



**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

**JUDGMENT**

**Not Reportable**

Case no: 23009/2012

In the matter between:

**VALISWA GADINI**

**PLAINTIFF**

and

**THE MINISTER OF POLICE**

**DEFENDANT**

Case no: 9021/2013

And in the matter between:

**THANDIKHAYA SHWENI**

**PLAINTIFF**

and

**THE MINISTER OF POLICE**

**DEFENDANT**

**Coram: AG CHRISTIANS AJ**

**Heard: 17, 18 November 2025, 5 December 2025**

**Delivered:** 9 June 2026

**Summary:** personal injury – plaintiffs shot by rubber bullets causing injury  
– public service protest – SAPS deployed to control protesting crowd – onus  
to prove justification – self-defence, necessity, voluntary assumption of risk  
– onus not met

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## **JUDGMENT**

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**Christians AJ**

### **Introduction**

- 1] This judgment concerns two separate actions that, by agreement between the parties, were heard together. In both cases, the plaintiffs instituted claims against the Minister of Police (the Defendant) for damages alleged to have been sustained as a result of being shot with rubber bullets on 30 July 2012.
- 2] The merits and quantum in respect of both cases have been separated and, thus, only the merits served before me for determination.
- 3] In case number 23009/2012, the Plaintiff is Ms Valiswa Gadini (Ms Gadini), who alleges that she was shot in her right upper thigh by members of the South African Police Service (SAPS) whilst walking home from the taxi rank. In case number 9021/2013, the Plaintiff is Mr Thandikhaya Shweni (Mr Shweni), who alleges that he was shot in

his right eye whilst sitting outside his house. Both incidents were alleged to have occurred in or around Sweet Home Farm, Philippi, Western Cape.

- 4] Although the Defendant did not admit that the Plaintiffs were shot, as alleged, the Defendant assumed the duty to begin. The crux of the defence was that, on the day in question, members of the Philippi community engaged in service delivery protests which necessitated police intervention. The protesting crowd became increasingly violent towards the police officers on duty at the protest and, as a result, police officers fired bullets at the crowd. On this basis, the Defendant alleges that the police officers acted in self-defence; alternatively out of necessity. The Defendant further alleges that the Plaintiffs were or should have reasonably been aware of the violent service delivery protest, and that members of the SAPS may have had to discharge their firearms in policing the violent service delivery protest. As a result of such knowledge, and appreciating the risks involved, the Plaintiffs consented to the risk of injury by participating in the violent protest and/or being present on the scene and/or not removing themselves from the scene.

### **The evidence for the Defendant**

*Mr Jonker*

- 5] The Defendant's first witness was Mr Jonker who, at the time of incident, was a Warrant Officer and video operator in the Public Order Policing Services unit ("the POPS"). He recorded the service delivery

protest on 30 July 2012, which recording was played in court and admitted as an exhibit.

- 6] The video recording, and the context provided by Mr Jonker, showed the events of the day as they unfolded from approximately 07h12 until 10h05, when the video ends.
- 7] At the start of the video, it can be seen that a crowd has already gathered near and around the intersection of Duinefontein Road and Govan Mbeki Road. At around 07h30, the POPS trucks (colloquially referred to as “Nyalas”) drove towards the crowd in an effort to drive the crowd back. The police officers also shepherded the crowd, who were singing and dancing, towards a large field in front of the Sweet Home residential area.
- 8] At 07h34 one of the Nyalas drove forcefully towards a small group of people gathered around a fire in the middle of the road. This action seemed to have evoked an animated reaction from the group and others who joined and began gesticulating and yelling in the direction of the Nyala. The larger crowd was still gathered to the left of this small group and the camera pans towards the larger crowd. Two loud bangs can then be heard, followed by two more shortly thereafter, accompanied by flashes of light and smoke visible on screen. Mr Jonker explained that stun grenades were thrown to give the crowd a fright.
- 9] This action had the intended effect because the crowd dispersed and ran towards the Sweet Home residential area. One of the Nyalas can be

seen driving on the pavement towards the retreating crowd. At 07h38 Mr Jonker can be heard recording that most of the crowd had dispersed but that a few people were coming together again. At 07h40, two tear gas cannisters were thrown towards the regathering crowd. This again caused a retreat towards the Sweet Home residential area.

