

MODULE 5 UNLAWFULNESS

UNLAWFULNESS

1. Legality
2. Conduct
3. Causation

4. Unlawfulness

5. Criminal accountability
6. Fault

De Wet and Swanepoel state that conduct is unlawful if:

1. It is contrary to a clause of prohibition or decree or
2. There is no ground of justification for the conduct

This description is not enough as there is no numerous clauses of grounds of justification

HOW UNLAWFULNESS MAY BE DETERMINED

❑ There are various approaches to determine unlawfulness

❑ Snyman recommends the following:

1. PRIVATE LAW – unlawfulness rests on the infringement of a private interest protected by law (violation of a subjective right)
2. PUBLIC LAW – unlawfulness rests on the infringement of a public interest protected by law
3. PUBLIC INTEREST – interests may sometimes extend further than the law is willing to protect. For this reason any infringement on the public interest is not necessarily unlawful. Eg. killing a person is against the public interest and thus unlawful BUT killing a person in self-defence is not unlawful.
4. OBJECTIVE REASONABLENESS – a criterion must exist to determine when the public interest is protected by law and when it is not. This criterion is objective reasonableness
5. CURRENT SOCIAL NORMS (BONI MORES) – objective reasonableness is the criterion for the existence of unlawfulness and the content of reasonableness is determined by social norms

- ❑ Van der Merwe and Olivier argue that this criterion is completely objective
- ❑ Illustration by example

A holds B at gunpoint with a water pistol. B thinks it is a real gun and shoots A with his 9mm. B's conduct is unlawful

Objectively, B totally exceeded the limits of self- defence

The fact that he thought, bona fide, that he was acting in self- defence will be considered when determining intent and the specific knowledge of unlawfulness

Using the totally objective test, the contrary is also true:

A kills B out of pure callousness at Nelson Mandela Square and after the fact it transpires that B was actually a terrorist who was about to bomb the square.

Objectively , As conduct is not unlawful

A's bad motive and the fact that he did not intend to save lives does not detract from the fact that there was no unlawful murder

