REPUBLIC OF SOUTH AFRICA

REPORTABLE
CASE NO: 401/96

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

MALAHE J F S	1ST APPELLANT
OMERA, N	2ND APPELLANT
MALO, JXM	3RD APPELLANT

and

THE MINISTER OF SAFETY AND SECURITY	1ST RESPONDENT
VAN ZYL, H	2ND RESPONDENT
ROOS, D	3RD RESPONDENT
BOTHA, L	4TH RESPONDENT
DU PREEZ, M	5TH RESPONDENT

CORAM: SMALBERGER, F H GROSSKOPF, STREICHER JJA, FARLAM et NGOEPE AJJA

HEARD: 17 AUGUST 1998

DELIVERED: 10 SEPTEMBER 1998

JUDGMENT

SMALBERGER JA ...

SMALBERGER JA:

Arising out of a shooting incident which occurred in the early hours of 18 April 1990 in Berea, Johannesburg, the appellants (as plaintiffs) instituted action against the respondents (as defendants) for damages for unlawful assault as well as, in the case of the first and third appellants, wrongful or malicious arrest and detention, and malicious prosecution. The matter came before Goldblatt J in the Witwatersrand Local Division. The learned judge ruled that the issue of liability for any damages sustained by the appellants was to be determined separately from the quantum of such damages. After a protracted trial Goldblatt J held that the respondents were liable jointly and severally for any damages sustained by the appellants as a consequence of the unlawful assault upon them on 18 April 1990, and as a result of the malicious

arrest, detention and prosecution of the first and third appellants. In addition the respondents were ordered to pay the appellants* costs.

The respondents were granted leave to appeal to the full court of the Transvaal Provincial Division. That court upheld the appeal with costs and made an order granting judgment for the respondents in respect of the claims for "injury, arrest and detention", and absolution from the instance in respect of the claim for malicious prosecution, in both instances with costs. Subsequently the appellants sought and were granted special leave to appeal to this Court. The leave granted excluded leave in respect of the claims for arrest, detention and malicious prosecution.

It is a matter for concern that a period of more than eight years has elapsed since the occurrence giving rise to the litigation under

consideration. It is not possible from the record to determine if anyone is to blame for this state of affairs. Justice delayed is justice denied, as the saying goes. It is incumbent upon courts and practitioners alike to strive conscientiously at all times to ensure that matters are disposed of as expeditiously as possible lest litigants be prejudiced and the administration of justice consequently suffer in its reputation.

In relation to the incident giving rise to the appellants' action the following facts are either common cause or no longer in dispute. A Toyota Corolla vehicle ("the Toyota"), belonging to the first appellant ("Malahe"), had been parked overnight in Beatrice Street, Berea. The Toyota's shape was that of a panel van/station wagon. It had two doors and a tailgate. There were two seats in the front but none at the back, as the rear had been converted for storage and sleeping purposes. The

photographs of the Toyota which form part of the record confirm that there were windows along both sides of the Toyota and a large rear window in the tailgate.

At some time between 04:30 and 05:00 on 18 April 1990 the Toyota was driven by the third appellant ("Malo") along Beatrice Street in a northerly direction. There were two passengers in the vehicle, Malahe and a woman whose identity was in dispute at the trial. The Toyota turned right into Park Lane and then right again into Tudhope Avenue. Shots were fired at the Toyota in Park Lane by the second respondent ("van Zyl") and the fourth respondent ("Botha") who were on foot at the time. The shots were fired deliberately with a view to causing the Toyota to stop and to arrest Malo. After the Toyota turned into Tudhope Avenue, proceeding in a southerly direction, it was

pursued by an unmarked police vehicle driven by the third respondent ("Roos") in which the fifth respondent ("du Preez") was a passenger. A high speed chase ensued during the course of which Roos and du Preez fired further shots at the Toyota with the intention of forcing it to stop and bring about an arrest. In firing the shots the second to fifth respondents were acting within the course and scope of their duties as policemen.

The majority of the shots fired struck and penetrated the body of the Toyota and Malahe sustained eight bullet wounds. The area traversed by the Toyota, and where the shots were fired, was relatively well lit. The chase ended at a bend where Tudhope Avenue merges with Hadfield Road where Malo, because of the speed at which he was travelling, lost control over the Toyota and it overturned.

