**IN THE HIGH COURT OF SOUTH AFRICA**
**EASTERN CAPE DIVISION – GRAHAMSTOWN**

CA & R: 368/13
Date Heard: 11/06/14
Date Delivered: 25/06/14

In the matter between:

**GERT JOHANNES VENTER** **APPELLANT**

Versus

**THE STATE** **RESPONDENT**

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**JUDGMENT**

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**SMITH J:**

[1] The appellant was charged in the Aliwal North Magistrate's Court with two counts of unlawful pointing of a firearm and two counts of *cirimen injuria.* The state alleged that on or about the 9th of November 2009, and at or near Vineyard Farm, Aliwal North, the appellant unlawfully pointed a firearm, capable of being discharged, at I. S. and N. D., and unlawfully and intentionally insulted them and impaired their dignity by referring to them as "kaffirs".

[2] The appellant was legally represented. He pleaded not guilty and did not proffer a plea explanation.

[3] After the close of the state case he was found not guilty and discharged in respect of three counts, in terms of section 174 of the Criminal Procedure Act. At the conclusion of the trial he was convicted of the *crimen injuria* count in respect of the alleged insult to Dyani. He was sentenced to pay a fine of R4 000 or undergo eight months' imprisonment, of which half was suspended for four years on the condition that he is not convicted of *crimen injuria*, committed during the period of suspension. The appellant appeals against both his conviction and sentence with the leave of the court *a quo*.

[4] The following facts were common cause. In the early hours of the morning on 8 November 2009, Frikkie Smith assaulted his [.....] and, either through pangs of guilt or spasms of conscience, called the Aliwal North Emergency Ambulance Services. At approximately 7 am that morning the two complainants drove in an ambulance to the Vineyard Farm, Aliwal North, in response to Smith's call. Smith waited for them at an agreed spot on route to the farm, where he boarded the ambulance and guided the complainants to the farm Coppia, where his injured partner was. After they established that the victim had already succumbed to her injuries, the complainants advised Smith to report the matter to the police. They thereafter returned to Aliwal North, again accompanied by Smith. While still on their way to the tarred road, they stopped to allow Smith to open a farm gate. It was at that stage that the appellant arrived on the scene in his truck, and parked it in the middle of the dirt road,

effectively blocking their way. What happened thereafter was the subject of fundamental dispute between the appellant and the state witnesses.

[5] According to the complainants, the appellant got out of his truck, pointed a firearm at them, and gesticulated by drawing his finger across his throat. They interpreted this gesture as a threat to kill them. He thereafter referred to them as "kaffirs" and threatened to shoot them. They remained in the ambulance with its engine running, until the appellant's neighbour arrived. The appellant then instructed them to cut the engine of the ambulance and to remain in the vehicle until the police arrived. When the police arrived on the scene about two hours later, the appellant told them that he suspected the complainants of having stolen his sheep, and requested them to search the ambulance. The police complied with his request and searched the ambulance, but could not find any contraband.

[6] They all then accompanied the police to the place where the deceased's body was, and were only thereafter allowed to leave the farm. They immediately proceeded to the Jamestown police station where they laid a criminal charge.

[7] The state also led the evidence of one of the police officers who reacted to the appellant's call, namely Luthando Ndevu. Although he could not take the matter any further, he did, however, confirm that the appellant appeared to be angry, and that he was carrying a firearm.

[8] The appellant testified that on the day in question he had noticed a vehicle emanating from the direction of his farm. He arrived on the scene

while one of the occupants had alighted from the vehicle to open a gate. It was only at that stage that he had noticed that the vehicle was an ambulance. He had parked his truck in such a manner as to block the progress of the ambulance. He thereafter instructed the person who was busy opening the gate, namely Frikkie Smith, to remain where he was, and called the police. At that stage the ambulance was still on his farm. He gestured for the driver to cut the engine by drawing his finger across his throat. The driver seemed to understand the gesture and switched the vehicle off. They all thereafter waited for the police to arrive. According to the appellant, there had not been any communication between him and the driver, other than the gesture to cut the engine.

