IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO. C.A&R 129/2019

Reportable	**Yes / No**

In the matter between:

DIANNE HORWITZ **Appellant**

and

THE STATE **Defendant**

JUDGMENT

NQUMSE AJ:

Introduction

[1] The appellant was convicted in the Magistrate's Court of the following counts:

Count 1: *Crimen Injuria* and

Count 2: Common Assault

For purposes of sentence both counts were treated as one and the appellant was sentenced to a fine of R2000 or to undergo 4 months imprisonment, wholly suspended for 3 years on condition that the appellant is not convicted of the offences of Assault and *Crimen Injuria* during the period of suspension.

[2] The appellant appeals, with the leave of the Court *a quo* against both conviction and sentence.

[3] It warrants mentioning at this early stage that at the hearing of the appeal counsel for the respondent conceded that the state is no longer opposing the appeal in respect of count 2 therefore agreeing that the appeal in respect of that count be upheld. This concession was in my view correctly made by the state, it has therefore limited the appeal to focus only on Count 1.

Grounds of Appeal

[4] The thrust of the appeal in relation to Count 1 is that the learned magistrate erred in fact and in law to find that the evidence of complainant, who was a single witness, was reliable and credible.

[5] Further the Court erred in failing to find that given the number, the nature and the extent of the contradictions that characterised the evidence of the complainant, he was not a credible witness.

[6] The judgment of the magistrate is further assailed for rejecting the evidence of the appellant as not being reasonably possibly true.

[7] It is a further ground that the sentence imposed, more specifically the period of suspension thereof, is so severe as to induce a sense of shock.

Background Facts

[8] The facts underpinning the convictions, briefly stated, are the following. The complainant, who is an adult male, was employed as a handyman at the Somerson Retirement Village in Port Elizabeth. On 12 October 2017 after receiving instructions from his manager to do chores for the day, he went to house No. 67, which is one of the houses in the retirement village, to repair a broken fascia board.

[9] Upon his arrival at the said house he needed to confirm with his manager as to which type of a material between an asbestos fascia board and a plastic one was he supposed to use. Whilst still at that house he was approached by the appellant who asked him why he did not replace the fascia board on the previous days when the weather was dry. On his explanation that it rained on the previous days, the appellant remarked that he was stupid, he cannot use his common sense and that he was a Kaffir. As a result of the hurt he felt from these utterances he went to report the incident to his manager who he found in his office but was busy in a lengthy telephone conversation. After waiting at the manager's door he ran out of patience and went to the residence of the assistant manager whom he did not find but only the assistant manager's husband to whom he narrated what had happened to him. On the way back from the assistant manager's house, he came across his manager who was in the company of the appellant.

[10] Whilst the complainant was approaching them the appellant screamed at the complainant whilst at the same time summoning him by uttering the words, "kom", "kom", "kom", loosely interpreted to mean "come", "come", "come". At the same time the appellant was asking the complainant why he was walking up and down wasting the company's time and money. According to the complainant the appellant further said to him he was useless just like his manager. The

complainant responded and said that he was not a boy to be spoken to in that manner and nor was he employed by her. This response caused the appellant to grab him, pull him by his jersey and force him to go and work. The appellant displayed a conduct which constituted an assault on his person.

[11] Subsequently, the complainant informed the appellant that he was aware of his rights and that the appellant was a racist. It was only then that the appellant let loose of the complainant's jersey. Complainant further testified that as a result of appellant's behaviour he felt humiliated as he is a black man, who according to his culture, cannot be treated by a woman in the manner he was treated by the appellant.

[12] Complainant further testified that as a result of the assault, he suffered body pains. Consequently, he did not report for work on the following day but went to seek medical attention. The doctor advised him that he was suffering from stress and instructed him to take pain tablets.

[13] A great deal of the cross examination of the complainant was dedicated to test the complainant's chronological recollection of the events of that day and also

to canvass his response to the version of the appellant that is totally different from his. He however, remained resolute in his account of the events and was adamant that the chronology thereof was as per his version.

[14] Ms Khetshengana, a security guard who was posted at the entrance gate of the village testified that on the day in question, whilst at the gate she was approached by the appellant who appeared angry and asked her for the whereabouts of the complainant. When she and the appellant went out of the guard room in order to look for the complainant, the complainant appeared and the appellant called him in Afrikaans saying ‘kom’, ‘kom’, ‘kom’, at the same time making beckoning gestures with her right finger. According to Ms Ketshengana this was happening in the presence of Mr Anthony who is the manager of the complainant.