A will be guilty of attempted murder

THE TEST FOR UNLAWFULNESS DIFFERS FROM THE REASONABLE MAN TEST USED FOR NEGLIGENCE

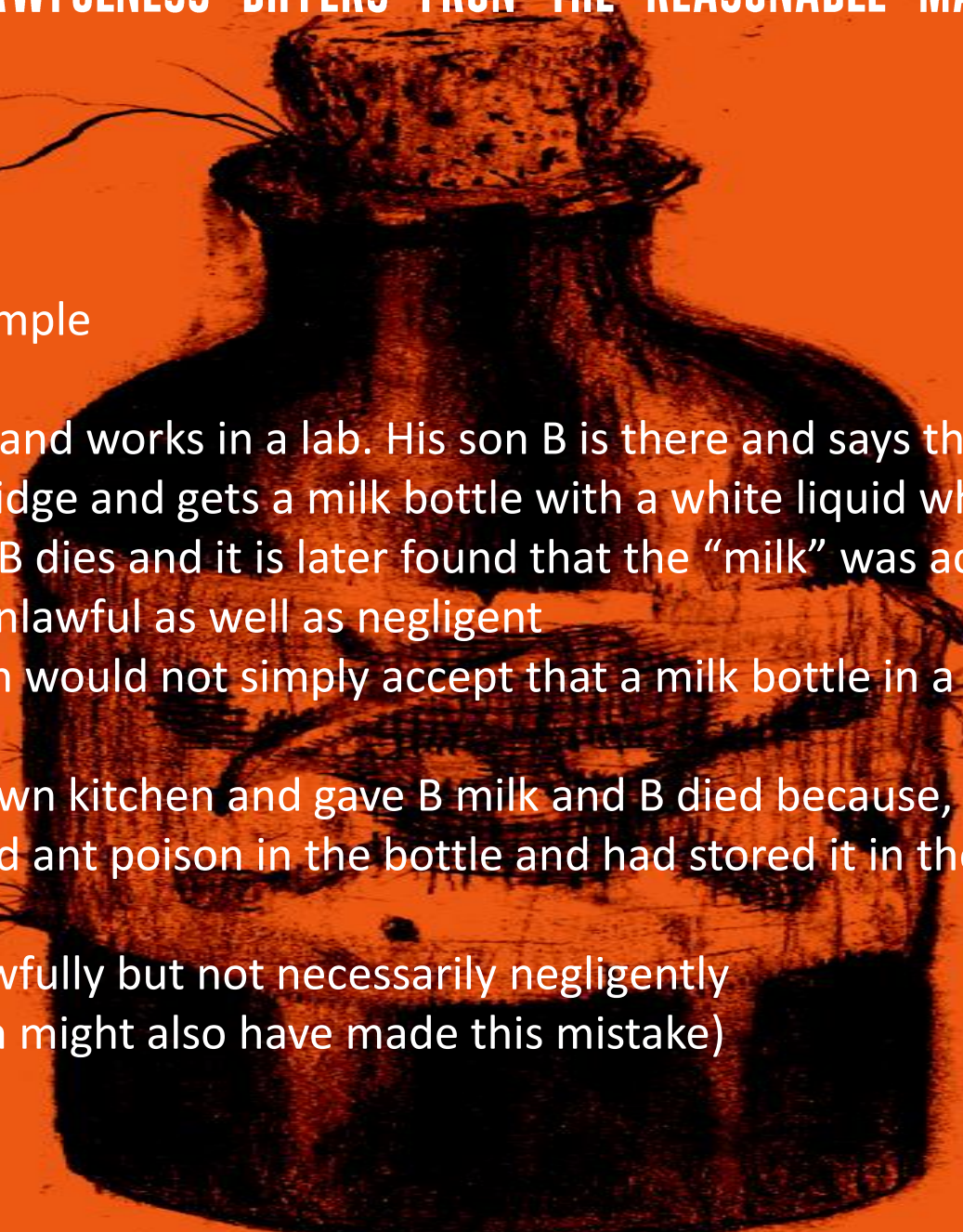
(both are objective)

□ Illustration by example

Prof A is a scientist and works in a lab. His son B is there and says that he is thirsty. Prof A goes to the fridge and gets a milk bottle with a white liquid which looks like milk and pours B a glass. B dies and it is later found that the “milk” was actually poison. Prof A’s conduct is unlawful as well as negligent (a reasonable person would not simply accept that a milk bottle in a lab contains milk)

If Prof A was in his own kitchen and gave B milk and B died because, as it later turns out, Mrs A had mixed ant poison in the bottle and had stored it in the fridge out of B’s reach.

Prof B still acts unlawfully but not necessarily negligently (the reasonable man might also have made this mistake)



❑ Snyman states that the objective ex post facto test (which is supported by De Wet, Swanepoel, Van der Merwe and Olivier) is not absolutely objective in certain cases and the perpetrators motives must at times be taken into account

❑ VdM&O agree that motive is a factor to be considered when asking whether the accuseds conduct is objectively unreasonable and thus unlawful (it then weighs the same as any other objective factor)

❑ The views of Snyman, Van der Merwe and Olivier are acceptable as they do not result in the same test for negligence

[Keep in mind these are the views of authors. The views of the courts are seen in the case law]

Unlawfulness is negated by grounds of justification

CRYSTALISED GROUNDS OF JUSTIFICATION



1. Self- defence/ private- defence
2. Necessity
3. Impossibility
4. Superior orders
5. Disciplinary chastisement
6. Public authority
7. Consent
8. De minimus non curat lex
9. Negotiorium gestio

SELF- DEFENCE

Def: “self- defence occurs when a person protects his own interests or those of another against an unlawful attack, or such threatening attack and in the process lawfully injures the attacker or threatening person”



REQUIREMENTS!!!

