



Reportable:	YES/	☐ NO
Circulate to Judges:	YES/	☐ NO
Circulate to Magistrates:	YES/	☐ NO
Circulate to Regional Magistrates:	YES/	☐ NO

IN THE HIGH COURT OF SOUTH AFRICA

[NORTHERN CAPE HIGH COURT DIVISION, KIMBERLEY]

CASE NO: CA&R 64/14

In the matter between:

DAVID CORNELIUS VAN VUUREN

APPELLANT

AND

THE STATE

RESPONDENT

Coram: Lacock J et Lever AJ

JUDGMENT

Lever AJ,

1. The appellant in this matter was convicted in the magistrate's court for the District of Kimberley on the 28th January 2014 on a charge of *crimen injuria*. The appellant has instituted this appeal against the said conviction alone.
2. The charge on which the appellant was convicted was that on or about the 11th July 2012 and at or near Allan Street in the District of Kimberley he unlawfully and intentionally injured, insulted and impaired the dignity of the complainant by calling him "a fokken kaffir and swart kaffir poes". As a consequence of this conviction, the appellant was sentenced to a fine of R1000.00 or 6 months imprisonment, all of which was suspended for a period of 5 years on condition that the appellant was not convicted of *crimen injuria* committed during the period of such suspension.

3. The grounds of appeal filed on behalf of the appellant in his Notice of Application for Leave to Appeal dated 17th February 2014 are set out as follows:

“The trial court erred in that:

- 3.1. It did not find that the States witnesses contradicted each other in material respects;*
- 3.2. It found that the State had proved its case beyond a reasonable doubt;*
- 3.3. It found that the State witnesses were credible;*
- 3.4. It placed too much weight on the fact that the complainant would not without reason lay a charge against the appellant;*
- 3.5. It did not find that under the circumstances the appellant’s version could reasonably possibly be true; and*
- 3.6. It did not find that the appellant’s evidence was false and untruthful. (SIC)”*

4. In the Heads of Argument that were filled on behalf of the appellant, the approach was that the substance of the aforesaid grounds of appeal could be summarised into three broad grounds of appeal. These three broad grounds of appeal were set out as follows:
 - 4.1. That the Honourable trial court did not take due cognisance of the material contradictions in the evidence adduced on behalf of the respondent;
 - 4.2. That the Honourable trial court placed an onus on the appellant to explain why the complainant would lay a false charge against him; and
 - 4.3. That the Honourable trial court dismissed the appellant’s version, on the basis that it could not reasonably possibly be true, without having a valid justification for doing so.
5. The appellant’s plea and his version as it appears from the record place him on the scene on the date and time in question. It is also common cause that the incident took place in the early afternoon at approximately 2:30pm. In summary his version is that he turned into Allan Street and at some point near the intersection a vehicle blocked the street. Appellant hooted and made a hand gesture for that vehicle to move along.
6. Originally, on appellant’s behalf, it was put to the State witnesses that it was physically impossible for the appellant to stop his vehicle next to that of the complainant because of an island in the middle of the road. Then in his evidence the appellant testified where he had stopped behind the complainant’s vehicle the last point of this island was on his right hand side next to where he sat in the driver’s seat

of his vehicle, but that there was a solid white line that extended from the end of this island for a distance down the road. Appellant maintained that he would not cross this solid white line as he was a municipal traffic official. It appeared however, that his duties were administrative. Later on appellant added another reason for not being able to draw level with the complainant's vehicle, being the presence of oncoming traffic.

7. In short, and for purposes of his plea, appellant places in dispute the words complained of and also places in dispute having the opportunity to address such injurious words to the complainant, in that on his version he could not draw level with the complainant's vehicle.
8. The complainant, Mr Lenohe and his colleague Ms De Wee are both members of the SAPS. As indicated earlier, the date, time and place were not in issue. In summary, the State's case is that complainant was waiting for a car to leave a parking bay so that he could parallel park, the appellant hooted, drew level with the complainant's vehicle and used the words complained of. Appellant then drove away and complainant noted the registration number of appellant's vehicle. Thereafter, traced the appellant and laid a charge.
9. Turning to the first ground of appeal pursued on the appellant's behalf namely, that there were material contradictions in the evidence adduced on behalf of the respondent.
10. The first issue raised on behalf of the appellant was that complainant testified that appellant approached him, conducted himself in the manner complained of and thereafter walked away. Whereas later on in complainant's evidence he makes it clear appellant, in his vehicle, drew level with complainant who was in his own vehicle uttered the words complained of and then appellant drove away. If one looks at complainant's evidence as a whole and considers it in its proper context, it is clear that the first statement is not the complainant's version. Viewed in this context the most likely explanation for this statement is that it was mistranslated by the interpreter. This conclusion is supported by the way the prosecutor handles the evidence which appears on the next page of the record a few paragraphs further on. Where the prosecutor says: "Yes, you testified that after he uttered the words, he drove away. You can proceed from there?"
11. The next issue taken up on behalf of the appellant is the complainant's version of where the second state witness was when the words complained of were used. Again, considering the evidence as a whole and in its proper context, none of the differences referred to can be considered material. In my view it leaves the inescapable impression that the appellant is grasping at straws.
12. It was then submitted on appellant's behalf that there were material differences between the injurious words alleged in the charge sheet and the complainant's evidence of the words used. The