[15] She further testified that the complainant asked the appellant to refrain from calling him in the manner she was doing as he was not his boy. This caused the appellant to grab the complainant by his jersey on his shoulder.

[16] Under cross examination she conceded that the response of the complainant to the appellant could have been 'you are not my boss' rather than 'I am not your boy'. According to her observations, even though the appellant shook the complainant from side to side when she was holding him by his jersey, she did not consider her conduct to be an assault.

[17] Rosemary Joubert, a tenant at the village testified that when she came through the gate on her vehicle she saw the appellant shaking the complainant with her right arm. Angered by the appellant's conduct she confronted her.

[18] Pieter Anthony testified that on the date in question he went to the house at number 67 to assist the complainant to fit the fascia board but did not find him at the said house. He started to search for the complainant. Whilst he was approaching the main entrance gate he noticed both the appellant and the complainant. The appellant was screaming at the complainant and shook him by his jersey. After the appellant let loose of the complainant the appellant apologised and said "sorry" three times. Thereafter he left with the complainant in order to complete the work.

[19] Under cross examination Mr Anthony confirmed that he was together with the appellant when he was searching for the complainant. He also stated that when he was at house no. 67 together with the complainant, he remembers the appellant saying "everything has been sorted out," although he cannot remember seeing the appellant when she said those words. Mr Anthony was at pains to explain how he remembers those words as having been uttered by the appellant but at the same time cannot remember seeing her.

[20] When Mr Anthony was confronted with his statement he made to the police, he confirmed what was in his statement to the effect that he heard the complainant saying to the appellant that she is racist and she had no right to treat him the way she did, only because she was white. He however, denied that he was standing next to the appellant and the complainant during the altercation next to the gate.

[21] After the dismissal of the application made in terms of s174 of the Criminal Procedure Act, the appellant's testimony is briefly the following: That during the morning of the day in question, which according to her was a Thursday, she took her mother for medical attention. When she was passing house No. 67 she noticed that the fascia boards she had bought in order for the old ones to be replaced had not yet been fitted. She dropped off her mother at the frail care division centre and

returned to house No. 67. Upon her arrival at that house she met the complainant and asked him why the fascia boards had not yet been replaced. The complaint informed her that he had been occupied with painting work on another house. According to her, this elicited her comment to the effect that in light of the predictions that were made about the rainy weather for Thursday and Friday, common sense dictated that the complainant should have prioritized the replacement of the fascia boards since it was more urgent than the painting work he had been busy with. Her discontent caused her to go to Mr Anthony's office and they both walked to house No. 67.

[22] On their arrival at the said house the complainant was nowhere to be found. Following her suggestion to Mr Antony, they both went to search for the complainant. As they were busy looking for the complainant she was also calling out his name. When the complainant appeared he told her that she was not his boss. She replied that whilst that was the case, his boss Mr Anthony was present. The appellant further testified that the complainant called her out for calling him stupid and for not using his common sense.

[23] The complainant further told her that all she sees in him is that he was black and that she was white. She also testified that when she held the complainant by

his jersey it was in order to get his attention when she was informing him that she sees no colour in people. The complainant's reaction was to bow and he said he will prefer to be her slave.

[24] According to the appellant they all walked to house No. 67 and whilst they were on the way the complainant apologised for the words he had uttered against her. In response she also apologised. Subsequently, the tension between them was cleared.

[25] The appellant denied calling the complainant stupid and a person who does not use his common sense. She also denied calling him a kaffir. Instead, according to her, when she mentioned the words common sense, she used them as a compliment to the complainant.

[26] Under cross examination the appellant conceded that the witnesses who testified against her had no reason to falsely implicate her. She further confirmed that there was no bad blood between her and the complainant. Appellant also denied grabbing the complainant on his shoulder nor making contact with her skin

when she held him on his jersey, thereby dismissing any suggestion that she assaulted the complainant when she did so.

[27] It is against this background that the appellant was convicted on both counts.

[28] However, as alluded to earlier, counsel for the state conceded quite correctly in my view that the conviction on the assault cannot stand and therefore should be set aside. What remains to be determined by the is the correctness or otherwise of the conviction in respect of *crimen injuria* in count 1 and the appropriateness of the sentence of a fine of R2000 or 4 months imprisonment.