In respect of the assault

- 1 Positive omission or commission
- 2 Unlawful
- 3 Has already begun or is immediately threatening
- 4 Does not have to be directed against the defender

In respect of the defence

- 1 Directed against the attacker
- 2 Conscious self- defence action
- 3 Essentially protects the threatened interest
- 4 Means used must not be more damaging than necessary to prevent assault (proportional)

1) Assault must be (+) omission or commission

Eg. where a prisoner has served their time in prison and the warder refuses to or neglects to set them free – prisoner acts in self- defence should he escape

2) Assault must be unlawful

- ❑ A attacks B and B counters the attack
 - If B lawfully counters A, A cannot raise a question regarding self-defence
 - If B unlawfully counters A in a manner which exceeds the limits of self-defence, A may in turn act in self-defence

- ❑ (NB) Self-defence is directed against an UNLAWFUL human act:
 - Against an unlawful blameless act of a lunatic = self-defence
 - Against an animal attack = necessity (animals cannot act unlawfully)
 - Against an animal used as an instrument by an attacker = self-defence

- ❑ What kind of interest are you allowed to protect using self-defence?
 - ❑ Seems to be any interest...

CASE LAW:

S v Steyn 2010 (I) SACR 411 [SELF STUDY]

S v Van Wyk 1967 (I) SA 488 A



3) Assault had already started or is immediately threatening

- If the attack has already taken place or still has to take place in the future self- defence cannot be used
- Other means must be pursued

4) Assault does not have to be directed towards the defender

- Self- defence may also be used to protect another person

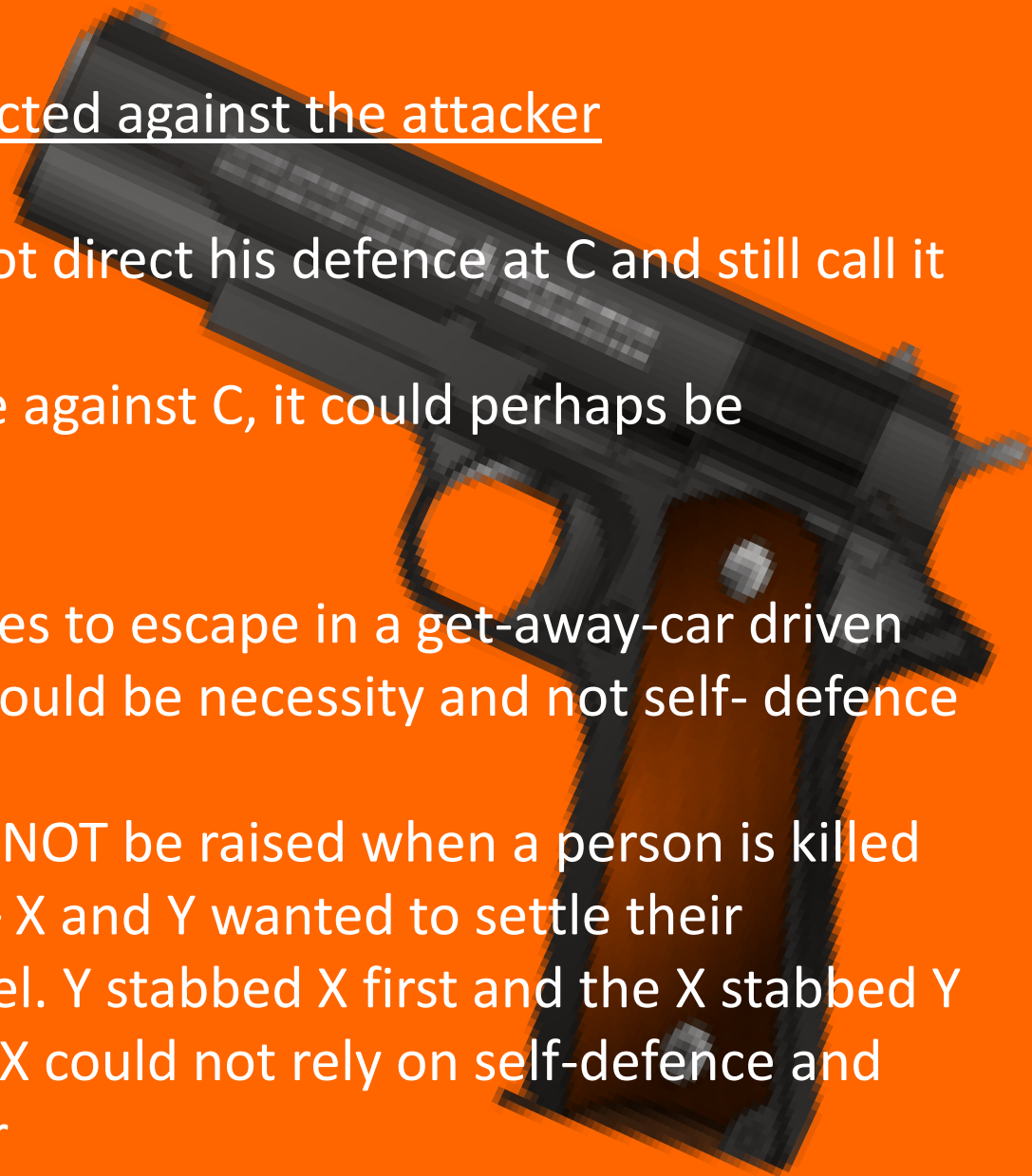
1) Defence must be directed against the attacker