- 10] The video pans to the two Nyalas, both of which were stationary and facing the Sweet Home residential area – with a field separating the Nyalas from the crowd. Members of the crowd can then be seen throwing stones towards the Nyalas from the far side of the field (i.e. from just in front of the houses). As the camera pans to the right, we see other members of the crowd running closer towards the police to throw stones and then retreating back again.
- 11] At 07h45 one of the Nyalas drove onto the field towards the crowd. The crowd again retreated into the residential area. In his evidence, Mr Jonker explained that the police officers then started shooting from his left-hand side (this was around the 07h46 mark). What I find significant about this part of the recording is that the shots can be heard after the crowd had already started running towards the residential area.
- 12] Then, at 07h49 people can be seen running out of the residential area on the far left side of the open field. The Nyalas cannot be seen at this time. To the right, the camera zooms into a crowd of people gathered between the houses.
- 13] I note that, although 3 minutes apparently lapsed according to Mr Jonker's narration, this part of the video was less than 1 minute

long. It is, therefore, apparent that the video recording is not a complete account of the events that transpired on the morning in question.

- 14] Similarly, less than a minute after Mr Jonker narrated the time as 07h49, he recorded the time as 07h53. In the distance, a crowd can be seen gathered in the road to the right of the residential area and one of the Nyalas can be seen driving from the direction of the crowd towards the camera. Mr Jonker's narration confirmed, with reference to the field in front of the residential area that "*it is nice and quiet here in front of us*".
- 15] Mr Jonker's narration then recorded, at 07h54, that the Metro Police had also arrived. Approximately 6 minutes are then unaccounted for before Mr Jonker recorded the time as 08h00 "*on the dot*". At this time, a Nyala can be seen driving towards the crowd. Members of the crowd can then be seen throwing stones at the Nyala as it slowly reverses (at around 08h02).
- 16] The footage jumps forward to 08h08, at which time the crowd and the Nyala appear to be in the same place as they were 6 minutes earlier. No police officers are visible on the screen at this time. The Nyala then drove towards the crowd and shots can be heard. The first Nyala disappears into the distance before the second one is seen to the right of the screen driving in the same direction. Mr Jonker recorded the time as 08h10.

- 17] About a further 30 seconds into the video, Mr Jonker recorded the time as 08h14, at which time a Nyala appears at the front of the screen and, again, drives in the same direction towards the crowd. The Nyala turned left into the residential area.
- 18] There is another short jump in the footage and, shortly after Mr Jonker records the time as 08h17, one Nyala can be seen driving out of the residential area and onto the field to drive some stragglers back towards the residential area. A further 1 minute into the footage, Mr Jonker recorded the time as 08h20 (i.e. the lapse of 3 minutes in real time).
- 19] At 08h21, one of the Nyalas can be seen at the intersection, facing the crowd. Two police officers were standing to the left of the Nyala. The crowd can be seen throwing stones, although none of the stones appear to reach the police officers.
- 20] Shortly after 08h23 the video cuts out and resumes at 08h29. The crowd can initially be seen running across the field towards the residential area, shortly followed by a Nyala driving in their direction. The Nyala stopped just ahead of the field, whereafter shots can be heard. We then lose another minute of footage between 08h29 and 08h32.
- 21] Although there was already a fair bit of damage to public infrastructure by then, some members of the crowd appear to have become particularly galvanised in their efforts at this point. However, the video does not record any police shooting after 08h29.

- 22] A further 4 minutes into the footage (i.e. from 08h32), Mr Jonker recorded the time as 09h01. The footage ends 7 minutes later, with the time recorded as 10h05. About 3 minutes before the footage ends, a number of police officers can be seen advancing into the residential area. However, the camera turns away to show the destruction on the bridge and surrounding areas.
- 23] Under cross examination, Mr Jonker accepted that he could not dispute Mr Shweni's version that he was at his home when he was shot. Mr Jonker further conceded that, if that was the case, Mr Shweni would have posed no threat to the police and there would have been no reason for the police to shoot at him. Mr Jonker also agreed with Mr Newton, who appeared for the Plaintiffs, that the police must take care not to injure innocent by-standers. Mr Jonker also agreed that it was possible that police officers entered the Sweet Home settlement after the video recording ended to pursue rioters.
- 24] Ms Gadini's version that she was shot whilst waking home from the taxi rank was put to Mr Jonker. His response was that that innocent people sometimes get caught in a riot.
- 25] The only justification Mr Jonker offered for why rubber bullets were fired on the day was that the crowd had been warned four times and, despite such warnings, continued to throw stones at the police. However, when it was put to him, he accepted that, if the situation had become dangerous for the police officers, they could have found refuge inside the Nyala vehicles, which were bullet proof.