The issues on appeal are confined to whether the second to fifth respondents were guilty of an unlawful assault, or negligent conduct, giving rise to injury suffered by the appellants, the pleadings having been amended on appeal to make it clear that the appellants were relying upon both possible causes of action. (There was no objection to the amendment on behalf of the respondents as all matters relevant thereto had been fully canvassed at the trial.) The common cause facts give rise to prima facie inference of wrongfulness on the part of the second to fifth respondents. They also establish that their conduct in relation to Malo was intentional. There accordingly exists prima facie evidence of an unlawful assault by the second to fifth respondents on Malo.

The respondents do not seriously contest that the overturning of the Toyota, and any injury occasioned to its occupants thereby, was

causally connected, both factually and legally, to the shooting. In my view, on either version of what occurred (with which I shall come to deal), the required nexus has been established. The respondents sought to justify the shooting at Malo, and rebut the prima facie inference of wrongfulness, by relying on the provisions of sections 40(1) and 49(1) of the Criminal Procedure Act 51 of 1977 ("the Act"). Section 40(1) authorises the arrest by a policeman (peace officer) without a warrant of any person who, inter alia, commits any offence in his presence or whom he reasonably suspects of having committed an offence referred to in Schedule 1 of the Act (which includes theft). Section 49(1) provides that:

> "(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) ....

(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."

The force that may be used will include, in appropriate circumstances, the use of a firearm. The respondents correctly accept that the onus is on them to justify the conduct of the second to fifth respondents in shooting at Malo (Macu v Du Toit en 'n Ander 1983(4) SA 629 (A) at 632 H, 637 D-E). In relation to the other occupants of the Toyota (Malahe and the woman passenger) the respondents' defence was that they were unaware of their presence. This was the only course open to them as section 49(1)(b) of the Act could not, on the respondents' version of the events, have provided them with a defence in respect of such occupants. They (the occupants) were not suspected of having

committed any offence, no attempts were made to arrest them or warn

them of possible arrest, nor could they have been thought to be fleeing from arrest (Macu v Du Toit en 'n Ander (supra) at 641 E - F; Prince and Another v Minister of Law and Order and Others 1987(4) SA 231 (E) at 238 A - B; Hughes en Andere v Minister van Wet en Orde en Andere 1992(1) SACK 338 (A) at 343 e - h). The requirements of section 49(1)(b) could accordingly not have been met. Insofar as the second to fifth respondents (1) denied their knowledge of any passengers in the Toyota and (2), in any event, put in issue the presence of second appellant in it at the relevant time, the onus was on the appellants to prove such knowledge and presence. The onus to establish negligence on the part of the second to fifth respondents also rests on the appellants. The respondents, having accepted the onus to justify the shooting

at Malo, commenced leading evidence at the trial. Botha, van Zyl and Roos testified. Their evidence, in broad outline, was to the following effect. During the early hours of 18 April 1990 they and du Preez were patrolling Berea in an unmarked police vehicle. Roos was the driver. They were there to observe and apprehend, where possible, persons who might be seen committing crimes. At approximately 04:00 they noticed someone who appeared to be acting suspiciously at the intersection of York and Barnato Streets. The person was walking between parked cars and peering into them. Van Zyl and Botha were dropped at different points to enable them to keep the suspect under observation from positions where they would not be seen. They remained in radio contact with the remaining occupants of the police vehicle. The suspect was kept under observation for about 40 minutes while he (the suspect being

a male) wandered around a number of streets peering into parked vehicles. Eventually he broke into an Alfa Romeo parked in Doris Street by smashing one of its windows. He removed a brown leather jacket from the vehicle. The suspect then walked away followed by Botha and van Zyl. They kept Roos informed of what was happening by radio. When the suspect saw them, he ran away pursued by Botha and van Zyl. They shouted that they were policemen and called upon him to stop, but to no avail. A chase through various streets in Berea ensued during the course of which the suspect dropped the leather jacket which was picked up by van Zyl. Botha and van Zyl were unable to catch up to the suspect. Save for when he went round corners he remained in view all the time, according to them. Eventually the suspect ran into Beatrice Street from Park Lane. According to the evidence he must at that time

have been about 40 metres ahead of Botha and van Zyl. He headed straight for the Toyota which was parked in Beatrice Street facing Park Lane, jumped in, switched on the ignition and drove off in the direction of Park Lane. Botha and van Zyl stood in the middle of the road each with a pistol in his hand, and signalled to the suspect to stop. He ignored the warnings and drove straight at them, forcing them to jump out of the way. He appeared to them to be the only person in the Toyota the back of which, according to them, seemed to be packed with wood. On their evidence the person they had pursued from Doris Street could only have been Malo. Their evidence leaves no room for mistake in that regard.