[29] In her heads of argument which were followed during oral argument the appellant contends that the complainant was a single witness and therefore the cautionary rule which is provided in s208 of the Criminal Procedure Act[1] applied and thus the evidence of complainant required corroboration to prove the allegation of *crimen injuria*. Consequently, the trial court misdirected itself by accepting the version of the complainant as probable and reliable. Appellant's counsel further argued that the complainant contradicted himself about the sequence of events and

[1] Act 51 of 1977

was inconsistent about the actual words that were uttered by the appellant. The upshot of the appellant's argument is that the trial court misdirected itself in rejecting appellant's version as improbable.

[30] The respondent's reply is simply that the trial court was correct in its finding and that there were no material contradictions in the evidence of the complainant and it was correct for the Court to reject the appellant's version as not being reasonably and possibly true.

The Law

[31] In *S v Bailey*[2] the court held that the powers of appeal to interfere with the factual findings of a trial court are strictly limited. If there had been no misdirection on the facts, there was a presumption that the trial court's evaluation of the factual evidence was correct. Bearing in mind the advantage the trial court had in seeing, hearing and appraising a witness, it is only in exceptional cases that the court of appeal would be entitled to interfere with the trial court's evaluation of oral testimony. In order to succeed on appeal the appellant would have to convince the court of appeal that the trial court had been wrong in accepting the evidence of

[2] 2007 (2) SACR 1 (C).

the state witnesses, a reasonable doubt would not suffice to justify interference with the trial court's findings. (Also see *R v Dhlumayo & Another* 1948 (2) SA 677 (A), *Kebane v S* 2010 (1) ALL SA 310 (SCA) at para 12).

[32] The complainant in *casu* was a single witness in respect of what happened at house No. 67 where the alleged impugned words that the complainant was stupid and was a kaffir were uttered.

[33] It is trite that the evidence of a single witness must be clear and satisfactory in every material respect before the Court can place reliance thereon. The evidence must not only be credible but must also be reliable.[3]

[34] In *Sauls & Others*[4] Diemont JA referred to the cautionary rule and stated the following:

"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (See the remarks of Rumpt JA in *S v Webber* . . .). The trial Judge will weigh his evidence, will consider its merits and demerits and having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or

[3] *See S v Stevens* [2005] 1 ALL SA 1 (SCA) at 5d – h; *S v Gantle* 2005 (1) SACR 420 (SCA) at para 17.
[4] 1981 (3) SA 172 (A) at 180E – G.

defects or contradictions in the testimony, he is satisfied that the truth has been told. The contrary rule referred to by De Villiers JP in 1932 [in *R v Mokoena* 1932 OPD 79 at 80] may be a guide to a right decision but it does not mean 'that the appeal must succeed. If any criticism, however slender, of the witnesses' evidence were well-founded' (per Schreiner JA in *R v Nhlapo* (AD 10 November 1952) quoted in *R v Bellingham* 1955 (2) SA 566 (A) at 569). It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

[35] In *S v Van der Meyden*[5], Nugent J (as he then was) stated:

"What must be borne in mind is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false some of it might be found to be unreliable and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored."

[36] The crux of this matter is whether or not the appellant uttered the impugned words resulting in her conviction for *crimen injuria*.

[37] It is not in dispute that after the encounter between complainant and the appellant at house No. 67, both endeavoured to speak to Mr Anthony, in order to report to him what had happened in that house. Whilst it appears that both were

[5] 1991 (1) SACR 447 (W) at 450.

going to give different reports on the events that took place, what is undeniable and which is gleaned from their respective testimonies is that each one's report demonstrates that they did not have a pleasant encounter. This is also borne out in the desperate attempt by the complainant to speak to the assistant manager when he could not succeed in speaking to the manager, a clear indication that he was extremely unhappy with what had just happened between the two of them.

[38] This is at the backdrop of the appellant saying to the complainant he must use his 'common sense'.

[39] Ms Ketshengana's testimony about the altercation at the gate between appellant and complainant is a further confirmation that earlier the two had an unpleasant encounter.

[40] All these testimonies referred to point to the probability that the initial altercation at house No. 67 could not have been limited to a statement that the complainant was not using his common sense. The behaviour of both suggest that more was said at that house.

