REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A206/2018
DPP REF NO: 10/2/5/1-2018/183

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

[28 JUNE 2019] ..... SIGNATURE

In the matter between:

MOMBERG, VICKI **APPELLANT**

and

THE STATE **DEFENDANT**

J U D G M E N T

MUDAU, J:

[1] The Randburg Magistrate's Court convicted the appellant on all four charges of *crimen injuria* and sentenced her to three years' imprisonment, one year of which was suspended for three years on condition that the appellant is not convicted of *crimen injuria* committed during the period of suspension. All the charges were taken as one for purposes of sentence. An application for leave to appeal against the conviction and the sentence was dismissed by the court *a quo* but granted by this court.

[2] The appellant, who was legally represented throughout the trial was accused of unlawfully and intentionally insulting and impairing the dignity of three of the complainants by calling them 'kaffirs'. Regarding the fourth complainant, the appellant was accused of calling her a 'fuckin bitch'. She pleaded not guilty to the charges and raised sane automatism or non-pathological criminal incapacity as a defence.

[3] This appeal initially served before my brothers Van der Linde J and Notshe AJ in March 2019. On that occasion, the appellant had a new legal team (her sixth on *pro bono* basis, the previous legal representatives withdrew or had their mandates terminated) sought an opportunity to present heads of argument as those before court were personally prepared by the appellant and to familiarize themselves with the case for the appeal to be argued properly. Accordingly, the matter was adjourned until 11 June 2019 and came before a newly constituted full bench. The media including the usage of video cameras was permitted by this court to cover the proceedings.

[4] When counsel for the appellant started to address the court, the appellant interjected and addressed the bench for which counsel was at pains to apologize. She alleged that the media have endangered her life by publishing her contact details in the past. She terminated her mandate to her instructing attorney, Rodgers and asked to represent herself. She was not interested in asking for legal aid as in her view; the legal aid system in the country is inadequate and unhelpful. She was however not in a position to pay legal fees. She was satisfied with the heads of argument prepared on her behalf by advocate Sukdeo. Due to the breakdown of the client-attorney relationship, her legal team formally withdrew from the proceedings.

[5] The circumstances giving rise to the appellant's conviction and sentencing can briefly be summarized as follows: on 3 February 2016 during the evening, the appellant made several telephone calls to the South African Police Service emergency helpline 10111, following an alleged 'smash and grab incident'. During the telephone calls, she insulted and swore at the complainants mentioned in counts 1 to 3 by referring to each of them as a 'fuckin kaffir', 'fuckin bitch', 'useless stupid kaffir,' respectively. During the trial, it was not disputed that the appellant was the caller whose voice was recorded on the

voice logger of the 10111 recording system during which time she used her personal cell phone with the number recorded on the system as supported by exhibits A and B, in that regard.

[6] A police officer, Ms Mamolomo gave testimony, which was unchallenged regarding the caller identification system and how the records identifying the appellant as the caller were downloaded. The complainants in counts 1 to 3 were the 10111 operators who responded to the calls made by the appellant. Each of them in their testimony before court confirmed the abuse and insulting words used by the appellant recorded in 'exhibit B'. The offending words were neither disputed nor denied. When the complainant in the first count responded to the appellant's call, she was asked: "*am I through to a fuckin kaffir again*?" The complainant in respect of the third count was in addition also called a '*useless, stupid idiot*'.

[7] The state's fifth witness, Mr Bitterbos was on the evening in question one of the 10111 call operators who responded to the appellant's calls. He is not one of the complainants. The appellant made it clear to him that she wanted help from any person other than a 'kaffir'. During the cross-examination of this witness, it was suggested to him by counsel on behalf of the appellant that she was not calm and rational. The witness disagreed on the basis that the appellant had stressed that she must not be sent a 'kaffir' to help her. From the audio recording (exhibit B) which is part of the record, the appellant indicated an area next to Bel Air shopping mall where she was likely to find white people at a Wimpy restaurant.

[8] Afterwards, whilst driving on Malibongwe Drive at about 21:10, the appellant flashed the lights of her car to stop a marked police car driven by the fourth complainant, Constable Mkhondo. Mkhondo was in the company of his colleagues, Constable Subroyan and Warrant Officer Van Heerden in crime prevention duties in the Northriding area, Randburg. He pulled into a nearby parking lot. The appellant parked her car behind theirs. The appellant got out of her car shouting inexplicably and said she was tired of 'kaffirs' and bastards in this country. Unsure of what that was all about, the appellant pointed at Mkhondo with a finger calling him a 'useless kaffir'. He stepped forward as he

wanted to arrest her at that point, but Van Heerden, who is white and senior in rank stopped him indicating that he will deal with the situation.