*Col Potgieter*

- 26] The Defendant's second witness was Colonel Potgieter who, at the relevant time, was attached to the POPS. He arrived at the scene at around 10h30 on 30 July 2012 and stayed until 19h00 that evening. His evidence was that, just before he arrived, members of SAPS had handled the protest and had effected arrests. By the time he arrived, there was no protest action.
- 27] Col Potgieter's evidence largely focused on how the POPS generally performs their work, rather than on what actually occurred on the day in question. He explained that, if a protesting crowd becomes volatile, the POPS would typically use pyrotechnical resources – e.g. stun grenades and gas cannisters – as “scattering measures” to disperse the crowd.
- 28] As a last resort, and only if the crowd continues to attack in response to the scattering measures, members of the POPS will get into formation and, under instruction, will aim at a specific target. If an instruction to shoot is given, members will aim at waist height to disperse what he called “splinter groups”.
- 29] Col Potgieter expressed his view that the force used on 30 July 2012 was in line with protocol because the crowd was throwing stones and it was necessary to disperse “splinter groups”. He also indicated that the four warnings were sufficient for any innocent by-standers to get out of danger.

- 30] When Mr O'Brien, who appeared for the Defendant, showed Col Potgieter a map and indicated the general vicinity of Mr Shweni's house, Col Potgieter stated that there would have been no reason for members of the police officers to go into the residential area. His evidence was further that police officers would generally not be sent into the residential area because any unrest in the residential area would be considered a "secondary threat"; whereas the priority was to respond to the "primary threat", being at the site of the protest.
- 31] Mr Newton referred Col Potgieter to the Incident Reporting Information System (IRIS) report and the fact that it has no entries from 10h15 to 13h30. Col Potgieter responded by saying that nothing happened during that period.
- 32] Col Potgieter further suggested that members of POPS would not go into the residential area because it was protocol to stay within the safety of the Nyala.
- 33] The remainder of Col Potgieter's evidence was speculation, including speculation that Mr Shweni might have been part of the protest. He offered no comment on Ms Gadini's version.

*The IRIS report*

- 34] The IRIS Report (exhibit "B") records rubber bullet rounds having been discharged as follows:

05h05: 10 x 12 rounds as response to Golden Arrow Bus being stoned and set alight

08h00: 10 x 12 rounds and 5 x 12 as response to protesters throwing stones and glass bottles

08h15: 10 x 12 rounds in response to further stone throwing

08h25: 8 x 12 and 10 x 12 rounds in response to group intimidating passers by

08h30: 10 x 12 rounds in response to further stone throwing

08h40: 8 x 12 and 10 x 12 rounds in response to more stone throwing

08h50: 12 x 12 and 10 x 12 rounds as response to tyres being burnt on the railway lines

08h50: 12 x 12 and 10 x 12 rounds as response to group throwing burning tyres from bridge onto railway lines

35] The identity of the officers who discharged each round is also recorded. In most instances, the bullet rounds were accompanied by gas cannisters and/or stun grenades.

36] It will be immediately apparent that most of the above shooting incidents were not captured in the recording. The gaps in the footage appear to coincide, in many instances, with the times at which the IRIS report records that rounds were discharged.

37] Moreover, the bullets discharged at 07h46 appear not to have been recorded at all.

38] The video footage is, therefore, an incomplete and materially deficient recordal of what occurred between 07h00 and 10h05 on 30 July 2012.

### **Ms Gadini's evidence**

39] Ms Gadini's evidence was that she lives in Sweet Home and, on the morning of 30 July 2012, she walked to the taxi rank to get to work. On her way there, she noticed the protest and, upon arrival at the taxi rank, she found that there were no taxis.

