CG CASE NUMBER: 188/89

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In die matter between:

CHRISTOPHER JAN ALFRED MARTINUS Appellant

and

THE STATE Respondent

CORAM: **HOEXTER, STEYN et EKSTEEN JJA**

HEARD ON: **14 SEPTEMBER 1990**

DELIVERED ON: **28 SEPTEMBER 1990**

J U D G M E N T

STEYN JA

At about 12h45 on Sunday, January 5, 1986, Dr Graham Cameron Monteith (the complainant) was seriously wounded in the face by a rubber bullet fired from a 12-bore shotgun by the appellant. The "bullet" was in the form of a ball approximately 15 mm in diameter. It struck complainant's left cheek just above the left upper lip and just next to the nose, penetrated the skin and sub-cutaneous muscles, breached the thin plate of bone constituting the anterior wall of the left maxillary sinus and lodged against the back of that sinus at a depth of about 6 cms. The track of the projectile from entry to lodgement was "fairly horizontal" and its direction was "from the front". The complainant must consequently have been facing the barrel of the gun when the shot was fired. (The complainant was of the opinion that the track of the bullet was downwards but the aforementioned description is that of Dr Thomas Ford, the surgeon who operated on complainant and removed the

projectile.)

At the time of the incident complainant was proceeding downstream in the front seat of a double (or two-seater) canoe on the Crocodile River (the river) in the direction of the Hartebeespoortdam and appellant was standing on the left bank of the river, on the property registered in the name of Lauralee Butgereit who was then his girl-friend and is now his wife. (Hereinafter she will be referred to as his wife.) The back seat of the canoe was occupied by John Drennan, a resident engineer at Reef Construction, Elandsfontein. It was his first trip on the river. He was an inexperienced canoeist and was being shown by complainant, a medical practitioner at the Hillbrow Hospital and Springbok canoeist, how to handle a canoe on a river.

This unfortunate and disturbing incident was the culmination of a period of mounting tension between canoeists travelling down the river and appellant, his

wife and other owners or occupiers of riparian properties. The undisputed evidence given at the trial of appellant, which will be referred to later in this judgment, reveals the following background to the events of that fateful Sunday. Appellant and his wife are, and have at all relevant times been, engaged in the computer business, he being a computer design engineer. Theirs is a very stressful occupation. They needed relaxation, and after a long search eventually found a "piece of land" where they could enjoy peace and solitude. It is the aforementioned property, which they bought and caused to be registered in her name as aforementioned, on October 18, 1983. According to the title deed the eastern boundary of the property extends to the middle of the river. This is also the case with the western boundary of the property immediately opposite theirs. The owner thereof is Donald Richard Barnard. Appellant and his wife are active bird-watchers and wildlife photographers.

The river is important to them because it attracts much wildlife. The property is 8,56 ha in extent, is long and narrow, lying lengthwise at right-angles to the river, and very mountainous. Only the area close to the river is suitable for building purposes. They accordingly built a house thereon, about 25 metres from the normal level of the river. Graham Frederick Meiring is the owner of a near-by riparian property, and has been living close to the river since approximately September 1985.

The portion of the river flowing past the aforementioned properties is frequented by large numbers of canoeists, especially during weekends in summer. There are obstacles, and shallow or rocky stretches which are unnavigable, either normally or at times of low water, where canoes have to be removed from the river and carried along the river-banks. At such portages the vegetation is unavoidably disturbed and even damaged. Many persons also repeatedly trespassed upon the riparian

properties in that area in order to reach the river with their canoes and to picnic on the river-banks or to reach a public road after removing their canoes from the river. Wildlife and nesting waterfowl were disturbed in this process and the environment polluted by litter and debris, such as bottles, plastic bags, pieces of fishing line and tackle, paper, etc., discarded by certain canoeists and their companions on the river or along its banks. Broken canoes were also from time to time discarded on the river-banks and stranded or lost canoeists continually trespassed upon riverside properties requesting help or asking for directions. This understandably distressed and annoyed appellant, his wife and other owners or occupiers of the properties affected. Signs were consequently erected by some of them, including appellant, warning canoeists and others against such conduct. The terms of certain of those signs were indicative of the degree of distress and

indignation so engendered. An example thereof is afforded by a photograph (exhibit B7) of one such sign (not erected by appellant), the Afrikaans version thereof being:

> "Oortreder (in underlined red letters) jy gaan jou .... sien (in black letters)."