❑ If A assaults B, B cannot direct his defence at C and still call it self- defence

❑ If B directs his defence against C, it could perhaps be necessity

Eg. A robs a bank and tries to escape in a get-away-car driven by C. If B shoots C this would be necessity and not self- defence

❑ Self- defence can also NOT be raised when a person is killed in a duel – Jansen case – X and Y wanted to settle their differences in a knife duel. Y stabbed X first and the X stabbed Y in the heart, killing him. X could not rely on self-defence and was convicted of murder



2) Defence must be a conscious self-defence action

- ❑ Has not been pertinently decided on what this means...
- Does not have to be deliberate (Krull case)
- Has to be deliberate (Fick case)

3) Defence must essentially protect the threatened interest

- ❑ Where it is possible to protect the interest in a different way, own action is not permissible
- ❑ The question to be asked: could the defender have protected himself by rather fleeing?
- ❑ Old authors argue that the attacked does not have to flee if:
 - It is dangerous
 - The attacked is discredited by fleeing

Zikalala case – a person must flee if it is dangerous

Van Wyk – a person need not flee to prevent an assault
(confirmed in the Ntsomi and Mothoane cases)

4) Means used by the defender must be proportional to the attack
(does not cause more damage than is necessary to ward off the attack)

❑ Was a defence at all necessary? // What means are acceptable?

❑ Various tests have been used:

1. the most important interests enjoy preference – Van Wyk
however protecting property enjoyed preference above
protecting life

2. the method of defence must weigh up against the means of the
assault – Jackson a revolver was used against an attack of fists and
shoes

- Terblance and Ntsomiif a person attacks an armed
policeman he may only blame himself if the policeman uses the gun
against him

3. the method of defence must weigh up to the threatening danger –
in both Van Wyk and Jackson the method of defence outweighed the
threatened danger

CURRENT TEST: were the means objectively and reasonably necessary to ward off the assault?
(the Van Wyk case emphasises the objective test)



IMPORTANT!!!