Botha and van Zyl chased after the Toyota for about 10 paces before firing at it in order to bring it to a stop and arrest the suspect.

After the Toyota turned into Park Lane they fired further shots at it. In all Botha fired four shots and van Zyl seven. Van Zyl advised Roos by radio that the suspect was attempting to escape in the Toyota. When the Toyota turned into Tudhope Avenue, Roos took up the chase. The police vehicle pursued the Toyota with a blue light mounted on its roof and flashing hazard lights. Both Roos and du Preez fired shots at the fleeing Toyota in a vain attempt to stop it. Of all the shots fired at the Toyota a substantial number were directed at the body of the vehicle.

The chase eventually ended when the Toyota went out of control and overturned. Malo was found to have been the driver; Malahe was lying half out of the Toyota. He had numerous bullet wounds. While in the end it was not disputed that there was a woman passenger, the respondents who testified denied that she was the second appellant.

Both Malo and Malahe were arrested. According to Roos he searched Malo and found an Allen key, an instrument capable of being used for opening the doors of motor vehicles, in his possession.

Malahe, Malo, the second appellant and her sister gave evidence for the appellants. At the time of the trial the second appellant was a Ms Sheila Meth ("Meth"). She has apparently changed her name since then. The appellants' evidence was to the following effect. Meth shared a flat with her sister in a block of flats situated at the corner of Beatrice and Caroline Streets. She and Malahe had an ongoing relationship. Malahe and Malo had been to Maputo to visit relatives. They returned to Johannesburg on the night of 17 April 1990. They spent the night at Meth's flat. Malo was due to write an examination in Mmabatho the next morning. It was agreed that Malahe and Malo would leave early;

that Meth would accompany them; that Malo would be dropped off in Mmabatho and the other two would return to Johannesburg. The following morning they woke up later than they had intended. At approximately 04:30 they went down to the Toyota where it was parked in Beatrice Street. At the back of the Toyota there were boxes on which rested a mattress. The mattress was level with the bottom of the back and side windows.

The Toyota's starter motor was damaged and it had to be push-started. They had trouble starting the Toyota. Eventually after Malahe and Malo had changed positions they succeeded in doing so. It had previously been agreed that Malo would drive to Mmabatho. They drove off with Malo behind the wheel, Meth on the passenger's seat next to him and Malahe lying on the mattress at the back.

When the Toyota approached the junction of Beatrice Street and Park Lane, travelling slowly, a person (later identified as van Zyl) peered into the left front window. The appellants were under the impression that he was trying to open the left front door, which was locked, and that he had a gun in his hand. Fearing an attack Malo, exhorted thereto by Malahe and Meth, accelerated, turned right into Park Lane and sped off. Shots were then fired at them and Malahe was struck by a number of bullets. According to the appellants they were terrified by these events.

At the corner of Park Lane and Tudhope Avenue the appellants passed a slow moving vehicle and turned right into Tudhope Avenue. The vehicle started chasing them and shots were fired at them from it. The vehicle was unmarked and there was nothing to indicate that it was a police vehicle. They suspected that, being black, they were under attack

by members of the AWB. Malo drove as fast as he could in order to escape from their pursuers. He eventually lost control when taking the bend into Hadfield Road, and the Toyota overturned. A crowd, including the second to fifth respondents, gathered at the scene. Malo was accused by one of the respondents of having stolen the Toyota. Meth thereupon fetched the Toyota's registration papers to show that the Toyota belonged to Malahe. Both Malo and Malahe were then arrested.

In the course of his judgment the trial judge stated:

> "From the evidence adduced I am satisfied that a leather jacket was stolen in the manner described by the witnesses Botha and van Zyl. In my view they probably did chase the thief and lost him somewhere in Berea. They then in all probability saw a black man slowly driving a car in the area where they had lost the suspect and thought that the suspect was driving such car."