The word omitted is the well-known three-letter folk expression denoting the human derrière. The signs were, however, mostly ignored and even vandalised. On a number of occasions appellant and Meiring personally complained to canoeists about their behaviour but to no avail, often merely eliciting abuse and insults. Complaints to the police were likewise unavailing because appellant and Meiring were unable to identify the offenders. Meiring went to Johannesburg and personally complained to the chairman of the Transvaal Canoe Union, unfortunately also to no avail.

Appellant sought to establish his and his

wife's rights in respect of the river. From the title deed he ascertained that their property extended to the mid-line of the river as aforementioned, and found, after further researches, that this was in accordance with sec 31 (bis) 6 (a) of the Land Survey Act, no 9 of 1927. He also studied the Reader's Digest Family Book of the Law in South Africa, the Water Act, the Criminal Procedure Act, no 51 of 1977 (the Act) and the Transvaal Nature Conservation Ordinances; had informal discussions with the South African Police at Randburg; and had an interview with a Mr Minnaar, an official in the legal section of the Department of Water Affairs. His wife consulted her attorney for the same purpose. Appellant came to the conclusion that canoeists had no rights in respect of the river, that they were guilty of trespass when navigating on the river as aforesaid and that the owners or occupiers of the riparian land affected had the right in terms of sec 42 (3) of the Act to arrest such

trespassers without a warrant. He likewise came to the conclusion that he was empowered by sec 49 (1) of the Act to use force to effect such an arrest should the arrestee resist or flee. During approximately the middle of 1985 appellant, his wife and Meiring commenced joint consultations on ways and means of dealing effectively with the aforesaid problems. At about that time Meiring also sought advice from his legal advisers and appellant was authorised by his wife and Barnard to keep trespassers off their respective properties. His mandate consequently included the whole stretch of river between their respective river-banks. Appellant was also a member of a small shooting club in the vicinity of his wife's property. He was experienced in the handling of firearms, including shotguns.

On Saturday, November 23, 1985, appellant adopted a new tactic in an endeavour to keep canoeists off the last-mentioned stretch of the river. He erected

a sign warning canoeists off that stretch, and some way downstream therefrom he put up an electrified wire across the river. He had a shotgun with him, loaded with blank cartridges, and awaited the arrival of canoeists coming from upstream. At about 14h00 two did arrive in the persons of messrs Craig and Morrison. They managed to lift the wire (albeit whilst being shocked in the process) and passed beneath it. Appellant asked them whether they had not seen the sign. They retorted "what sign?" (Craig had in fact seen, affixed to a low-level bridge, a sign to the effect that any canoeists proceeding beyond that point would be shot at.) Appellant replied that they should go back and read it. They did not do so but proceeded on their way downstream. Appellant thereupon fired a shot with the shotgun. (Appellant later maintained that it was a warning shot, in the air. They alleged that the shot had been directed at Morrison.) The two canoeists carried on, however, and

disappeared from view. Appellant maintained his watch at the wire. At about 15h00-15h30 a further party of five canoeists, all in single canoes, approached the wire from upstream. Amongst them were Anthony Webstock and Colin Strime, attorneys of Alberton and Johannesburg respectively. Appellant hailed them, told them that they were trespassing on private property and that they must go back. An argument ensued, Webstock and Strime maintaining that they had a right to be on the river and that appellant had no right to prevent them proceeding downstream. Webstock pushed the wire from its left-side mooring with the prow of his canoe. Appellant fired a blank cartridge with the shotgun and told Webstock he was arresting him "for breaking and entering" his property. (According to Webstock Appellant then aimed the shotgun at him but appellant maintained that although the stock was at his shoulder, the barrel pointed downwards to the ground.) A further altercation, including threats of

charges and counter-charges, followed. The canoeists then proceeded downstream. Appellant phoned Meiring who then joined him. They met the canoeists at their point of disembarkation and a further, and highly unpleasant, quarrel followed. They all proceeded to the Hartebeespoortdam police station where complaints about pointing a firearm and trespass and malicious damage to property were made by the canoeists and appellant respectively. On the 28th November 1985 detective-sergeant Meiring and appellant discussed the events of the 23rd November. Appellant maintained that he had been within his rights and had acted lawfully. Sgt Meiring however warned him against pointing a firearm at persons and putting up electrified wires over the river, stating that it was unlawful to do so, and told him that that was also the opinion of the public prosecutor at Brits.