[41] The evaluation of the evidence by the magistrate led her to the conclusion that the inherent probabilities demonstrate that the appellant uttered the words in which she referred to the complainant as a stupid kaffir. In doing so, the magistrate appears to have been alive to the cautionary rule.

[42] The magistrate was further alive to the contradictions in the evidence of the complainant but found them to be immaterial when juxtaposed to the body of evidence which proves that the complainant's version is reliable and satisfactory. To this end it is my view that the magistrate applied correctly the guidelines laid down in *S v Mkhohle*[6] that contradictions *per se* do not lead to the rejection of a witness's version. The court has to look at their nature, number and bearing on the rest of the evidence. Furthermore, the courts regard it as irrational to expect witnesses to remember and recall their evidence *verbatim*.[7]

[43] The appellant has proffered no other plausible explanation for the allegation made against her save to deny repeatedly referring to the complainant as a stupid kaffir. If regard is had to all the evidence adduced in this matter and the inherent probabilities, I cannot fault the magistrate for her finding against the appellant.

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[6] 1990 (1) SACR 95 (A).
[7] *S v Prinsloo* 2014 JDR 144 (SCA) para [15].

[44] In *S v Mtsete*[8] it was held that the *onus* which rested upon the State in a criminal case was to prove the guilt of the accused beyond a reasonable doubt, not beyond a shadow of doubt. Further, in *Miller v Minister of Pensions*[9] the following was stated:

"It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable", the case is proved beyond reasonable doubt."

[45] Therefore, I come to the conclusion that, the verdict the court arrived at, that the appellant was guilty of the offence of *crimen injuria*, was based on factual findings which it had properly evaluated without misdirecting itself. It is trite that if there had been no misdirection on the facts, there is a presumption that the trial court's evaluation of the factual evidence was correct. It therefore follows that the appeal against the conviction of the appellant ought to be dismissed as without merit.

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[8] 1998 (2) SACR 178 (SCA).
[9] [1947] 2 ALL SA ER 327 at 373H.

[46] What remains to be determined is the appropriateness of the sentence imposed. The magistrate is assailed for the lengthy period of suspension which, so it was argued, is a misdirection and disturbingly shocking.

[47] It is trite that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. The court of appeal may only interfere if the reasoning by the court *a quo* is vitiated by misdirection or when the sentence imposed can be said to be startingly inappropriate or to induce a sense of shock, or when there is a strikingly disparity between the sentence imposed and the sentence the court of appeal would have imposed.[10]

[48] It is the duty of the court on sentencing to have regard, not only to the nature of the crime committed and the interest of society, but also to the personality and circumstances of the offender.

[49] The personal circumstances of the appellant were presented by appellant's counsel from the bar as the following:

[10] *S v R* 2017 (2) SACR 402 (WCC), See also *S v Pieters* 1987 (3) DA 717 (A) at 734D – F.

The appellant was born in 1958 and is a first offender. She is self employed as a Financial Advisor. She is not married and hers no children. She stays with her mother of 88 years old. She obtained a Diploma in Financial Planning from the University of the Free State. She later obtained an Advanced Diploma in Post Graduate Diploma in Financial Planning. It was further submitted on her behalf that she is an industrious woman who contributes towards society.

[50] It is apparent from the record that the trial magistrate was astutely aware of the three factors of the triad that she has to take into account when sentencing the appellant. This is further demonstrated when she said that the appellant is a first offender which calls upon the court to exercise an element of mercy irrespective of what transpired on that day.

[51] What the magistrate considered in relation to the interests of the complainant is significant. She took into account the fact that the complainant was humiliated as a result of what was done to him by the appellant. The magistrate also took into account the ridicule he is now subjected to by some in the community of Somerson where he is employed, which has led others to see him as a coward.

[52] In this case, the words, "stupid kaffir" were uttered by a white woman towards a black man who has a family with a child who is engaged in tertiary education. The humiliating and negative effect of what this type of conduct does to a black person was recognised by our courts even during the apartheid era about three decades ago in *S v Puluza*[11] quoted with approval in *Ryan v Petrus*[12] where the following dicta was made: "When a black man is called a kaffir by somebody of another race, as a rule the term is one which is disparaging, derogatory and contemptuous and causes humiliation." The pain and suffering brought to bear by these utterances to African people, could not have been better stated than when the Supreme Court of Appeal in not so far distant past in, Pistorius v S[13] stated thus:

"It is a well-known fact that these words formed part of the apartheid-era lexicon. They were used during the apartheid years as derogatory terms to insult, denigrate and degrade the African people of this Country. Similarly words like 'boer', 'coolie' and 'bantu'. The word is both offensive and demeaning. Its use during apartheid times brought untold pain and suffering to the majority of the people of this country. Suffice to say that post - - - 1994 we, as a nation, wounded and scarred by apartheid, embarked on an ambitious project to heal the wounds of the past and create an egalitarian society where all, irrespective of race, colour, sex or creed, would have their right to equality and dignity protected and promoted. Our Constitution demands this undoubtedly, utterances like these will have effect of re-opening old wounds and fanning tension and hostility."