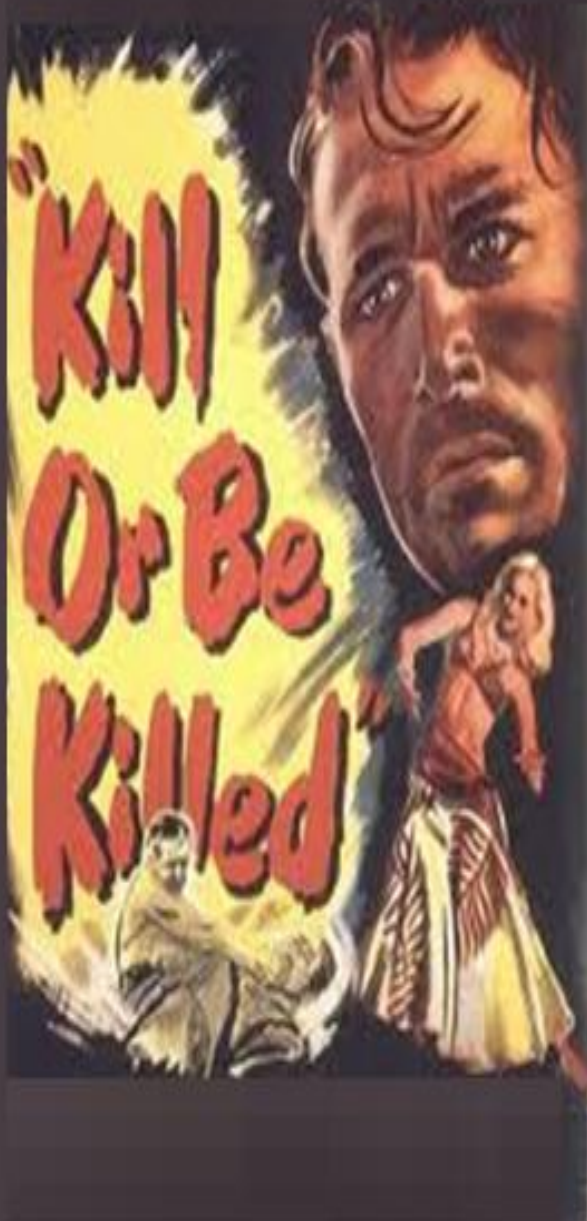
To determine liability in exceeding the limits of self-defence, knowledge of unlawfulness is required...

| | | |
|--|--|-----------------------------|
| Aware that limit is exceeded | Knowledge of unlawfulness | Guilty of murder |
| Unaware that limit is exceeded | The reasonable person would have realised this | Guilty of culpable homicide |
| Neither the accused nor a reasonable man would realise the limit has been exceeded | --- | Not guilty |

self-defence



NECESSITY



Def: “There is necessity when the perpetrator can only protect his interests by sacrificing the interests of another or where he contravenes a prohibition in order to protect himself against danger.”

Judged objectively

☐ Requirements

1. necessity can be caused by **human or natural forces**
2. danger has **already begun** or is **immediately threatening**
3. danger to **person, life or property** may be warded off with necessity
4. danger to **you or your property** or **another person or their property**
5. a person who is **legally obliged** to endure distress cannot use necessity
6. perpetrator **cannot create** the necessity
7. perpetrator's action is the **only way out** of the necessity
8. **no more damage** is caused than is **necessary**
9. the **sacrificed interest must not be greater than the protected interest** (the life of another person?)

CASE LAW:

S v Goliath 1972 93) SA 1 A

S v Mandela 2001 (1) SASV 156 K

IMPORTANT!!! Self- defence // Necessity
[both protect interests: life, physical integrity and property]

There are 2 important distinctions

Origin of the situation of emergency

- ❑ Self- defence – stems from an unlawful human attack
- ❑ Necessity – unlawful human attack or from chance circumstances like natural occurrences

Object towards which the act of defence is directed

- ❑ Self- defence – always directed at an unlawful human attack
- ❑ Necessity – directed at either the interests of another innocent third party or it merely amounts to the violation of a legal provision

IMPOSSIBILITY

- ❑ This defence is based on the maxim “**lex non cogit ad impossibilia**” – the law does not compel the performance of impossibilities
- ❑ Only raised where an obligation rests on a person to do something positive and where it was objectively impossible for him to comply with the obligation
- ❑ 3 requirements
 1. a positive obligation imposed by law
 2. it is physically possible to comply with the law
 3. the impossibility is not due to the accused person’s fault
- ❑ Defence can only be raised where a person neglected to comply with a legal provision
- ❑ This legal provision must be an order “keep off the grass”

CASE LAW:

R v Canestra 1951 (2) SA 317 (A)

SUPERIOR ORDERS

❑ Usually where junior persons in the army or police commit a crime by order of a person with a senior rank