Sometime thereafter appellant investigated the use of rubber bullets. He testified that he was informed

by the arms dealer whom he consulted that such bullets were non-lethal, that they could be dangerous at close ranges of 15 feet or less but that they would "probably cause no more than bruising" at greater distances. He then purchased a number. He did not himself, however, test their penetrating power nor did he consult any experts on such ammunition. He only fired one such bullet as a test at a bottle on the water but missed it, the bullet striking water beyond the target.

Early on Sunday morning January 5, 1986, at about 07h00-07h30 appellant was woken by a noise from upstream. On investigation he found a group of canoeists disturbing a large troop of baboons. The baboons were in a tree on the opposite bank of the river and the canoeists were shouting and throwing stones at them. Appellant had his shotgun with him; it was loaded with bird shot. The conduct of the canoeists annoyed him intensely and he told them "in no uncertain terms to

leave immediately", which they then apparently did. He then decided that he "would make some efforts to further persuade canoeists from traversing the properties there, either on land or where the river flows over". He then took n wooden sign which read "No canoeists. Trespassers will be harassed, shot at and prosecuted" and attached it to a string which he strung across the river above "paddle reach" so that it could not be knocked down by canoeists on the water. This sign was apparently erected near the south-eastern corner of his wife's property. At about 12h30 he took up position at a hammock strung between two trees near the river-bank between 80 and 100 metres downstream from the aforesaid sign. He again had the shotgun with him but it was now loaded with a rubber bullet and he had several other such cartridges on him. So accoutred and positioned he awaited the coming of further canoeists from upstream. The Crocodile River was about to become the Aqua Dolorosa of the Transvaal. The

first canoeists to arrive were the complainant and Drennan as described above. The aforementioned shooting followed soon thereafter.

As a result of the incidents of November 23, 1985 and the shooting of complainant on 5 January 1986 appellant was brought to trial in the regional court at Brits on three counts, to wit,

Count 1: attempted murder of Morrison on 23 November 1985 by shooting at him with a shotgun with intent to murder him;

Count 2: contravention of sec 39 (1) (i) of the Arms and Ammunition Act, no 75 of 1969, by unlawfully and wilfully pointing a firearm (shotgun) at Webstock on 23 November 1985;

Count 3: attempted murder of the complainant by shooting him with a shotgun on 5 January 1986 with intent to murder him.

Appellant pleaded not guilty to all three

charges and made a statement in terms of sec 115 of the Act to the following effect:

(i) In relation to all three charges he acted lawfully in terms of sec 42 (3) of the Act.

(ii) In relation to count 3 he acted lawfully in terms of sec 49 (1) of the Act and did not fire at the complainant. He merely fired a warning shot.

Appellant was acquitted on counts 1 and 2, the court having found in respect of count 1 that it had not been proved beyond a reasonable doubt that appellant had fired at Morrison and concerning count 2, that although it accepted the State evidence to the effect that appellant had in fact pointed the shotgun at Webstock and rejected the appellant's evidence that he had not done so, it had nevertheless not been proved beyond a reasonable doubt that appellant had the necessary **mens rea**. The magistrate's finding on this count is in the following terms:

> "It is evident in the present case that in view of the accused's actions prior to the attempted arrest in regard to count 2, it is his attempts to ascertain what his rights are, the putting up of signboards and his conduct at the time of the incident, that accused **bona fide** and honestly was under the impression that he was entitled to arrest the complainant.
> The court is therefore of the opinion that although **ex post facto** the attempted arrest seems to be unlawful, the State did not prove that at the time the accused had the necessary **mens rea** to commit the offence of pointing a firearm."

The regional magistrate's reference to the unlawfulness of the attempted arrest was based on his correct finding that he was bound by the order of Eloff DJP in the matter of TRANSVAAL CANOE UNION AND ANOTHER v BUTGEREIT AND ANOTHER despite the fact that it was then on appeal to this Court. That order was made on June 26, 1986, declaring that the Transvaal Canoe Union, its members and the second applicant (Dr Monteith) were entitled as of right in so far as the respondents in that matter (appellant and his wife) were concerned, to

canoe on the Crocodile River and interdicting the respondents from interfering with their rights. [That judgment is now reported in 1986 (4) SA 207 (T).] Eloff DJP's judgment was confirmed on appeal by this Court on November 30, 1987, in BUTGEREIT AND ANOTHER v TRANSVAAL CANOE UNION AND ANOTHER 1988 (1) SA 769 (A). The effect of those judgments is that appellant did not have the right to arrest Morrison, Webstock, complainant or Drennan as they were at all relevant times members of a Canoe Club affiliated to the Transvaal Canoe Union. And the judgment of this Court has finally settled the matter as far as appellant and his wife are concerned.