This passage has a twofold significance. In the first instance, it was an

attempt by the trial judge to reconcile the respective versions of the

appellants and the respondents with regard to the events that preceded the actual shooting. In my view they are irreconcilable as they are mutually destructive of each other. On the evidence of Botha and van Zyl there was no room for mistake on their part that someone other than Malo had prowled the streets of Berea and broken into the parked Alfa Romeo to steal a leather jacket. On the appellants' version Malo was in the company of Malahe, Meth and the latter's sister until the time all three appellants left the flat together and went to the Toyota immediately before setting off for Mmabatho. On their version Malo could not have been the thief that Botha and van Zyl persistently claimed he was. In attempting to reconcile these two opposing versions the trial judge misdirected himself in a material respect. This leaves us at large to

consider the matter afresh. The second point of significance is that it is

clear from the trial judge's finding that he was not prepared to accept unreservedly the respondents' evidence in preference to that of the appellants - if anything the passage quoted (and certain other passages in his judgment) indicate a preference for the appellants' version.

It will be convenient, before proceeding further, to deal with the position of Meth. The evidence of all three appellants and that of Meth's sister is that it was Meth who was the woman passenger in the Toyota. It is in my view clear, on the totality of the evidence, that she was at the scene where the Toyota overturned immediately (or almost immediately) after the occurrence and was later taken to a hospital. How did she come to be there (or come to be there so soon) if she were not a passenger in the Toyota? And once it is accepted that there was a woman

passenger, why would the appellants substitute Meth for the actual woman who presumably would have been equally capable of lending material support to the appellants' version of events? Given the trial judge's findings of credibility and the inability of the respondents' witnesses to refute with any conviction that Meth was the other passenger in the Toyota, I am satisfied on a balance of probabilities that she was.

Whether either party (i.e. respondents as opposed to appellants) has discharged the onus upon it depends in the first instance on whether or not its version can be said to be more probable than that of the other. This is what the trial judge should have addressed his mind to as a first step to the resolution of the issues in this matter, and what we are now called upon to do. In arriving at a decision in this matter we must be

guided, unless the record clearly indicates otherwise, by the credibility

findings of the trial judge. In this regard he said the following:

> "In my view, there was nothing in the demeanour of the witnesses to influence my findings as to credibility. Roos, Botha and van Zyl were all experienced policemen who appeared at ease in the witness box and who gave their evidence in a positive and clear manner. The plaintiffs' witnesses were not as precise or positive but in the case of Malahe and Malo they were not giving evidence in their home language. All four of the plaintiffs' witnesses appeared to be honestly trying to remember an unusual and traumatic experience and in these circumstances various discrepancies and inconsistencies in their evidence do not, in my opinion, deserve undue weight or criticism. In general 1 formed the impression that they were honest witnesses."

In my view neither version of the events, viewed in isolation, is

inherently improbable. Differently put, neither version is inherently

more probable than the other. The respondents' version must be

considered against the following background. There can be no doubt

that Malahe and Malo had returned from Maputo the previous day. Their passports bear testimony to that having been the case. Nor is the evidence that they arrived late at Meth's flat and spent the night there open to serious challenge. It can also be accepted on the evidence that the three appellants planned to leave for Mmabatho early the following morning. There is also no reason to doubt that they overslept and were behind the schedule they had set themselves, although they still had more than enough time to get to Mmabatho for Malo's examination.

If the respondents' evidence is to be accepted then Malo, despite having woken up late, and being faced with an examination later that morning, either by pre-arrangement with Malahe and Meth, or on a frolic of his own, went prowling around the streets of Berea in search of something to steal from a parked vehicle. In doing so he did not confine

himself, as one might have expected him to do, to the streets in the immediate vicinity of Beatrice Street. He went wider afield. When first observed by Botha and the other policemen he was some five city blocks from Beatrice Street. On the reasonable assumption that he would not have proceded there directly but would have peered into vehicles en route in search of something to steal, and having regard to the period of time that he was under observation by the police (including the period during which he was chased by Botha and van Zyl), the best part of an hour must have elapsed before he returned to Beatrice Street and got into the Toyota. When he eventually did so Malahe and Meth were already in it waiting for him.