[9] The appellant had stressed that she did not want any help from a 'kaffir' but wanted help from a White, Indian or Coloured officer. Mkhondo is the one who asked Constable Subroyan to take a video of the incident which she did with her cell phone.

[10] Constable Subroyan testified and confirmed Mkhondo's evidence. She later downloaded the video recording from her cell phone, stored it on a disc which she later handed in as evidence, exhibit 2 in this matter which was not seriously challenged. In the video, the appellant could be heard saying: "*do not worry about me, I just need to calm down*" on a cell phone conversation with someone else as the police officers waited on her. Subroyan could however not confirm whether the appellant's window was broken as alleged. At that stage, the incident, according to her took approximately 25 minutes. The appellant had stressed that she was not going to change her mind, but pointed towards her and Mkhondo that she hated the fucking bastards.

[11] The following utterances were also recorded on the video: *"[I]t does not matter one kaffir is bad enough, this happens all the time. The kaffirs in Johannesburg are terrible, I am so sick of it. I do not care what anyone says; I do not like a single black person in Johannesburg. The calibre of blacks in this town varies from the calibre of blacks in Durban. They are opinionated, they are arrogant and they are just plain and simple useless. I am very happy for a white person to assist me or a coloured or an Indian person. I do not want a black person to assist me. If I see a kaffir I will drive over him. If I had a gun I will shoot everybody. I said I do not want to deal with any kaffirs, I am not prepared to deal with any kaffirs. I have just been smash and grabbed by a black kaffir*".

[12] Warrant Officer Van Heerden also testified and confirmed the evidence of his colleagues regarding the use of the 'K' word by the appellant. It was however Van Heerden's evidence that the appellant referred to all of them as 'kaffirs' contrary to the evidence by his black colleagues. In this regard however, Van Heerden is not supported by the video recording of the incident. He also

estimated the confrontation at that stage to be about 5 to 6 minutes. The appellant was clearly upset and he tried his best to calm her down.

[13] The appellant testified that she was on her way home to Bedfordview from Krugersdorp when she was at an intersection on Malibongwe Drive where she became a victim of 'a smash and grab' by a black person. It happened so quickly that she only had a flashback of the culprit's face inside her car. She panicked and tried to get help by phoning her parents as well as friends. She drove in a circle and tried phoning 10111 but was not getting any help. She was frustrated and agitated.

[14] On her version, she eventually drove on towards a KFC. As she headed towards the highway that is when she saw the police car turning into the Bel Air Shopping Mall where she followed it. A white officer approached her trying to help. Later, the black officer approached her as though he was going to hit her. She remembered having an argument with the white officer who wanted to know what happened. All she wanted was for someone to follow her. She also remembered being angry but could not recall what words she used. During cross-examination she confirmed that she didn't want any black person near her. She also conceded that the 'k' word is derogatory. Neither could she dispute having used the 'k' word about 48 times.

[15] It is trite that a cognitive or voluntary act is an essential element of criminal responsibility. In *R v H*[1] it was held that defences such as automatism and amnesia require careful scrutiny. That they are supported by medical evidence, although of great assistance to the Court, will not necessarily relieve the Court from its duty of careful scrutiny for, in the nature of things, such medical evidence must often be based upon the hypothesis that the accused is giving a truthful account of the events in question.

[16] Automatism is a term used to describe unconscious, involuntary behaviour, the state of a person who, though capable of action is not conscious of what he or she is doing. It means an unconscious involuntary act where the mind does not go with what is being done. Psychologists and psychiatrists are frequently requested to offer expert opinion regarding the defences of non-pathological criminal incapacity and sane automatism, which are increasingly

[1] 1962 (1) SA 197 (A) at 208B

raised in criminal courts in this country. In most cases, usually murder, expert testimony is challenging because the offence is so violent - where the accused person submits a defence to the effect that he or she was so overwhelmed by emotions, triggered by an upsetting event that a court of law should not find him or her guilty of an offence, because the behaviour was in some way or another involuntary owing to the uncontrollable effects of the emotions.

[17] In our law, expert testimony should only be introduced if it is relevant and reliable. Otherwise it is inadmissible. It should, therefore, only be introduced if there is a possibility of it assisting the court in (i) understanding a scientific or technical issue, or (ii) in establishing a fact either directly or by using inferential as opposed to speculative reasoning. Testimony that falls outside the scope of either of the two is superfluous. The expert witness should bring specialised knowledge to the court. Hearsay evidence as to any fact is inadmissible. The specialised knowledge could be both experience, training or study-based and the testimony that the expert witness provides must be entirely or substantially based on the specialised knowledge of the expert. In other words, there is no need for an expert's opinion if the court can come to its own conclusions from the proven facts. Importantly, a court is not bound by, nor obliged to accept, the evidence of an expert witness.[2]

[18] In this case, Dr Ward, a general practitioner, who is neither a psychologist nor a psychiatrist, testified on behalf of the appellant. He knew the appellant from their business interaction, as he was involved in property development and she did work for him from time to time. He had detailed discussions with Dr Fine, a forensic psychiatrist who had consulted with the appellant. He also listened to the audio recording and watched the video recording. He concluded that the appellant had almost no cognitive ability and did not know the difference between right and wrong, and showed signs of acute distress disorder.