In respect of the third count it is common cause that appellant accosted complainant and Drennan when they approached him, that he asked them their names and addresses, and that complainant responded. (Complainant testified that he did give his name and address. Appellant, however, alleged that the

complainant merely mumbled inaudibly.) It is also common cause that appellant commanded them to stop and turn round, that they did so and came back upstream, that he told them that he was arresting them for trespass, that they must "come ashore" in order to be apprehended, and that complainant refused to do so. Their respective versions differed as to what then happened. It is unneccesary to analyse those differences in detail. Suffice it to say that appellant said that he fired a warning shot as they were paddling away downstream, that he did so after warning them that he would use force to prevent them from escaping from custody, that he aimed at the canoe just below the water-line, slightly behind where the complainant was sitting, and that he fired whilst the latter was looking back at him. He suggested that the complainant was hit either because the rubber bullet ricocheted off something in the water or because the recoil of the shot unexpectedly caused the barrel of

the gun to jump upward. Appellant's wife supported his version but said that he aimed at the water about 80% of the distance between him and the canoe. The complainant and Drennan however alleged that their canoe was stationary in the water at an angle of about 45° to where the appellant was standing, that they were looking at him, that he aimed directly at the complainant's head and that appellant fired at him just after he had refused to come to the river-bank. They were then approximately 20 metres from appellant. Complainant however conceded that the appellant could have been aiming at a lower part of his body than the head.

Detective warrant-officer A H du Plessis of the South African Police also testified on behalf of the State. He is a member of the forensic department of the South African Criminal Bureau and is in the ballistic section thereof. He had received specialist training, **inter alia** in the examination of firearms and ammunition

and in the identification of cartridge cases, toolmarks, and bullets which had been fired. He conducted tests to establish the penetrating power of the type of rubber bullet used by appellant, using the carcass of a freshly slaughtered pig for that purpose. He fired at the cheek of the carcass and obtained a penetration of 6 cms at a distance of 23 m. Taking into account the differences between the skin and facial bony structure of a pig and a human being he came to the conclusion that the complainant must have been not less than 10 m and not more than 20 m from the appellant when shot and wounded. He also discounted the possibility of the course of the bullet having been influenced by a recoil of the gun and voiced the opinion that there is no recoil until the bullet has left the barrel. This opinion was accepted by the magistrate, but it appears to be in conflict with Newton's third law of motion which states the principle of "an equal and opposite reaction". (Thus as the

projectile is accelerated towards the muzzle by the force of the explosion of the propellant, the gun is simultaneously pushed backwards by an equal but opposite force generated by that explosion.) Du Plessis also discounted the possibility of a ricochet, stating that a rubber bullet of the type here used would lose too much momentum in the process to have penetrated to the depth it did when it struck the complainant. He also fired test shots on the water at the place from where appellant had shot on January 5, 1986 but, by virtue of the angle of fire, found that the bullets did not ricochet.

The magistrate accepted the evidence of the complainant and Drennan and rejected that of appellant and his wife, and did so **inter alia** in these terms:

(a) "All the witnesses were found to be intelligent and refined persons who gave their evidence in a calm and placid manner. Although there are some contradictions of a non-essential nature in both the versions of the State and the Defence, it can mostly be attributed to a faulty memory or recollection of the sequence

of the events or of what precisely was said or done by the persons present there at the incident.

The Court was, however, more favourably impressed by the demeanour of the State witnesses. They did not give the impression that they were trying to exaggerate. In fact, they were more disposed to make concessions in their evidence than the accused. ...

(b) In the light of the fact that accused advertised on a signboard that canoeists will be shot, that he was armed with a shot-gun, loaded to his mind with a non-lethal rubber bullet, and the complainant's refusal to obey his order, it seems highly probable that he would have resorted to the firing of a shot at the complainant.

With the prevailing findings in mind, the Court is of opinion that it can be accepted that accused aimed the firearm in the direction of the complainant when he fired the shot and that the defence version in this regard is rejected as improbable and false where it is in conflict with that of the State witnesses."