❑ 3 requirements

1. the order emanates from a person superior in authority over the subordinate
2. the subordinate has a duty to obey the order
3. the subordinate must have done no more than necessary to obey the order

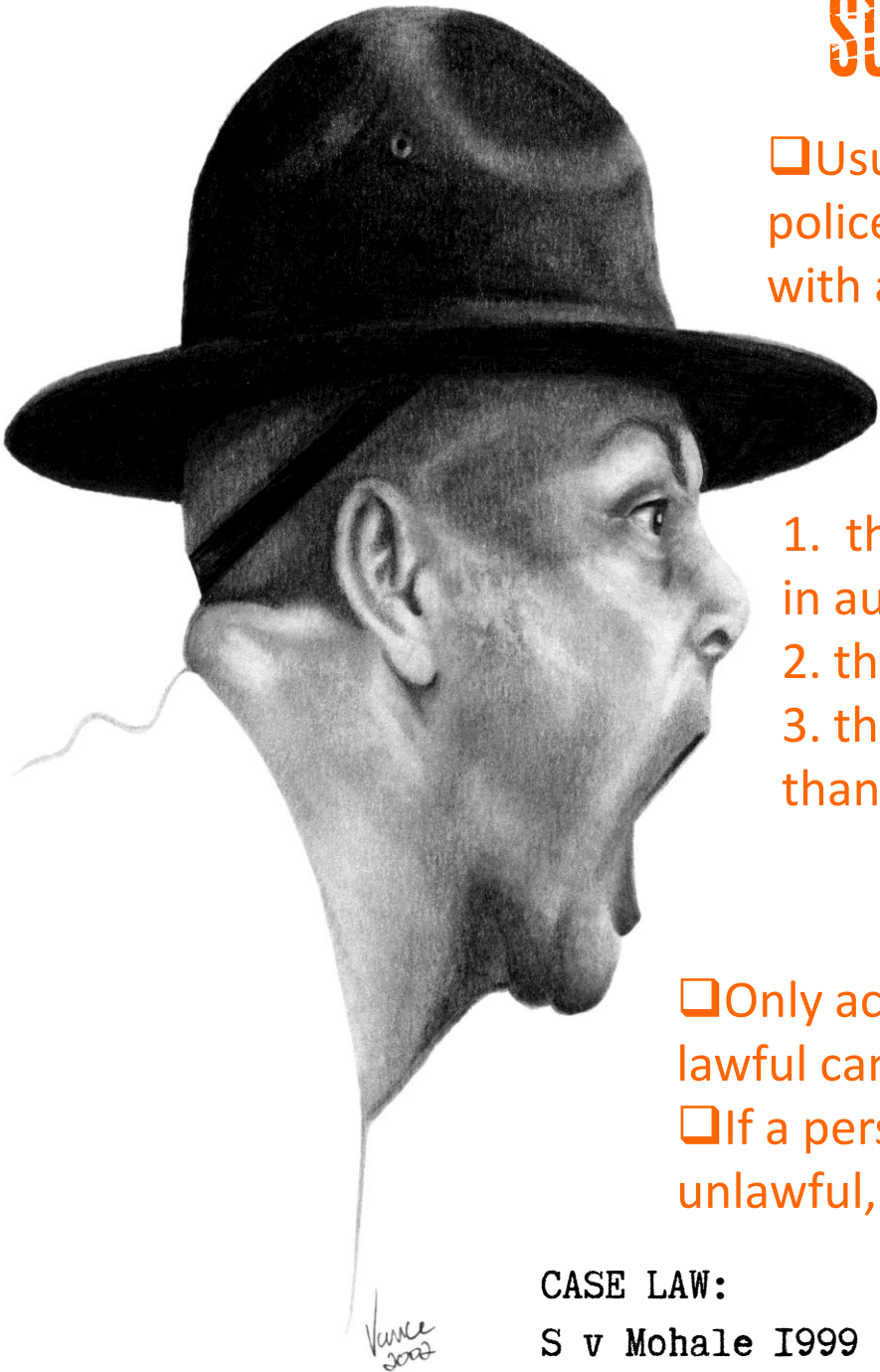
❑ Only actions which follow orders which are clearly lawful can serve as a defence