40] She then walked back towards her home when police approached and started shooting. She was shot in her upper right thigh.

41] During cross-examination, she stated that she left home at 06h45 and that the walk to the taxi rank is no more than 10 minutes. She also explained that, before she was shot, she was running away from the police with a crowd of people and that the police started shooting after cornering them in a yard. Her evidence was further that "*they were shooting at us as a crowd*".

42] When it was put to her that the police could not reasonably be expected to distinguish between protestors and innocent people caught up in the crowd, Ms Gadini stated pointedly that the police should have been focused on where the protest was happening and not in between the shacks.

### **Mr Shweni's evidence**

- 43] In a nutshell, Mr Shweni's evidence was that, on the morning in question, he was sitting outside his house, basking in the winter morning sunshine. Whilst in conversation with a neighbour, he suddenly felt dizzy and was then unconscious. When he came to, he felt his face was wet and, after touching the right side of his face, he found that he was bleeding.
- 44] He then noticed that police were shooting and he took cover to hide. When things calmed down, somebody called an ambulance but the ambulance could not get to him because of the protest. A neighbour took him to the bridge, where he fell asleep until the ambulance collected him.
- 45] The medical report confirmed that he was shot in the right eye with a rubber bullet (the rubber bullet having been retrieved from his eye). He lost his eye as a result.
- 46] Under cross-examination, much was made about apparent discrepancies between Mr Shweni's evidence in chief and an earlier affidavit, dated 19 June 2017, in which he stated that he witnessed a protest unfold. However, like the particulars of claim, the affidavit also states that he was sitting outside his house when he was shot. The medical records also indicate Mr Shweni's residential address as the address at which the incident occurred. Thus, whether or not his 2017 affidavit was, in all respects, an accurate account of his instructions to the drafter thereof

is not material. The relevant part of his evidence was that he was sitting outside his house when he was shot out of nowhere.

47] Mr Shweni could also not recall the time of the incident but was referred to the medical records which indicated 12h15 as the time of the incident. However, since Mr Shweni was collected by the ambulance quite some time after he was shot, the time recording may be inaccurate.

48] The high water mark of the cross-examination was the submission that it is highly improbable that the police officers would go into a densely populated area. From this, the implication was that Mr Shweni must have been part of the protesting crowd when he was shot.

49] Mr Shweni's neighbour, Mr Sam was also called as a witness. His evidence largely corroborated Mr Shweni's and he recalled that the incident occurred earlier in the morning and definitely before 12h00.

### **Evaluation**

50] To start, the Plaintiffs' allegations and evidence that they were shot with rubber bullets on 30 July 2012 were not seriously challenged. There was also no evidence to suggest that any persons other than members of the POPS had discharged rubber bullets on the day in question. I accordingly accept that each of them were shot by members of the POPS on the day in question.

- 51] Thus, with the Plaintiffs having proved, in each case, that the shooting occurred, the onus shifted to the Defendant to justify the shooting in each instance.<sup>1</sup>
- 52] The real issue to be determined, therefore, is whether the police officers had a lawful justification for shooting rubber bullets at the Plaintiffs. This determination necessarily includes an enquiry into the circumstances under which each of the Plaintiffs were shot.
- 53] Counsel for the Defendant submitted that the Court was faced with mutually destructive versions and urged me to apply the test established in the oft-cited *Stellenbosch Farmers' Winery*.<sup>2</sup> I have some difficulty with the submission because the Defendant did not lead evidence to directly disprove the Plaintiffs' versions as regards their location when each of them was shot. The best Mr Jonker and Col Potgieter could offer were their opinions that there would have been no reason for police officers to go into the residential area.
- 54] But the video recording itself proved otherwise. Not only did the Nyalas follow (or drive) the retreating crowd into the residential area, but police officers were also seen advancing into the residential area close to the end of the recorded footage. To this end, the video footage corroborates Ms Gadini's evidence – all the more so because, in respect of the shots that can be heard on the footage (i.e. 07h46, 08h08 and 08h29), the shots were fired *after* the crowd could be seen already running away.