It is highly improbable that if they had left the flat together he would have kept them waiting so long for his return (bearing in mind

that they were behind schedule), or that they would have been prepared to wait for him in the Toyota for the full period that he was away. If he had left the flat before them how would they have known when he would return so as to be in the Toyota when he arrived back? The most obvious arrangement would have been for Malahe and Meth to wait for him in the comfort of Meth's flat which was close to where the Toyota was parked. The striking improbability that they would in all the circumstances have been waiting fortuitously for Malo in the Toyota when he reached it at the end of the police chase in my view detracts significantly from the acceptance of the respondents' version.

I also consider it improbable that had Botha and van Zyl pursued Malo on foot over the distance they claim to have done, they would not at least have fired a warning shot or shots in an attempt to cause him to

stop. The explanation given by them for not doing so, namely, that they were in a built-up and heavily populated residential area is a lame one.

I am not unmindful of the difficulties which confront the police, in a situation such as the one in which they claim they found themselves, with regard to whether or not to use a firearm. But one or more shots fired directly into the air are unlikely to have endangered anyone.

It must be accepted, as found by the trial judge, that Botha and van Zyl did observe someone breaking into a vehicle and stealing a leather jacket. I am also prepared to accept that Botha and van Zyl would not have fired at the Toyota for no reason whatsoever. Why then, on the appellants' version, did they fire at it? There appear to me to be two reasonable possibilities. The first is that they may well have lost the suspect in the chase and that, on seeing the Toyota proceeding slowly

along Beatrice Street, mistakenly associated it with the suspect. This may have caused them to act in the manner claimed by the appellants, and to have fired at the Toyota when Malo accelerated away. This mistaken association could account for the subsequent arrest of Malo and Malahe, and with Malo later being confronted with the stolen leather jacket in the presence of its owner. It is not necessary, on this postulate, to consider whether Botha and van Zyl might have had reasonable grounds for believing that the suspect was in the Toyota, for their case was not predicated on it. The postulate is only advanced to provide a possible reason for their acting as they did on the appellants' version.

The other scenario is that if Botha and van Zyl were searching in Park Lane for a suspect they had lost, they may well have observed, on the appellants' version, the Toyota being push-started in Beatrice Street.

This could have aroused a suspicion (although not necessarily a reasonable one) that the Toyota was being stolen, and provide an explanation for their subsequent conduct. It would also tally with the appellants' claim that at the scene where the Toyota overturned the accusation was made that it had been stolen. While this involves some measure of speculation it does provide a feasible explanation as to why the second to fifth respondents might have acted as they did. They of course never sought to justify their conduct on the basis of a reasonable belief that the Toyota had been stolen.

In the circumstances I am of the view that it cannot be said that the respondents' version of what occurred is more probable than that of the appellants. It follows that their version of the major events cannot be accepted in preference to that of the appellants for the purpose of

determining whether they have discharged the onus resting upon them.

In the circumstances it becomes futile to attempt to resolve factual disputes such as whether an Allen key was found in Malo's possession where both the allegation that it was, and the denial of that fact, may be equally open to suspicion - in the one instance because it may be an attempt by the respondents to bolster up their case, and in the other because if it were true one would expect a denial from Malo.

It does not follow as a matter of course that simply because the respondents' version cannot be accepted on a balance of probabilities, that of the appellants must be. All that such non-acceptance means is that the respondents have failed to discharge the onus upon them to justify the shooting at Malo. It remains to be considered whether the appellants have discharged the onus in respect of those issues where they

bear the burden of proof. For such onus to be discharged on their evidence the appellants need to establish that their version is more probable than that of the respondents.

The appellants' evidence is undoubtedly open to a number of criticisms in relation to matters such as how the Toyota came to be started that morning; why Malo, who was due to write an examination that morning, was driving and not Malahe; their detailed evidence with regard to the events at the corner of Beatrice Street and Park Lane; and their allegations concerning a second police vehicle. Numerous criticisms are directed at the appellants' evidence in the judgment of the court a quo. I do not propose to canvass them. Some were well founded; others in my view not. (Nor for that matter was all the trenchant criticism of the trial judge justified.) Suffice to say that the

shortcomings in the appellants' evidence are such that it cannot be said with confidence that their evidence should be accepted as more probable than that of the respondents. This is underscored by the fact that this Court, in granting leave to appeal, did not grant leave to appeal against the court a quo's order in respect of the issues of arrest, detention and malicious prosecution. This is indicative of the fact that it was not considered that there were reasonable prospects of the appellants' evidence being acceptable in its entirety.

