ As was held in *S v Francis*:⁷

'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's 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's evidence – a reasonable doubt will not

³ *R v Dhlumayo and Another* 1948 (2) SA 677 (A) ('*Dhlumayo*').

⁴ *Powell & Wife v Streatham Nursing Home* 1935 AC 243 at 265 as quoted in *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC); [2016] ZACC 13 para 38.

⁵ *Dhlumayo* above n 3 at 705.

⁶ *Dhlumayo* above n 3.

⁷ *S v Francis* 1991 (1) SACR 198 (A) at 198j — 199a. For application of this authority in this Division in the context of a claim for damages against the Minister of Police, see, for example, *Piperdi v Minister of Police* 2020 (1) SACR 572 (ECG) para 3; *Finnis and Others v Minister of Police* (unreported, Case No: 87/2022, Eastern Cape Division, Makhanda) (15 September 2023).

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.'

[9] This is not to overstate the deference to be afforded to the trial court's findings. This court is duty-bound to overrule factual findings of the trial court so as to do justice to a matter *if it emerges from the record that the trial court misdirected itself on the facts or that it came to a wrong conclusion.*⁸

[10] Whether there was a misdirection of fact by the trial court requires consideration of the reasons given for that court's decision. Reasons that are either on their face unsatisfactory, or shown by the record to be such, would suffice. There may also be a misdirection of fact where, although the reasons as far as they go are satisfactory, the trial court is shown to have overlooked other facts or probabilities.⁹

Was there a material misdirection of fact?

[11] The trial court's conclusion was based mainly on its assessment of the conflicting versions of Constable Blunden and the appellant, with particular reliance upon credibility findings in favour of Constable Blunden. The appellant's version was assessed as being replete with inconsistencies while Constable Blunden's version, including that shots had been fired by the police only in retaliation, was found to be honest.

[12] There appears to be no misdirection in respect of both key credibility findings. This is because there are various improbabilities and contradictions in the appellant's version in respect of material matters, emanating from the record of proceedings. As will be illustrated, her version of events is also unsynchronised with the probable timeline of events, casting further doubt upon the veracity of her testimony in respect of the shooting.

⁸ *Makate v Vodacom Ltd* above n 4 para 40.

⁹ The appellate court is then at large to disregard the trial court's findings on fact, even though based on credibility, in whole or in part according to the nature of the misdirection and the circumstances of the particular case, and to come to its own conclusion on the matter: *Dhlumayo* above n 3.

[13] The appellant offered a vague version of her movements on the evening in question, and appears to have been particularly flustered when questioned by the presiding officer. On the version which appeared during that questioning, she and her boyfriend, Charles Harper, had spent the afternoon together with friends, using Harper's father's vehicle and socialising. It was dark by time they 'went to get Warren'. When asked if the arrangements were made telephonically, the appellant indicated that 'he just came to us' and then 'we did not know that we will meet him along the road'. She then reiterated that '...we did not go to pick him up. We found him along the road.' Rademeyer requested to accompany them, with no purpose in mind, and they drove around together, with no apparent destination in mind. For an unexplained reason, and at a time the appellant could not recall, the three then went to 'sit' at her house and enjoyed themselves while listening to music. From there they proceeded to the lake and then to Summerstrand.

[14] The appellant added that it was dark when she, Harper and Rademeyer were in Summerstrand together. They spent 'an hour or two hours' there. During at least part of that time, she and Harper walked on the beach near the Pier while Rademeyer remained in the vehicle. They returned and drove around with him on their way home. Whilst still driving around Summerstrand, Rademeyer, who had drugs in his system, indicated that he wished to alight from the vehicle. When pressed as to why Harper and the appellant had allowed him to do so, on his own, late at night and far from home, the appellant testified as follows:

'Ms Hufkie: Charles said he must get off – he can get off because Charles does not want him [to] drive his vehicle.

Court: I beg your pardon.

Ms Hufkie: Charles said he must get off if he wants to get off. Because [he] cannot be angry if Charles refuses for him to drive his vehicle.

Court: Now when did that happen?

Ms Hufkie: At [the lake] after he asked if he cannot drive Charles' vehicle and Charles said no.

Court: So you say now Warren was angry at the lake.

Ms Hufkie: I am not saying he was angry but I also do not know.

Court: So you do not know why Warren wanted to alight from the vehicle?

Ms Hufkie: No.

[15] The improbabilities of aspects of this version are immediately apparent. To that must be added the various material inconsistencies between the appellant's version in response to the presiding officer's questions, compared to her earlier testimony, and when considering the version put to Constable Blunden by Mr *McKenzie* on behalf of the appellant.