❑ If a person follows an order which is clearly unlawful, he can be held liable for the consequences

CASE LAW:

S v Mhale 1999 (2) SASV I (W)

Vance
2002



DISCIPLINARY CHASTISEMENT

(also judged against the norm of objective fairness)

- Harm done to minors may be justified by having to discipline them
- Parent/ guardian/ person acting in loco parentis
- Williams case declared corporal punishment unconstitutional as it is inhumane and disgraceful [S10 and 11(2) of the Constitution]
- S10 of the SA Schools Act 84 of 1996 has declared that no person may administer corporal punishment to a learner at a school
- 3 requirements
 1. the minor must deserve the punishment
 2. punishment must be moderate
 3. punishment is imposed with the aim of improving the minor's behaviour

CASE LAW

S v Williams 1995 (3) SA 632 CC

PUBLIC AUTHORITY

☐ Persons may be authorised by statutory provisions or by inherent public authority to conduct certain activities which would usually be unlawful

1. Persons authorised by court order - Eg. where a person is authorised under such an order to remove goods from a judgement debtors property

2. (Some) public officials

3. Legal arrests – as defined in S39-53 of the CPA BUT if a person steps outside these powers they act unlawfully and may be held accountable



4. Killing if persons in certain conditions – the previous S49(2) of the CPA was very drastic as a person could be killed by his arrestor under certain circumstance (eg. resisted arrest)

- Declared unconstitutional in the **Walters** case

- 1) infringed on the right to life, dignity and security of the person
- 2) narrow test (proportionality between seriousness of offence and the force) was broadened to consider the proportionality between the nature and degree of the force and the threat posed by the fugitive to the safety and security of the police, individuals and society

REDEFINED S49 AND THE INTERPRETATION THEREOF

49. Use of force in effecting arrest.—(I) For the purposes of this section—

- (a) **“arrestor”** means any person authorised under this Act to arrest or to assist in arresting a suspect; and
- (b) **“suspect”** means any person in respect of whom an arrestor has or had a reasonable suspicion that such person is committing or has committed an offence.
- (c) **“deadly force”** means force that is likely to cause serious bodily harm or death and includes, but is not limited to, shooting a suspect with a firearm.

(2) 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: **Provided that the arrestor is justified in terms of this section in using deadly force that is intended or is likely to cause death or grievous bodily harm to a suspect, only if he or she believes on reasonable grounds—**

- (a) that the force is immediately necessary for the purposes of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;
- (b) that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or
- (c) that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm.

CONSENT



❑ Very difficult to describe as it may be influenced by so many factors

Burchell - “for consent to succeed as a defence the following requirements must be satisfied:

1. the complainant’s consent in the circumstances must be recognised by law as a possible defence
2. it must be real consent; and
3. it must be given by a person capable of giving consent”

❑ It has been suggested that objective fairness should also be applied here – consent will thus be a valid defence if it is accepted by social norms that the consent was reasonable to risk or harm

❑ CANNOT consent to being killed

❑ Consent MUST be voluntary and not given under duress or extortion

❑ The consenting party must be FULLY aware of what they are consenting to

CASE LAW:

S v Nkwanyana 2003 (I) SASV 67 (W)

DE MINIMIS NON CURAT LEX

- = the law does not concern itself with trifles
- Triviality is recognised as a ground of justification
- IOW there is no unlawfulness if the crime is so trivial that it should not be threatened with punishment according to the objective standards of fairness
- If the perpetrator did not know of the triviality and thus subjectively thought it was a serious crime, he should be found guilty of an attempt to commit the crime

CASE LAW:

S v Kgotong

NEGOTIORUM GESTIO

(UNAUTHORISED ADMINISTRATION)



□ = management of business

□ Where a person protects the interests of another in his absence or without his knowledge

□ Has not been raised as a criminal defence

□ Necessity could be used rather than NG