One is unfortunately faced with the situation of not knowing exactly where the truth lies in relation to the disputed events. Neither version, as a whole, can be accepted as more probable than the other. It is thus necessary to revert to the common cause facts in an effort to arrive at a decision.

As previously mentioned, the common cause facts suggest that the

shooting at Malo was prima facie wrongful. The shooting was also intentional. The respondents have failed to justify such shooting. The absence of any legal justification renders the prima facie wrongfulness of the shooting conclusive. The shooting at Malo therefore constituted an unlawful assault. The overturning of the Toyota was causally related to such assault. It follows that the respondents (the first respondent vicariously) are liable for whatever injury and damages Malo sustained in the events that occurred.

The first and second appellants sustained physical injury as a consequence of the conduct of the second to fifth respondents. This gives rise to an inference of wrongfulness (Cape Town Municipality v Paine 1923 AD 207 at 216/7) as there exists no legal justification or

excuse for the infliction of such injury. What remains is the issue of culpability. This resolves itself into the question whether the common cause facts are able to sustain an inference of negligence on the part of the second to fifth respondents in respect of Malahe and Meth. If they (the respondents referred to) knew or could reasonably have foreseen that there were passengers in the Toyota, a reasonable person in their position would have foreseen the possibility of harm being caused to such persons if shots were fired at the Toyota, and would have guarded against such harm being caused by not shooting - at least not in the manner in which they did. In such circumstances it would prima facie have been negligent to shoot at the Toyota. On the other hand, if they did not know that there were passengers in the Toyota, and could not reasonably have foreseen their presence, they would not have owed such

passengers any legal duty and could not have acted wrongfully towards them.

On the issue of reasonable foreseeability a distinction must be drawn between the position on the common cause facts and the position that would have existed had the respondents' version prevailed on a balance of probabilities. For on the latter version the position would have been that Malo, after having been observed and followed for nearly an hour, made for the Toyota, jumped into the driver's seat and drove away. In those circumstances, and particularly having regard to the time factor, a reasonable person may well not have foreseen the presence of passengers in the Toyota. I need not express a firm view on the matter.

The common cause facts on which the appeal falls to be decided disregard the circumstances in which the respondents' claim Malo

entered the Toyota, and commence from the time the Toyota was proceeding along Beatrice Street towards Park Lane. The common cause facts may in my view legitimately be supplemented by the following. There is no reason not to accept that Meth was seated in the passenger seat of the Toyota. It was the only other seat in the vehicle and in the normal course that is where one would have expected at least one of the passengers to have been seated. Had she been in the back of the Toyota it is most unlikely that she would not have sustained any bullet wounds, as any person lying there would be more exposed, and the most vulnerable, to shots fired from behind.

In the course of giving evidence Botha testified, inter alia, as follows:

" Wat net u alles in die voertuig gesien terwyl die voertuig besig was om op u af te pyl? - - Terwyl die

voertuig besig was om af te pyl het ek net die verdagte in die voertuig gesien. Daar was geensins enige iets anders sigbaar in die voertuig nie.

Maar u kon die verdagte al die tyd in die voertuig sien vandat hy ingespring het totdat u uit die pad uit moes wegkoes dat die kar u moes raakry? - - Dit is korrek.

Nou is u doodseker dat u in daardie tyd niemand in die passasiersitplek gesien sit het nie? - - Ek het niemand in die passasiersitplek gesien sit nie.

Kon u die passasiersitplek sien? - - Ek kon wel die passasiersitplek duidelik sien.

Met ander woorde dit is nie dat u nie opgemerk het of daar iemand was nie, u kon die sitplek sien en u het gesien dat daar niemand in daardie sitplek sit nie? - - Dit is wel so, edele."

There is no reason why this evidence cannot be accepted at face value. Botha as a policeman is no doubt a trained observer, and is capable of observing accurately even in difficult circumstances. I have already pointed out that the area was well lit. Even in the anxiety of the moment he might be expected to notice whether there was anyone sitting

on the passengers seat. Accepting that Meth was sitting there, Botha

should have seen her. This would be so even if she had ducked down. She would still have been on the seat and would not have been completely hidden from the gaze of someone who was not only next to the car but actually took stock of the passenger's seat. If Meth must have been visible to Botha, and by inference was visible to him, the same would apply to van Zyl. (It is in fact unlikely that in the course of the events not one of the police witnesses would have seen the other occupants of the Toyota.) Accordingly when Botha and van Zyl fired they must have known that there was at least one passenger in the Toyota, and could reasonably have foreseen that there might be more. They would have had a legal duty to act reasonably towards such passengers (Government of Republic of South Africa v Basdeo and

Another 1996(1) SA 355 (A) at 368 B). In shooting at the Toyota they would have been in breach of that duty. In the absence of any lawful excuse for the shooting, and none has been established, their conduct was both wrongful and negligent.