55] Even more damning for the Defendant, is that most of the recorded incidents, as per the IRIS report, occurred during gaps in the video footage. Even if I assume, in favour of the Defendant, that the shots heard at 08h08 were incorrectly recorded in the IRIS report as 08h00, the Court still has no meaningful insight into why or where rubber bullets were discharged at 08h15, 08h25, 08h40 and 08h50. And since the 07h46 incident appears not to have been recorded in the IRIS report, the Court cannot confidently conclude that no shooting occurred during the other gaps in footage or after 10h05.

56] At this point it is necessary to say that I was also not convinced by Ms Gadini' evidence in all respects. If, as she said, she left home at 06h45, then walked 10 minutes to the taxi rank and then walked home, she would have been home shortly after 07h00. Even if one assumes she waited 10 – 15 minutes before walking back home, she would have been home by 07h20 at the latest. Apart from the earlier shooting at 05h05, the first shooting was at 07h46. In the circumstances, and even if I accept that Ms Gadini was not initially part of the protesting crowd, I find that it is probable that, at the very least, she joined the crowd after finding that there were no taxis to get to work.

57] But does that, without more, provide a justification for the police shooting at her? I think not. That she might have been dishonest on one aspect of her evidence does not justify an inference that the remainder of her evidence was false.<sup>3</sup> It is as likely that she tailored that part of her evidence out of fear that she would be non-suited if she admitted that she had joined in the protest. It does not follow that she

was being dishonest in her description of how she was shot. Importantly, her evidence that she was shot after being chased into the residential area is consistent with the video footage.

58] Before dealing with the remainder of the evidence, I reiterate that, the shooting having been proven, the onus shifted to the Defendant to prove that the shooting was justified. The justification offered by the Defendant was three-fold:

58.1. First, that the officers acted out of self-defence;

58.2. Second, that the officers acted lawfully and reasonably out of necessity to protect their lives and physical integrity and the lives and physical integrity of innocent members of the public;  
or

58.3. Third, that the Plaintiffs consented to the risk of being shot by being part of the protesting crowd.

59] Both Mr Jonker and Col Potgieter stated, categorically, that it would not have been necessary for the police officers to enter the residential area because that was not where the threat was. From this, it must follow that, to the extent that members of the crowd retreated to the residential area, it was neither necessary nor appropriate for police officers to follow and pursue them there.

60] The Plaintiffs' evidence is that that is exactly what happened. And that is what appears from the video footage.

- 61] Equally significant is the Defendant's failure to call any of the police officers, even though the IRIS report identifies the names of each officer who discharged rubber bullets on the day in question. There is, therefore, no first-hand account from the relevant police officers to confirm that they did not enter the residential area or, if they did, that they did not discharge their weapons there. As already stated, the best Mr Jonker and Col Potgieter could offer was that, in their respective views, it would not have been necessary or appropriate for the police officers to enter the residential area or to discharge weapons there.
- 62] In the circumstances, I am not persuaded that I am faced with two mutually destructive versions. On the one hand, I have heard the first-hand accounts of the Plaintiffs and Mr Sam, all of whom state categorically that the Plaintiffs were shot inside the residential area.
- 63] On this part of Ms Gadini's version, I find no reason to reject her evidence. On the other hand, I have the speculative views of Mr Jonker and Col Potgieter and the incomplete video footage. Indeed, the video footage that we do have corroborates, to a material degree, that the police officers *did* enter the residential area.
- 64] As far as Mr Shweni is concerned, no evidence at all was presented to challenge his version that he was sitting outside of his house when he was shot. That has been his version since the summons was issued in 2013 and I find his version consistent with the probabilities. Although he could not remember the time, he recalled that he was basking in the winter morning sun. That could have been during any of the recorded

incidents between 07h46 and 08h50, or it could have been thereafter if, like the 07h46 shooting, some shooting incidents were not recorded in the IRIS report.