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[11] 1983 (2) PH H 150 (E).
[12] 2010 (1) SA 169 (ECG).
[13] 2014 (2) SACR 314 (SCA).

[53] In the circumstances of this case where the victim was an employee and with the perpetrator who is a member of the Board of Trustees that represents the employer, I find it apposite to refer to what was said in *South African Revenue Services v Commissioner for Conciliation Mediation and Arbitration and Others*[14] where Mogoeng CJ referred to *Crown Chickens (Pty) Ltd t/a Rockland Poultry v Kapp* and the following was stated:

"The attitude of those who refer to, or call, Africans "Kaffirs" is an attitude that should have no place in any workplace in this country and should be rejected with absolute contempt by all those in our country-black and white – who are committed to the values of human dignity, equality and freedom that now form the foundation of our society. In this regard the courts must play their proper role and play it with the conviction that must flow from the correctness of the values of human dignity, and freedom that they must promote and protect. The courts must deal with such matters in a manner that will give expression to the legitimate feelings of outrage and revulsion that reasonable members of our society black and white – should have when acts of racism are perpetrated. The Chief Justice continued and stated: "The use of this term captures the heartland of racism, its contemptuous disregard and calculated dignity – nullifying effect on others - - -. Conduct of this kind needs to be visited with a fair and just but very firm response by this and other courts as custodians of our constitutional democracy, if we never hope to arrest or eliminate racism. Molly coddling cannot cut it." Whilst this judgment was still hot from the oven, it appears that owing to the unrelenting attitude that undermines the values espoused in our Constitution, the Constitutional Court had to reiterate its

[14] 2017 (1) SA 549 (CC) at para 54.

sentiments in the subsequent judgment of *Duncanmec (Pty) Limited v Gayland NO and Others*[15] where the following was said:

"There are people who would persist in their racist behaviour regardless of what the Constitution says. It is therefore the duty of the courts to uphold and enforce the Constitution whenever its violation is established."

[54] The impugned words uttered by the appellant against the complainant were completely unsolicited and unwarranted. The level of education the appellant professes to possess should have made her appreciate the hardship and the indignity this kind of disparaging utterance brings to bear on another of a different race. What is also glaringly lacking in the appellant is her lack of contrition or complete remorse for her deeds. Given the pleasant history and relationship both the appellant and the complainant conducted before this incident, I find no reason why the appellant could never offer a genuine apology to the complainant to demonstrate that her error was not actuated by malice, disrespect or racism. Why the appellant failed to avail herself of such an opportunity flies in the face of any reasoning.

[15] 2018 (6) SA 335 (CC).

[55] In light of the seriousness of the racial attitudes harboured by some in our society, the time may have come for the government to consider establishing a "Register" of offenders of this type of conduct. The purpose of this would be to enter the details of those who relentlessly treat the foundational values that underpin our constitution with disdain and who undermine the efforts in building a cohesive non-racial society. This may also serve as a constant reminder to anyone that, to refer to other people of a different race with disparaging and degrading descriptions is contempt to the progressive agenda this nation adopted in 1994 in its quest to build a non-racial society.

[56] In light of the aforegoing, I can find no misdirection in the sentence imposed by the magistrate.

[57] Consequently the appeal on sentence is dismissed.

Order

[58] The following order will issue

1. **The appeal against the conviction on Count 2 of Assault is upheld and the conviction of the appellant is set aside.**

2. The appeal against the conviction and sentence on Count 1, *Crimen Injuria* is dismissed

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V NQUMSE

JUDGE OF THE HIGH COURT (ACTING)

GRAHAMSTOWN

BROOKS J,

I agree

R W N BROOKS

JUDGE OF THE HIGH COURT

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Date Heard:	11 December 2019
Judgment Delivered:	25 February 2020