[16] The appellant testified during her examination-in-chief that, while driving around in Summerstrand, Rademeyer 'said we must drop him ... when we got to flats'. During cross-examination, she was unable to recall that they had in fact dropped him off next to the vehicle that was subsequently hijacked, vaguely adding that 'I saw a small vehicle but the street was full of [vehicles].' She then testified that she had not seen the hijacked vehicle. Leaving aside the conflict between this version and the complainant's statement to the contrary, at no stage was there any mention of Harper instructing Rademeyer to alight or an issue about whether Rademeyer could drive his vehicle. The appellant led the court to believe that Rademeyer had simply requested to be dropped off at a random moment while they were in Summerstrand, after which the appellant and Harper continued to drive around until they were running out of petrol and decided to return home. She could not recall the time that elapsed from dropping Rademeyer until they arrived home.

[17] The description of what occurred then is also significant. The appellant's version during her cross-examination was that Rademeyer was in their street with the hijacked vehicle when they arrived there. He advised them that it was his friend's vehicle. Despite having dropped him off outside flats in Summerstrand a few minutes previously, this did not appear to arouse any suspicion whatsoever. From there the three, along with another individual, proceeded to the latter's home in Schauderville. The appellant watched television while the others smoked mandrax. All of this occurred prior to the shooting incident.

[18] In addition to the inherent improbabilities, the appellant's version is vastly different, in material aspects, from what was put to Constable Blunden by her

attorney, who drew from a written statement from Harper which was included as part of the record:

'And then plus minus, the plaintiff will come and testify plus minus 8 o' clock he was, she was with her boyfriend, Charles Harper on that night and they were in Summerstrand with Warren Rademeyer ... while they were driving in Summerstrand Warren told him to stop next to a blue vehicle because he wanted to get out. It was the complainant's vehicle. And he [Harper] could see that there was a white lady in the vehicle ... then the next moment then Warran went to this lady and both the plaintiff and Charles did not take any note of what he was doing and as Warren was saying that he wanted to get off the vehicle they drove off ...

Later that night Charles parked the vehicle at Skuda Street. And he was on his way to, he walked to take his girlfriend. As they were walking then they came here comes Warren with the with a blue vehicle. Now at that stage they did not know. They did not put two and two together ... Warrant told them to get into the car, take a drive with them and they both got into the vehicle. There was another passenger in the vehicle with him sitting in front. So they got into the back (sic).'

[19] Inherent improbabilities and contradictions aside, the appellant's slow-moving version of events described in court is inconsistent with the common cause facts and other facts that may be accepted as relevant to the shooting incident. Based on the complainant's statement, it may be accepted that the hijacking occurred at approximately 22h30. Constable Blunden's uncontested evidence was that he and his partner spotted the hijacked vehicle within a few minutes after radio control reported the incident. He confirmed the vehicle's description with radio control and, as the trial court noted, was advised that the suspects who had hijacked the vehicle were armed. Although he testified that the complaint was received after 21h00, his written statement reflects that this occurred at approximately 22h41, which accords with his testimony that he and his partner had spotted the vehicle shortly after the complainant's report was relayed over radio. Constable Ntamo's affidavit repeated that time and Warrant Officer Botes, the investigating officer, testified that he met the complainant at the Humewood Police Station within an hour of that time, at 23h38, by which time she was already in the process of making a statement.

[20] The appellant testified in a manner that was materially different from the version put on her behalf, both in respect of what occurred at the time Rademeyer alighted from Harper's vehicle and as to what occurred when they met him thereafter. This warranted the conclusion that she had misrepresented the events in question. Her version was improbable and the adverse credibility findings are unassailable. The probabilities, supported by Warrant Officer Botes' testimony as to his investigation, favour the conclusion that the appellant and Harper dropped Rademeyer alongside the hijacked vehicle in Summerstrand. They subsequently met with Rademeyer, now driving the hijacked vehicle, outside Harper's home in Korsten soon after the hijacking took place, and accompanied him knowing that he had hijacked that vehicle. While Constable Blunden consistently maintained his version in a seemingly honest manner, the appellant was indeed evasive, particularly in respect of what occurred inside the hijacked vehicle from the time when the police used their vehicle's lights and sound to attempt to bring it to a halt, until it eventually crashed and stopped. As the trial court noted, had Rademeyer, the driver of the vehicle, stopped before being chased by the police, the shooting would not have been necessary.

