

Reasonable Force – A New Interpretation? by John Welch

After I had written last month's column, the Supreme Court of Appeal (in the matter of *Govender v Minister for Safety & Security*) made a very important decision which concerns the use of force in the execution of an arrest.

At the time *Govender* (G) was a 17-year-old scholar. However, he was doing what scholars are not supposed to do – he and two friends were drinking beer and trying to find dagga to smoke. At a shopping complex they met another friend who had already stolen the keys to a BMW in the parking lot – they stole the car without any further hesitation. Later that night they were spotted by policemen in a patrol car who, after confirming the car had been stolen, gave chase. Eventually G and his friends left the car and fled on foot. One policeman, 'C', chased G but could not catch up with him and, after shouting several warnings, fired a warning shot and then at G's legs. The bullet however, struck him in the spine. G was paralysed as a result of the bullet wound.

G's father then claimed damages from the Minister for Safety & Security – whose defence was that the shooting was not wrongful as the policeman had acted within the scope and ambit of Section 49(1) of the Criminal Procedure Act. When the trial judge found in favour of the Minister, G's father took the matter to the Supreme Court of Appeal.

As the facts were not in dispute, the Court of Appeal had to consider the correct interpretation of section 49(1) of the Criminal Procedure Act in the light of the Constitution. The appellant had the choice to attack the judgement on two grounds – the *constitutionality* of section 49; or the *interpretation* of this section in the light of our new constitutional dispensation, based on human rights.

Although not required to do so, the appeal judge said that the objectives and purport of subsections (49(1) and (2) are obvious and are fundamentally there "to protect the safety and security of all persons." The judge also quoted the following from the Harvard Civil Rights/Civil Liberties Law Review: "If suspects were able to flee successfully from an arrest on a more regular basis, the threat of punishment would be weakened and the efficiency of the criminal justice system as a deterrent to crime undermined" and said that "A failure by the state to preserve the effectiveness of the criminal justice system will end in lawlessness and a loss of the legitimacy of the state itself."

I believe that in South Africa, where the likelihood of arrest is fairly low, a more liberal interpretation of the provisions concerning the use of force to effect an arrest clause may prove to be necessary for us to *restore* law and order.

In order to decide whether the interpretation of section 49(1) is in accordance with the constitutional limitation of rights clause, the court took note of the Constitutional Court's statement on the prime importance of our Constitution in all matters: "When interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

It was because of this (and other) rulings of the Constitutional Court that the legislature enacted the new section 49 – I must assume that the *Govender* judgement now clears the way for it to be put

into operation. The court emphasized that, although the police and citizens should have the right to use reasonable force in the execution of arrests, the person fleeing *also* has constitutional rights that must be protected – including the right to be presumed innocent. (Note also that even escaping convicted persons have constitutional rights.)

The important question the court had to answer was how the interests of the state and the rights of the fleeing suspect could be brought into balance. The answer to this question lies in the meaning of any 'reasonable force' necessary to overcome the resistance or to prevent the suspect from fleeing. In *Matlou v Makhubeda*, the former Appeal Court's (liberal?) interpretation of this requirement led to the ruling that there must be proportionality between the degree of force used and the seriousness of the crime of which the person is suspected. In the *Govender* case, however, it was argued that the scope of section 49 should be further limited – by requiring 'arrestor' to prove that the suspect posed an *immediate* threat or danger of serious physical harm to the police or to others. In deciding this issue the court then said that full weight should be given to factors such as the age of the fugitive, his bodily features, whether he was armed, whether he could be brought to justice in some other way (eg whether he was identified) and what threat if any, he had caused to the pursuing policeman or the society in general. The crux of the judge's finding was that the protection of property could never be equal or more important than the right to life or physical integrity.

In conclusion, the judge ruled that "section 49(1)(b) of the Act [I believe it will probably also be applicable to section 49 (2)] must therefore generally speaking (there may be exceptions) be interpreted so as to *exclude the use of a firearm* or similar weapon [something potentially lethal] unless the person authorised to arrest, or assist in arresting, a fleeing suspect has reasonable grounds for believing:

- "1. That the suspect poses an immediate threat of serious bodily harm to him or her, or a threat of harm to members of the public; or
- "2. That the suspect has committed a crime involving the infliction or threatened infliction of serious bodily harm."

Although the judgement does not cover the killing of a suspect during/after an arrest, the principles remain the same. Minimum force is what is required and killing will be condoned *only* if the suspect presents a threat of serious bodily harm to the pursuing policeman, civilian or members of the public in general.

I welcome the ruling that force (that could lead to the death of the suspect) may be permitted in the event of an arrest for a violent crime. The new section 49 is not clear in this regard and it was a matter of grave concern that a person, who has just committed a serious violent crime but who, *at the time of the (attempted) arrest* no longer constitutes an immediate danger, may evade arrest simply by outrunning his/her pursuers. Although the *Govender* decision does not deal with the new 49, or with the killing of a suspect during an attempted arrest, or with private defence, it is reasonable to infer that such killing would be justified only in the circumstances described in the judgement.

There is no doubt that law enforcement officers now have a much more difficult task at hand. They will have to ensure that the circumstances described in the judgement are present *before* they use force to execute an arrest, eg whether or not the suspect was armed, his physical features, including age, etc. Bear in mind that in both criminal and civil cases there is in fact an onus of proof on policeman/civilian to prove that he/she had complied with all the requirements. Officers will have to depend on intelligence supplied by the control room and make sure of exactly what crime the suspect is being sought for. If it was robbery or hijacking, force may be justified despite the suspect not constituting an immediate threat to the policeman. If, however, it was car theft, force (with a firearm or other potentially lethal

weapon) would be justified *only* if the suspect constitutes a threat of danger to the policeman or society.

Let us have a look at some of those crimes the Supreme Court of Appeal may have had in mind as exceptions to the rule. Housebreaking with the intent to commit an offence is one such crime. Although force is often employed to break and enter this is generally not regarded as a typically violent crime. I am of the view that this is a very serious offence that would probably be distinguished from 'ordinary' theft. More often than not the housebreakers are armed with crowbars, screwdrivers, knives and the like and will seldom hesitate to use violence if confronted by the homeowner.

Another crime that comes to mind is stock theft. In many such cases the victims and the

police are helpless as the culprits are never arrested. These criminals may flee into a neighbouring country – never to be seen again. In many instances the farmers are not insured (due to prior claims) and many are forced into insolvency. I can hardly understand why these victims should not be entitled to use lethal force to protect their property.

Only time will tell what effect this judgement will have on crime and law enforcement. Police officers will have to be trained – not only in practical law enforcement, but also to change their mind set. Civilians also will have to ensure that they have a better understanding of the relevant laws and how to act within the constitutional limitations.