[9] He testified further that he suspected that the ambulance was being used to steal livestock, because he had read an article in the local newspaper about an ambulance being used for such purposes in the Aliwal North area. Although Frikkie Smith had told him that the ambulance had been called to attend to his injured [.....], he had nevertheless decided to prevent them from leaving his farm because he could simply not understand why they had been in a particular camp.

[10] The appellant also called Frikkie Smith to testify on his behalf. Smith confirmed that he was serving a prison sentence for the murder of his [.....].

[11] Smith corroborated the complaints' testimonies up to the point where he alighted from the ambulance to open the gate. From that point onwards his version of the incident differed fundamentally from that of the

complainants. He testified that during 2009 he was living on the farm called Coppia, which is situated between Aliwal North and Jamestown. In the early hours of the morning on 8 November 2009, he and his [.....] had an altercation during which he had assaulted her. He thereafter phoned the Aliwal North Emergency Services and requested them to send an ambulance to attend to his [.....]'s injuries. He waited for the ambulance next to the Jamestown road where he boarded it and guided the complainants to the spot where his [.....] was. After establishing that his [.....] was already dead, the complainants instructed him to call the police.

[12] When the complainants thereafter left for Aliwal North, he again accompanied them. On the way to the national road he had to alight from the vehicle to open a gate. While he was busy opening the gate the owner of farm (the appellant) arrived in his truck and parked it in such a way as to completely block the road. The appellant then alighted from his truck, pointed a firearm at him, and instructed him to remain where he was. The appellant appeared to be angry, and asked him what he was doing on his farm. He attempted to explain to the appellant why he had to call the ambulance, but he refused to listen to reason and simply instructed him to remain where he was until the police arrived. He thereafter went to the complainants, who were still sitting in the ambulance, and related to them what the appellant had told him. According to Smith the appellant never spoke to the complainants, and the driver of the ambulance had cut the vehicle's engine only after he had spoken to him.

[13] Smith also testified that the appellant did not instruct the driver of the ambulance to cut the engine; neither did he make any gestures to signify such an instruction to him. According to Smith he was at all material times sufficiently close to the appellant and the complainants as to hear any discussions between them. The appellant did not use any "vulgar" language, and did not refer to him, or any of the complainants, as "kaffirs".

[14] This was then the factual matrix against which the presiding magistrate was required to consider whether the state had proved the accused's guilt beyond a reasonable doubt.

[15] Even though the law relating to the onus and standard of proof in criminal matters is trite, I think it is necessary for me to briefly summarize the applicable legal principles, since it unfortunately does not appear from the magistrate's judgment that he had remained cognisant of these legal prescripts when evaluating the evidence.

[16] It is trite that the onus was on the state to prove the guilt of the appellant beyond a reasonable doubt. In determining whether or not the state had successfully proved the guilt of an accused beyond reasonable doubt, the court must consider the evidence in its totality. In *S v Chabalala* 2003 (1) SACR 134 (SCA*),* at paragraph 15, Heher AJA said that:

> "The correct approach is to weigh up all the elements which point to the guilt of the accused against all those which are indicative of innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, decide whether the

> balance weighs so heavily in favour of the State so as to exclude reasonable doubt about the accused's guilt."

[17] Where an accused has tendered an explanation which could possibly be true, he or she is entitled to an acquittal. If, however, a court is, upon consideration of all the evidence, of the view that the state case clearly and unambiguously point to the guilt of the accused, the court may convict, even if the accused's version may appear to be reasonably possibly true. (*S v Van Den Meyden* 1999 (1) SACR 447 (W).