The magistrate did, however, find that "it cannot be ruled out as a possibility that accused did not aim at the face of the complainant, but slightly lower, at the larger area of the body which would not have been easy for the complainant to spot due to his position in the

water and [that] because of faulty aim which happened on the previous occasion when the accused tried out the bullets, the bullet struck the complainant in the face instead".

The magistrate further found that by virtue of the aforementioned warnings given him by sgt Meiring, appellant in fact knew that he had no right to arrest the complainant, but that even if he "was justified in arresting the complainant, he, under the circumstances went beyond the scope of sec 49 (1) of the Act by using force in excess of what would reasonably be necessary to overcome resistance or prevent the complainant from fleeing ..." The magistrate however came to the further conclusion that it had not been proved that appellant intended to kill the complainant or that he had foreseen the possibility that he might be killed if hit by such a bullet, and therefore found appellant not guilty of attempted murder but guilty of assault with intent to do

grievous bodily harm. The magistrate sentenced the appellant to a fine of R800,00 or 6 months' imprisonment, conditionally suspended for 4 years.

Appellant was dissatisfied with this result and appealed to the Transvaal Provincial Division against his conviction and sentence. At the trial he had been represented by an advocate. However, the appellant argued the appeal in person. He achieved partial success. His conviction was altered to one of common assault and his sentence reduced to a fine of R200,00 or two months' imprisonment.

During argument before the Transvaal Provincial Division appellant attacked the magistrate's findings on the credibility of the witnesses. In delivering the judgment of that court Schabort J however found that there were no grounds for interfering with those findings. After quoting the remarks of the magistrate set out in quotation (b) above, the learned judge

proceeded as follows:

> "This passage must be read in conjunction with the magistrate's finding that the bullet did not ricochet. This finding and the associated decision to accept the state's version as to where the appellant was aiming, was based on the magistrate's observations of demeanour and impressions of reliability as a matter of credibility. No misdirection of fact by the magistrate in arriving at his relevant conclusion has been brought to our attention and I am not at all convinced that he was wrong in his decision.
>
> Monteith's evidence when challenged about his statement that the appellant had aimed at his person, was in my opinion impressive and convincing.
>
> Drennan too, who was paddling the canoe with Monteith, was adamant about his observations and conviction at the time of the incident that the gun was aimed at Monteith. As far as I am able to determine, neither of these witnesses was shaken in cross-examination on this score.
>
> The magistrate obviously was not impressed with the appellant's speculative theory after the event of a possible ricocheting and was justified in my opinion on a consideration of all the evidence, including that of Warrant Officer Du Plessis, the ballistics expert, to hold that view. The confrontation between the appellant and Monteith was extremely tense and a situation where the appellant in his own words, finally "was trying to get rid of" the recalcitrant canoeists. He had erected a

> wooden sign that morning with the words: 'No canoeists. Trespassers will be harassed, shot at and prosecuted' and was waiting for transgressors, gun at the ready.
> It is far from unlikely in these circumstances that the appellant would have suited his action to his warning and would have resorted to the ultimate measure he had clearly contemplated when acquiring the rubber bullet cartridges and making enquiries as to the effect thereof on the human body."

But the learned judge nevertheless found that the appellant did not have the requisite **mens rea** when he fired the shot at the complainant because it was clear "that the appellant was at all material times utterly convinced in good faith of the correctness of his understanding of the legal position, namely, that canoeing on the river by the complainants was unlawful" and that he therefore also honestly believed that he was lawfully entitled to arrest them. The court however rejected appellant's contention, based on sec 49 (1) of the Act, that in shooting complainant he used a degree of force which was reasonably necessary to effect the

arrest, and his further contention that at worst for him he had merely been negligent in failing to aim with sufficient care. The reasons for that rejection appear from the following passage in the judgment of Schabort J:

> "The second question with regard to section 49 is whether the appellant brought his actions on a preponderance of probabilities under the protection of sub-section (1) thereof. The appellant's very attempt, unsuccessful as it was, to resist the notion that he aimed at Monteith, belies to my mind, any suggestion that he did not appreciate that shooting at Monteith was unwarranted in the circumstances and unlawful as a means to prevent Monteith from fleeing.
> The magistrate's opinion in this regard was expressed in these words:
>
> > 'The Court is further of the opinion that even if accused was justified in arresting the complainant, he, under the circumstances, went beyond the scope of section 49 (1) of the Act by using force in excess of what would reasonably be necessary to overcome resistance or prevent (Monteith) from fleeing and he would nevertheless therefore be guilty of assault with intent to do grievous bodily harm.'
>
> I agree with this passage, except as indicated below.
> The appellant did not fire a warning shot. It