Even leaving aside Botha's evidence to which I have referred, in the circumstances revealed by the common cause facts he, and also van Zyl, should reasonably have foreseen the presence of passengers in the Toyota. In Basdeo's case (supra) Hefer JA said (at 369 E - F):

> "In the present case Apostolides readily conceded that he could not see whether there were passengers in the car and did not even consider such a possibility. But, simply because it is such a common occurrence, I agree with the trial Judge that he should reasonably have foreseen that the person whom he wanted to arrest might not be alone in the car. In this regard the present case is distinguishable from Prince and Another v Minister of Law and Order and Others 1987 (4) SA 231 (E) on which Mr Marnewick relied."

Basdeo's case involved a car proceeding along a major road at night.

The present matter relates to a vehicle travelling in a city street after 04:30 in the morning. Berea is a densely populated area in or on the fringe of the Johannesburg heartland. It would not be considered an uncommon occurrence for vehicles to be around in the early hours of the morning. Nor would it be uncommon for such vehicles to have passengers. The presence of passengers in the Toyota should therefore reasonably have been foreseen by Botha and van Zyl with the result that the shooting at the Toyota would have been negligent on this approach as well.

What applies to Botha and van Zyl in this regard also applies to Roos and du Preez. They had no reason to believe that there were no passengers in the Toyota and should equally have foreseen the

reasonable possibility that there might be. It was not suggested that the culpability of Roos and du Preez should be determined, in this regard, on a basis different from that of Botha and van Zyl. It is not disputed that the first respondent is vicariously liable for the blameworthy conduct of the other respondents.

The approach I have adopted accords with the need to protect innocent passengers against the consequences of the unlawful use of firearms. While it is not sought to render the powers of the police under section 49(1) of the Act nugatory, such powers must at all times be exercised with circumspection and strictly within the confines laid down by that section (see the remarks of Hefer JA in Basdeo's case (supra) at 368 B-H).

It follows that the appeal must be allowed, with costs. This will

result in the order of the court a quo being set aside save with regard to its orders relating to the first and third appellants' claims for wrongful or malicious arrest and detention, and malicious prosecution (in respect of which leave to appeal to this Court was not granted). Those issues were largely incidental to the main issues and very little additional evidence related to them. The first and third appellants' lack of success in regard to those issues does not detract from the fact that the appellants were substantially successful in their action and are entitled to their trial costs. The respondents will, however, have achieved some success against the first and third appellants (but not the second appellant) in the court a quo, even though in the end result they failed on the main issues. Such success is sufficiently substantial to entitle them to their costs of appeal in the court a quo as against the first and third appellants. As

they were unsuccessful against the second appellant they must pay her

costs of appeal.

In the circumstances an appropriate order is the following:

1) The appeal succeeds, with costs.

2) The order of the trial court (the Witwatersrand Local Division) is

altered to read:

"1. The defendants are liable jointly and severally for the damages sustained by the plaintiffs as a consequence of the unlawful assault on the third plaintiff, and their negligent conduct in relation to the first and second plaintiffs, on 18 April 1990.

3) There will be judgment for the defendants in respect of the first and third plaintiffs' claims for wrongful or malicious arrest and detention.

4) Absolution from the instance is granted in respect of the first and third plaintiffs' claims for malicious prosecution.

5) The defendants are ordered to pay the costs of the hearing to date jointly and severally."

c) The order of the court a quo (the Transvaal Provincial

Division) is set aside insofar as it differs from the order set out in (b) above, as well as its order as to costs.

6) The first and third appellants are ordered to pay the respondents' costs of appeal in the court a quo.

7) The respondents are ordered to pay the second appellant's costs

of appeal in the court a quo jointly and severally.

JW SMALBERGER
JUDGE OF APPEAL

FH GROSSKOPF JA)concur
STREICHER JA) FARLAM
AJA) NGOEPE AJA)