[18] Mr *Snyman,* who appeared on behalf of the appellant, was constrained to concede that the evidence adduced by the state constituted a *prima facie* case against the appellant and would, in the absence of a reasonable explanation by the appellant, constitute proof of his guilt beyond reasonable doubt. The only issue which then remained to be considered is whether or not the version proffered by the appellant was reasonably possibly true. In this regard the magistrate's judgment is unfortunately singularly unhelpful. In a rather terse and cryptic judgment, he failed to analyze the evidence tendered on behalf of the defence with a view of determining whether the appellant's version could be reasonably possibly true. In fact, his conclusion that the state had proved the appellant's guilt beyond reasonable doubt was based on the rather fragile and fallacious assumption that the appellant had an obligation to proffer a reason why the complainants would have falsely implicated him. This much is apparent from his judgment where he said the following in this regard:

> "This gentlemen that is Mr Nkululeko Friedman Dyani gave a clear account of what took place on that particular day and it is clear from the evidence that you did not know him prior (sic) the day in question he also did not know you therefore there were no ill feelings between the two of you, he therefore in my view had not (sic) reason whatsoever to falsely implicate you. That is why I am satisfied that your guilt as far as count 3 is concerned was proved beyond reasonable doubt."

[19] It is trite law that this line of reasoning is untenable, and can never serve as justification for rejecting an accused's version which would otherwise be reasonably possibly true.

[20] In considering whether there is a reasonable possibility that the appellant's version could be true, I am mindful of the fact that his testimony was not without difficulty. By way of example; in his evidence-in-chief, he denied that he had spoken to the complainants at all. This denial was obviously important in the context of his defence, which was essentially a denial that he had uttered the alleged injurious words. During cross-examination, however, he admitted that he had approached the ambulance, and verbally instructed the driver to cut the engine. There are also fundamental differences between his testimony and the version proffered by Frikkie Smith. To name but one; according to Smith the appellant was very angry and threatened him with a firearm, while the appellant had denied pointing a fire-arm, either at him or the complainants.

[21] In my view, however, these contradictions are not sufficiently serious as to justify the rejection of the appellant's version as being false. In *S v Mkohle* 1990 (1) SACR 95 (A) the court held that contradictions *per se* should not lead to the rejection of a witness' testimony. The trier of

fact must consider whether or not a contradiction is due to an error, and having regard to the nature of the contradictions, their number and importance, and their bearing on other aspects of the witness' testimony, decide in the light thereof whether or not it is safe to rely on the evidence.

[22] While the appellant could arguably have had good reason to downplay the intensity of his anger and outrage at finding the ambulance on his farm, and to disingenuously deny that he had threatened Frikkie Smith (and conceivably also the complainants) with a firearm, Frikkie Smith was an independent and objective witness who had nothing to gain from fabricating evidence to favour either the state or defence. He appeared to have been a good witness, and consistently denied that the appellant had uttered the alleged injurious words. This fact, in my view, should have been enough to convince the magistrate that there was sufficient and reasonable doubt about the appellant's guilt.

[23] Where the state alleges that the *actus reus* element of *crimen injuria* consists of a verbal insult, this element of the charge has no physical manifestation other than the psychological impairment of the victim's dignity. An accused person can, under these circumstances, often do no more than to deny that he or she had spoken the alleged injurious words and, where possible, corroborate such a denial by virtue of the testimony of a bystander. This is exactly what the appellant has done. He adduced the evidence of an independent and objective witness who had been in the company of the complainants, and had no conceivable reason to tailor his evidence to suit either version.

[24] Mr *Snyman* has correctly submitted that the magistrate should have found that there was reasonable doubt as to whether or not the appellant had uttered the injurious words, and he should thus have given the appellant the benefit of that doubt. I am accordingly of the view that the appeal should succeed.

[25] In the result the following order issues:

(i) The appeal succeeds.

(ii) The appellant's conviction and sentence are set aside.

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**J.E SMITH**
**JUDGE OF THE HIGH COURT**

**I agree.**

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**G.N.Z MJALI**
**JUDGE OF THE HIGH COURT**

**Appearances**

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| Counsel for the Appellant | : | Advocate Snyman |
| Attorney for the Appellant | : | Horn and Kumm Attorneys<br>24 Smith Street<br>Aliwal North<br>9750 |
| Counsel for the Respondent | : | Advocate Obermeyer |
| Attorney for the Respondent | : | Director of Public Prosecutions |

Grahamstown
6140

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