> is reasonably possible that a warning shot would in the circumstances have induced Monteith to subject himself to arrest by the appellant. More pertinently, the appellant has not shown that Monteith was not likely to have done so in the circumstances. It seems most improbable that Monteith, notwithstanding any possible bravado or belief in the lawfulness of his presence on the river, would have risked life and limb by attempting to paddle away, with the ring of a warning shot in his ears, exposed and defenceless as he and Drennan were in the canoe."

The reasons of the court below for nevertheless allowing the appeal against the conviction and for altering it as set out earlier herein, appear from the following passage in the judgment of Schabort J:

> "Finally, the magistrate accepted that the appellant did not aim at Monteith's face, 'but slightly lower at the larger area of the body which would ... not have been easy for the complainant to spot due to his position in the water ...' This finding was consonant with Monteith's own concessions about the possibilities in this connection.
> I am entirely satisfied that the appellant did not intend to cause Monteith serious bodily injury. He had been advised that bullets of this kind "could probably cause no more than bruising" at a range of more than 15 feet.

> This shot was fired at a distance of between 10 and 15 metres according to Du Plessis. The appellant was extremely shocked and concerned at the effect of his shot and tried to assist Monteith to the best of his ability. This conduct was clearly inconsistent with any intention to cause serious bodily injury.
> The conviction must, in my view be altered in these circumstances to one of common assault and an appropriate alteration must be made to the sentence."

Despite the measure of success he had achieved in his appeal, the appellant was still dissatisfied. With leave of the court **a quo** he now appeals to this Court against his altered conviction and sentence. He again argued the appeal in person.

In view of the decision of this Court in BUTGEREIT AND ANOTHER v TRANSVAAL CANOE UNION AND ANOTHER, **supra**, and bearing in mind the favourable finding of the court **a quo** that the appellant honestly believed that complainant was trespassing and that he therefore had the right to arrest him, the only issue in the present appeal is the question whether appellant

acted in accordance with the provisions of sec 49 (1) of the Act in shooting complainant.

The first aspect here in issue is the factual one of whether or not appellant aimed directly at the complainant when he fired the shot. Appellant argued that the magistrate erred in accepting the evidence of complainant and Drennan in this respect; and that the court below erred in not interfering with that finding. There is no merit in this contention. I agree with the afore-quoted remarks of Schabort J. The learned judge's approach was correct. There is no good reason to interfere therewith or with the magistrate's finding. As long ago as April 5, 1948, Davis AJA reaffirmed the rule that an appellate court will not interfere lightly with a trial court's finding as to the credibility of witnesses. The learned judge did so in this Court in REX v DHLUMAYO AND ANOTHER 1948 (2) SA 677 A. At pp 705-706 he set out a series of numbered conclusions relating to the approach

of an appellate court to factual issues. Those relating to findings on credibility are the following:

> "3. The trial Judge has advantages - which the appellate court cannot have - in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked.
> 4. Consequently the appellate court is very reluctant to upset the findings of the trial Judge.
> 5. The mere fact that the trial Judge has not commented on the demeanour of the witnesses can hardly ever place the appeal court in as good a position as he was.
> 6. Even in drawing inferences the trial Judge may be in a better position than the appellate court, in that he may be more able to estimate what is probable or improbable in relation to the particular people whom he has observed at the trial. ...
> 8. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.
> 9. In such a case, if the appellate court is merely left in doubt as to the correctness of the conclusion, then it will uphold it."

(The reference in para (8) to "the trial judge" also

applies to a trial magistrate.)