[19] Whether the appellant's cognitive functions were absent and consequently, that her actions were unplanned and undirected depends on the evaluation of the facts. The trial magistrate convicted the appellant and rejected Dr Ward's

[2] *Twine and another v Naidoo and another* [2018] 1 All SA 297 (GJ) at para 18; see also *Holtzhauzen v Roodt* 1997 (4) SA 766 (W)

opinion that the choice of words used by the appellant during her outbursts was racial and directed specifically to black people which proved that she had the necessary intent in the form of *dolus directus*.

[20] In our law, it is well established that in a criminal trial, the state bears the onus of proving the guilt of an accused beyond reasonable doubt. There is no onus on the part of an accused to prove his or her innocence. Put differently, there is no onus on an accused to convince the court of the truthfulness of any explanation that he or she gives.[3] As Nugent J observed in *S v van der Meyden*[4] the conclusion which is reached, whether it be to convict or to acquit must account for all the evidence. None of such evidence may simply be ignored.[5]

[21] It is trite that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong.[6] The trial magistrate had advantages which this court on appeal does not; having seen, observed and heard the witnesses testifying in her presence. She was steeped in the atmosphere of the trial. Absent any positive finding that she was wrong, this court is not at liberty to interfere with her findings. Essentially, interference with the trial magistrate's findings is only permissible where the record of proceedings reveal material misdirections of fact, where it is glaringly obvious from the content of the evidence that her conclusion was wrong.

[22] At paragraph 61 of the *Eadie*[7] judgment relied upon by the appellant, Navsa JA in dismissing the appeal states as follows:

> "When an accused acts in an aggressive goal-directed and focused manner, spurred on by anger or some other emotion, whilst still able to appreciate the difference between right and wrong and while still able to direct and control his actions, it stretches credulity when he then claims, after assaulting or killing someone, that at some stage during the directed and planned manouevre he lost his ability to control his actions".

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[3] *S v Jochems* 1991 (1) SACR 208 (A) at 211E-G
[4] 1999 (2) SA 79 (W) at 82C-E
[5] *S v Van Aswegen* 2001 (2) SACR 97 (SCA) para 8
[6] *R v Dhlumayo & another* 1948 (2) SA 677 (A) at 706; see also *Kebana v S* 2010 (1) All SA 310 (SCA) at para 12).
[7] *S v Eadie* 2002 (3) SA 719 (SCA)

He continued and stated at paragraph 64 which is apposite that:

> "Part of the problem appears to me to be a too-ready acceptance of the accused's *ipse dixit* concerning his state of mind. It appears to me to be justified to test the accused's evidence about his state of mind, not only against his prior and subsequent conduct but also against the court's experience of human behaviour and social interaction. Critics may describe this as principle yielding to policy. In my view it is an acceptable method for testing the veracity of an accused's evidence about his state of mind and as a necessary brake to prevent unwarranted extensions of the defence".

[23] Having had the benefit of reading the record, I cannot find any fault with the reasoning and conclusion of the magistrate. Her insulting words were not directed at the black person who allegedly smashed and grabbed but innocent people far removed from the scene of the original incident. In this case, the appellant had the presence of mind to call 10111 repeatedly but was clear in her choices that she did not want any help from black officers. There is no doubt that she was focused when she stopped the police patrol car but took offense when approached by a black police officer as evidenced by the video recording. The insulting words were clearly directed at the black police officers and blacks in general. It follows, accordingly, that the appeal against conviction is without merit.

[24] It remains to deal with the appeal on sentence. It is the duty of the Court to have regard, not only of the nature of the crime committed and the interests of society, but also to the personality and circumstances of the offender with regard to sentencing. The law in this regard is settled. The decisive question which this court faces regarding appeal on sentence is whether the trial court which imposed the sentence had exercised its discretion unreasonably. If so, this court on appeal, is entitled to interfere.[8] The determination of sentence or any specific period of imprisonment in any given case cannot occur in accordance with any exact, objectively valid standard or measure. Accordingly, even if the court of appeal is of the view that it would have imposed a much lighter sentence, it would not be free to interfere if it were not convinced that the sentencing court could not reasonably have imposed the

[8] *S v Pieters* 1987 (3) SA 717 (A) at 734 D-F

sentence which it determined.[9] There is no law in our country which prohibits a first offender from undergoing a custodial sentence.[10]

[25] The appellant's personal circumstances are distilled from the pre-sentencing report by Ms Naidoo. She was born on 2 November 1968 as the second born of six children. She matriculated in 1986. Thereafter, she completed a two-year diploma in fashion designing. She held various jobs in the fashion industry and also worked as an estate agent for two companies. In 2004 she established her own real estate company. She also operated a canteen business. During 2016 until 16 June 2016 she worked for another real estate company. She reported to the probation officer that she suffered financial losses as a result of abuse by a work partner in excess of R50-000 000-00. She is single and has no dependents.