[21] While the trial court's credibility findings are an important component of determining the matter, they are not on their own determinative. In arriving at its conclusion, the trial court failed to refer to various aspects of the evidence led. There are three grounds of appeal that relate to this perceived shortcoming, each of which require consideration.

Evidence ignored

[22] The first ground is that expert fingerprint evidence was ignored. That evidence indicated that six sets of fingerprints were taken from the hijacked vehicle. The magistrate took a dim view of the relevance of the evidence from the outset and the appellant's attorney expressly indicated that he would argue that the evidence was completely irrelevant, only for the trial court's failure to refer to that evidence to be a point taken on appeal. That aside, the evidence is, at best for the appellant, neutral, and counsel for the appellant rightly did not pursue the matter.

[23] The second ground is the contents of the shooting incident report, alleged to contradict Constable Blunden's evidence. The basis for this is the following summary of the shooting incident contained in this report:

'Members were chasing a hijacked vehicle in Gelvandale area and suspects didn't want to stop when they were instructed to stop by the police. Suspects started to shoot police and police fired back. Two (2) suspects injured, One (1) suspect fled One (1) suspect arrested on scene.' (sic.)

[24] Ignoring the reference to the police shooting in retaliation, this extract is linked to the third ground, namely that the trial court ignored material contradictions in the evidence of Constable Blunden and Warrant Officer Botes. The main point of contention is the number of suspects inside the hijacked vehicle at the time of the shooting. Constable Blunden's testimony was that there had been six suspects who alighted from the hijacked vehicle once it hit a pole and came to a standstill during the chase. Three of those suspects had run in different directions and managed to escape. This version coincided with both Constable Blunden and Constable Ntamo's written statements. Warrant Officer Botes' evidence, corresponding with his written statement, was that Constable Blunden had told him that there had been five suspects, and that two had run away. The commander's shooting report, however, only made reference to one suspect fleeing the scene.

[25] Although the trial court failed to deal with this discrepancy directly, it is apparent that it ultimately accepted Constable Blunden's version that three of the six suspects had fled when the hijacked vehicle had come to a stop, and that two of the rear passengers had fired approximately six shots towards the police vehicle from each of the rear windows.

[26] An appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial court. This is because it must be accepted that no judgment can ever be perfect and all-embracing. Failure to mention an aspect does not necessarily imply that that dimension was not considered.¹⁰ While these

¹⁰ *Dhlumayo* above n 3.

principles may be noted, the trial court must be criticised for failing to have expressed itself on various other aspects of the evidence adduced, including the contradictions in respect of the number of suspects who escaped the scene, the weight to be attached to Constable Ntamo's statement and the weight to be attached to Lieutenant-Colonel Meiring's evidence. Failing to do so has deprived this court of the opportunity to consider the trial court's assessment of these matters, and their effect on the overall probabilities. Instead, this court is obliged to undertake that exercise absent the various benefits of observing the witnesses first-hand, and with no sense of the trial court's impressions as to the veracity of that evidence.

[27] The discrepancies in the number of suspects reflected in police records of the incident must be considered together with the other available evidence. The pivot of the respondent's case was the testimony of Constable Blunden, who was the driver of the police vehicle and the person who explained how the police returned fire. That explanation was, correctly in my view, assessed as cogent and consistent by the trial court.

[28] There are various reasons for this conclusion. Constable Blunden's version finds a modicum of support when considering the accepted evidence that the vehicle was reported as hijacked with the aid of a firearm. It must also be noted that the shooting incident occurred during the midst of a high-speed chase which ran for between two and three kilometres. That distance offers a plausible explanation why any spent cartridges would not have been found, despite a search, bearing in mind the evidence that some firearms do not release cartridges. The accepted position was that the hijacked vehicle was proceeding recklessly, its driver under the influence of drugs. The police vehicle was in pursuit, with the distance varying from time to time, the closest point being approximately 12 metres away. Constable Blunden explained, during cross-examination, that, from what he could see, the persons that shot at the police vehicle had 'just put their hands out with the firearms out and was shooting at the back towards us'. This explained why there was no gunshot residue inside the vehicle. The evidence that it was not unusual for untrained civilians to miss their targets when involved in high-speed chases or shooting incidents, even when only a short distance apart, is equally believable when

these circumstances are given proper consideration. The probabilities of that outcome are enhanced by the speed involved, the direction in which the civilians faced when they shot at the police, their likely lack of training and the way they did so, simply putting their hands outside the rear vehicle windows while shooting. As for Constable Blunden's candour, one needs to look no further than his persistence, during cross-examination, as to the likely existence of a shooting incident report, even without knowing whether its contents would favour his version of events. That report was sourced as a direct result of his testimony and formed the basis of further cross-examination.