The record reveals no misdirection or mistake of fact by the magistrate in arriving at his conclusion that the complainant and Drennan were to be believed, and none were pointed out to us by the appellant. That finding must consequently stand. The probabilities also overwhelmingly favour the version of the complainant and Drennan. A particular set of circumstances can have the effect of a two-edged sword. That is the position here. The background to the events of the 5th January 1986 as set out earlier in this judgment, makes it clear that on that day appellant honestly believed that he could lawfully arrest the complainant and use permissible force to effect the arrest should circumstances so require. That redounded to appellant's favour. But on the other hand, it also rendered probable that he actually intended the rubber bullet to strike and injure the complainant (albeit only by bruising his torso) when the latter

contumaciously (in appellant's opinion) refused to heed his order to come to the river-bank. It establishes as a probability that the appellant shot directly at the complainant. This therefore operates in favour of the versions of complainant and Drennan and against that of the appellant. The location and direction of the wound as described in the first paragraph of this judgment, also provides strong corroboration of the two canoeists' evidence that appellant aimed and fired directly at the complainant whilst the latter was facing him. The possibility (or even probability) that the recoil of the gun caused the bullet to strike higher than appellant had intended, does not detract from the fact that appellant intended to hurt complainant by shooting at him. And appellant had no reasonable grounds for believing that the hurt so inflicted would not be serious. He had received only equivocal information regarding the penetrating power of the bullet in question, namely, that

it would "probably cause no more than bruising" at distances greater than 15 feet. On such indefinite information he could not have been certain as to the true position. The extent and gravity of bruising so caused at ranges greater than 15 feet were also matters uninvestigated by him. With his knowledge of shotguns appellant should have entertained reservations as to the reliability of information to the effect that such bullets would do no more than bruise when fired at the almost point-blank range of 16 feet. But he took no steps to determine the accuracy of the information so given to him. The power of such a bullet is, as was so unfortunately demonstrated, in fact much greater than the aforesaid information indicated. By using it at such a fairly close range as he did, appellant took a quite unreasonable, and indeed an almost reckless, chance.

I am also in agreement with the findings of the magistrate and of the court **a quo** that for the reasons

set out in the quotations from their judgments appellant clearly exceeded the bounds of force permitted by sec 49 (1) of the Act. The mere fact that the canoeists involved in the incidents of 23 November 1985 did not react to the warning shots in the way appellant intended that they should, did not mean that the complainant would also have failed to react as desired to such a shot or shots. Such reactions depend upon the personalities of the individuals involved, which can be almost infinitely varied. The disappointing results achieved by those previous warning shots consequently did not entitle appellant to dispense with such a warning shot or shots on 5 January 1986. But those previous results may have, and probably did, induce him to dispense with a mere warning shot and to shoot directly at the complainant with the intention of hitting him.

The power conferred upon a private citizen to arrest without a warrant should be exercised sparingly

and with great circumspection. The use of a firearm in an attempt to effect such an arrest should be resorted to with even greater caution. A private person has usually received no instruction as to when and how to do so and has usually also not received the training to enable him to resort to a firearm in a disciplined manner. Although appellant was a member of a shooting club and had experience in the handling of firearms, there is no suggestion that he ever received any instruction in the procedures of arrest and proper methods of effecting it.

Sec 49 (1) of the Act provides as follows:

> **"49. Use of force in effecting arrest.** - (1) If any person authorized under this Act to arrest or to assist in arresting another, attempts to arrest such person and such person -
>
> (a) resists the attempt and cannot be arrested without the use of force; or
>
> (b) flees when it is clear that an attempt to arrest him is being made, or resists such attempt and flees,
>
> the person so authorized may, in order to effect the arrest, use <u>such force as may in the circumstances be reasonably necessary</u> to

> overcome the resistance or to prevent the person concerned from fleeing."
> (My underlining.)

The test whether the use of such force has in any particular case been reasonably necessary, is an objective one. That provides a salutary safeguard against any unreasonable use of force in attempting to effect an arrest. A private person contemplating the use of force in terms of this sub-sec should steadily bear in mind that, however **bona fide** he may be in judging that he has the power to do so and that the method envisaged by him is a proper one, his conduct will be judged according to the objective standard of the reasonable man, and not by his own subjective estimation of the position.

In appellant's case the position is as follows. Even if he had in fact had the power to arrest the complainant (which he did not) he clearly used a quite unreasonable degree of force in attempting to effect the arrest. He therefore acted unlawfully. His appeal

against his conviction consequently cannot succeed. That consequence notwithstanding, I am in passing constrained to say that perhaps the appellant should reflect upon his good fortune in this matter. First, it was a matter of pure luck that the shot fired by the appellant at the complainant did not kill the latter. Second, the appellant was also fortunate in achieving in the court below the degree of success which he did.

The appellant wisely did not contend that the sentence as reduced by the court below was in any way improper.

The appeal is dismissed.

M T STEYN JA

CONCUR:

HOEXTER JA)
EKSTEEN JA)