[26] It was noted that Ms Sekoba, a probation officer, was initially assigned to this case but recused herself after becoming victim of the appellant's insults and degradation. The appellant had insisted that she wanted to communicate with Ms Naidoo, Ms Sekoba's supervisor. Ms Naidoo opined that the appellant's conduct "is caused by the underlying feeling of racism and she acted out impulsively, with anger and hatred towards targeted victims". The probation officer recommended periodical imprisonment in terms of section 285 (1) of the Criminal Procedure Act 51 of 1977 for a period and on conditions determined by the court.

[27] The trial magistrate was alive to the fact that periodical imprisonment was recommended by the probation officer and that the appellant had been subjected to Equality Court proceedings. The magistrate was however of the view that the appellant showed no remorse for her conduct and that a message had to be sent out in the interests of the community that this kind of conduct is reprehensible. That the appellant is unremorseful is permeated by the report of the probation officer.

[28] In *Pistorius v S*[11] it is stated thus:

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[9] *S v Skenjana* 1985 (3) SA 51 (A) at 54I-55F) quoted with approval in *Pieters* (above) at 734H-I
[10] Courts should not have an aversion to imprisoning first offenders: *S v Malgas* [2001] 3 All SA 220 (A) at para 25
[11] 2014 (2) SACR 314 (SCA)

'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 rights to equality and dignity protected and promoted. Our Constitution demands this. Undoubtedly, utterances like these will have the effect of re-opening old wounds and fanning racial tension and hostility'.[12]

[29] The system of apartheid, on which racism has its foundation, has been declared, a crime against humanity. Human dignity is listed in s 1 of the Constitution to be a foundational value of our democratic state and s 10 of the Constitution provides:

'Everyone has inherent dignity and the right to have their dignity respected and protected.'

[30] In *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others*[13] Mogoeng CJ at para 54 quoted authoritatively, Zondo DCJ (then JP) in *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp*[14] where the latter 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, equality 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

[12] At para 37
[13] 2017 (1) SA 549 (CC)
[14] (2002) 23 ILJ 863 (LAC) at para 38

members of our society - black and white - should have when acts of racism are perpetrated.'[15]

[31] The learned CJ continued at para 56 wherein he 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 ever hope to arrest or eliminate racism. Mollycoddling cannot cut it.'

[32] Reaffirming the sentiments above, the Constitutional Court in another matter *Duncanmec (Pty) Limited v Gaylard NO and Others*[16] stated:

> '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.'[17]

[33] In *The Citizen 1978 (Pty) Ltd and Others v McBride*[18] Ncgobo CJ expressed himself in the following terms:

> "We have recently emerged from a legal order that was founded on racism and characterised by gross discrimination against black people, in particular, black Africans. It sought to dehumanise its victims and strip them of their human dignity by relegating them to an inferior status".[19]

[34] In this case, the incident took place while the police officials were engaged in their official duties. The insults arose out of and were in part directed at the performance of their work. Offenses committed against police officers whilst on duty are generally considered in a serious light. The police in this country work under very difficult circumstances. Regard being had to the totality of the facts regarding this case and the usual approach regarding sentence referred to as the 'triad', coupled with the fact that the appellant is and was quite evidently unremorseful for her conduct, the sentence imposed cannot be

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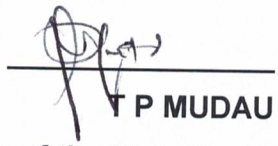
[15] *SARS supra* at para 54
[16] 2018 (6) SA 335 (CC)
[17] At para 6
[18] 2011 (4) SA 191 (CC)
[19] At para 144

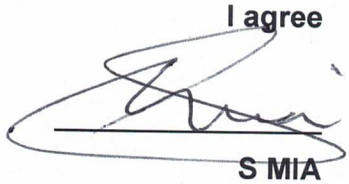
faulted. There is no justifiable reason to interfere with the sentencing discretion of the trial court in this case.

[35] The appeal against conviction and sentence is dismissed.



T P MUDAU
[Judge of the High Court,
Gauteng Local Division,
Johannesburg]

I agree



S MIA
[Acting Judge of the High Court,
Gauteng Local Division,
Johannesburg]

Date of Hearing:	11 June 2019
Date of Judgment:	28 June 2019

APPEARANCES

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