[29] While Constable Frieslaar did not testify, the appellant relied on his primer residue report in support of her claim, and that report was accepted into evidence. Warrant Officer Botes confirmed that Constable Frieslaaar had been on the scene of the shooting before him. Part of Constable Frieslaar's report is a written summary of the case, dated 26 February 2015. The summary refers specifically to a vehicle hijacked by '+- six suspects' and that 'suspects shot at the SAPS members and the members shot back at the suspects'. That, together with Warrant Officer Botes' own statement and recollection, puts paid to the reference to only one person escaping, contained in the shooting report. That reference is anomalous and does not accord with the overall probabilities. Considering all the evidence, including the positive credibility findings in favour of Constable Blunden, the probabilities favour his evidence that six suspects were travelling in the hijacked vehicle. In any event, whether five or six suspects were travelling in the hijacked vehicle, the real question is whether the two or three who managed to run away had fired shots towards the police vehicle, from the rear corner seats, during the car chase.

[30] Constable Blunden's version of events on that score is supported by both Constable Ntamo's statement accepted into evidence, and by the testimony of Lieutenant-Colonel Meiring, who was the Gelvandale SAPS relief commander. He testified as to his movements that evening, including what was conveyed by radio control, and that he was new to the area. His evidence explains his reasons for a three to four second conversation he had with a person he observed standing on the stairs in Highfield Road. That person had allegedly witnessed a part of the chase and

informed him that suspects had been shooting 'back' at the police. This accords with his evidence that his first question to Constable Blunden, upon meeting him at the scene, was whether a police vehicle or official had been shot. Considering the hijacking situation at hand, the probabilities support his explanation for not taking a statement from the witness, instead proceeding swiftly to the scene.

[31] These pieces of evidence offer further support, at least to some degree, of Constable Blunden's version regarding the shooting itself. Adding the trial court's respective credibility assessments of Constable Blunden and the appellant, which have already been evaluated as being appropriate, the outcome is that there remains no basis to interfere with the trial court's factual and credibility findings, or its conclusion, when considering all the evidence.

The amended CPA and the alternative defence

[32] Mention has already been made of the trial court's reference to an outdated section of the CPA in its evaluation of the matter. Section 49(2) of the CPA provides as follows:

'If any 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 or to prevent the suspect from fleeing, but, in addition to the requirement that the force must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force only if –

- (a) the suspect poses a threat of serious violence to the arrestor or any other person; or
- (b) the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later.'

[33] 'Deadly force' is defined in s 49(1) of the CPA to mean '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.'¹¹

[34] While it is lamentable that the trial court referred to a previous iteration of the section, and indeed to case authority that considered a differently worded section, it is readily apparent that the outcome would have remained the same even if the amended section had been considered. Bearing in mind Ms *Du Toit's* concession on the point, which was appropriately made, it is unnecessary to dwell on that dimension any further. It is also unnecessary to consider the merits of the respondent's alternative plea, which evokes s 49(2)(b) of the CPA.

Conclusion

[35] Absent any material misdirection, the trial court's conclusions are presumed to be correct. The appellant has failed to convince me, on adequate grounds, that the trial court erred in accepting the respondent's version of events. The record, read in its entirety, does not support the arguments advanced in respect of the alleged misdirections on the facts. While the trial court failed to make mention of certain dimensions of the evidence led in its judgment, filling those gaps, and undertaking the requisite analysis in place of the trial court, has added little of substance to the mix. It is so that the respondent was unable to recover the actual firearms in question, or produce scientific proof confirming shots fired from the hijacked vehicle. While such evidence would have put the matter beyond any doubt, the probabilities favour the conclusion that the appellant's injuries were caused by Constable Blunden and Constable Ntamo returning fire. That being the case, there is no basis for holding that the trial court came to the wrong conclusion.

¹¹ Section 49(1) of the CPA defines 'suspect' to mean 'any person in respect of whom an arrestor has a reasonable suspicion that such person is committing or has committed an offence'. 'Arrestor' means any person authorised under the CPA to arrest or to assist in arresting a suspect.

Order

[36] The following order is issued:

1. The appeal is dismissed with costs.

A GOVINDJEE
JUDGE OF THE HIGH COURT

I agree.

G N Z MJALI
JUDGE OF THE HIGH COURT

Heard: 27 October 2023

Delivered: 07 November 2023

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