- 65] Also relevant to Mr Shweni's evidence is Col Potgieter's confirmation that police officers are required to aim their shots at waist height. Thus, the fact that Mr Shweni was shot in the eye is consistent with the police officers aiming their weapons at what would ordinarily be waist height.
- 66] I accordingly accept the Plaintiffs' versions that each of them was shot inside the Sweet Home residential area.
- 67] That being the case, the Defendant's own witnesses accepted that the police officers would have had no justification to shoot at civilians inside the residential area. Not least of all because innocent bystanders, like Mr Shweni, would be at an unacceptable risk of being caught in the cross-fire.
- 68] It, therefore, follows that the defence of voluntary assumption of risk – in respect of both Plaintiffs – must fail.
- 69] In any event, even if one or both of them were part of the protesting crowd and were shot in what Col Potgieter called the "primary threat" area, I am still not persuaded that the Defendant has discharged the onus of proving that the shootings were justified.
- 70] Because none of the police officers who discharged their weapons were called to give evidence, I cannot conclude that any of them were acting

in self-defence. Indeed, Mr Jonker accepted that, if the officers were in danger, they would have been able to retreat into the safety of the Nyala vehicles. The video footage also confirms that this was done. By contrast, the audio on the video footage demonstrates that shots were fired only after the crowd was already retreating.

71] For the same reason, the Defendant has not demonstrated that, in discharging the rubber bullets, the police officers acted reasonably and out of necessity.<sup>4</sup> The three incidents captured on video did not demonstrate necessity. In each instance, the crowd was already retreating. There was, therefore, no imminent danger in those moments. Thus, although the video footage shows extensive damage to public infrastructure, and there was some evidence of the crowd harassing passers-by, the video recording does not demonstrate that the rubber bullets were discharged to stop or prevent these actions by the protesting crowd. To the contrary, the only justification offered by Mr Jonker was that the rubber bullets were fired in response to the crowd throwing stones at the police. The evidence does not show that discharging rubber bullets at the crowd was reasonably necessary to dispel the threat of the stone-throwing crowd.

### **Conclusion and costs**

72] In all the circumstances, I find that the Defendant has not discharged the *onus* of proving that, in shooting each of the Plaintiffs with rubber bullets, the police acted lawfully.

73] It was common cause that the POPS members who were on duty at the protest on 30 July 2012 had acted in the course and scope of their employment with the SAPS at the time. In the premises, the Defendant is vicariously liable for the damages arising from the police officers' unlawful conduct.

74] On the issue of costs, I am satisfied that the nature and complexity of the disputes justifies the costs of counsel to be paid on Scale C.

### **Order**

75] I thus make the following orders:

#### Under case number 23009/2012

(a) Defendant is liable for 100% of the Plaintiff's proven or agreed damages;

(b) Defendant shall pay the Plaintiff's costs and, for purposes of Rule 67A read with Rule 69, the costs of counsel incurred from 12 April 2024 shall be taxed at Scale C.

#### Under case number 9021/2013

(a) Defendant is liable for 100% of the Plaintiff's proven or agreed damages;

(b) Defendant shall pay the Plaintiff's costs and, for purposes of Rule 67A read with Rule 69, the costs of counsel incurred from 12 April 2024 shall be taxed at Scale C.

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**AG CHRISTIANS**  
**ACTING JUDGE OF THE HIGH COURT**

Appearances:

For plaintiffs: A Newton

Instructed by: Laubscher & Hattingh Attorneys.

For defendant: S O'Brien SC

Instructed by: State Attorney, Cape Town

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<sup>1</sup> *Minister of Safety and Security v Ntamo and others* 2003 (1) SA 547 (SCA) para 3, and the authorities cited therein.

<sup>2</sup> *Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and others* 2003 (1) SA 11 (SCA)

<sup>3</sup> See *Vilakazi v The State* (576/07) [2008] ZASCA 87 (2 September 2008) paras 47 – 49; and *Mandhlaami v Minister of Police* (7279/2013) [2017] ZAWCHC 33 (29 March 2017) paras 39 – 40.

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<sup>4</sup> *Petersen v Minister of Safety & Security* (514/2008) [2009] ZASCA 88 (10 September 2009) para 11, in which the following extract from ‘*Delict*’ 8(1) Lawsa (2ed) by J R Midgley and J C van der Walt, para 87 was cited with approval:

*“An act of necessity can be described as lawful conduct directed against an innocent person for the purpose of protecting an interest of the actor or a third party... against a dangerous situation...”*

*Whether a situation of necessity existed is a factual question which must be determined objectively...*

*A person may inflict harm in a situation of necessity only if the danger existed, or was imminent, and he or she has no other reasonable means of averting the danger...*

*The means used and measures taken to avert the danger of harm must not have been excessive, having regard to all the circumstances of the case.”*