words contained in the charge sheet have been set out in paragraph 2 above. The complainant's evidence of the words used are contained in two passages of the transcript, which read as follows: Firstly, "Laat jy ry, in Afrikaans, laat jy ry. After saying that he then said: jou swart kafferpoes, laat jy gaan, jy kannie soos 'n bobbejaan hier kom parker nie. Ek skryf jou dood. Ek skryf jou in jou moer in." Then secondly, "As I was still waiting for the other vehicle to drive out of the parking lot. Whilst I was still waiting there this guy came and parked his vehicle next to mine and he uttered those ugly words that I am a kaffer and I am a baboon and he is a state servant. Then I am also a state servant. I do not think a state servant can use those words."

13. In the charge sheet and in the complainant's evidence the term "kaffer" is related to a particular racial group. We cannot divorce ourselves from the historical context in which the term kaffer was used in the past. In this historical context the term itself is injurious. It is the core 'sting' in the charge sheet and in the evidence which the complainant gave. Viewed in this context the differences between the charge sheet and the evidence constitute nothing more than further detail. In my view such differences are not material.
14. Then it was submitted on behalf of the appellant that Ms De Wee's version of the injurious statement is also different. Her version was as follows: *"As jy nie nou hierdie fokken kar ry nie dan skryf ek jou in jou moer in en wat hy ook gesê het terseldetyd in een asem: jou fokken swart kaffer. Dit is die tyd wat Thabang hy wou uitgeklim het en at that time het die meneer wegger."*
15. Again, the core 'sting' is the same. The differences are detail. The court *a quo* dealt with these differences and concluded that this merely showed that the complainant and Ms De Wee did not collude on the evidence that they placed before the court *a quo*. I respectfully agree with this conclusion. In the present circumstances I am of the view that nothing further can be read into these differences.
16. Then the issue of Ms De Wee's evidence in relation to the windows of the respective vehicles being open or closed at the material time and the probability of complainant and Ms De Wee being in a position to hear the injurious remarks. The striking thing about this line of argument is that this was never taken up with the complainant. In my view if the appellant wished to raise it and rely on it, it ought to have been taken up with the complainant as well. Even if it meant that the appellant would have had to bring an application to recall the complainant in order to do so. The only version that was put to the complainant was that it was impossible due to the island and the width of the road for the appellant to stop next to the complainant.

17. Ms De Wee indicated that the whole incident took place too quickly for her to observe the details relating to the windows. From the record, the impression Ms De Wee gives is of an honest witness who did not really observe these details and cannot really say what the position was in regard to the windows being open or closed, but she heard what she heard.
18. Turning to the second ground of appeal pursued by the appellant, namely that the court *a quo* placed an onus on the accused to show what motive the complainant would have had in laying a charge against the appellant, if it was not true.
19. Reading the learned trial magistrate's judgment as a whole, I believe that this was just an observation he made in passing. In making this remark I do not believe the learned trial magistrate expected the appellant to lead evidence or show that the complainant had a motive to get him into trouble. It is clear from the trial court's judgment itself that the onus was correctly placed on the State. In my view the learned trial magistrate's substantive reason for his finding was simply that he did not believe that the appellant's version could reasonably possibly be true.
20. The third ground of appeal pursued by the appellant was that the court *a quo* dismissed the appellant's version on the basis that it could not reasonably possibly be true, without having a valid basis for doing so.
21. In my view there are at least three compelling reasons for dismissing the appellant's version as not being reasonably possibly true.
22. Firstly, the contention that the appellant could not pass the complainant's vehicle. It was put to the complainant and Ms De Wee that it was impossible to have the appellant's vehicle draw level with the complainant's vehicle at the point where the incident took place, due to the presence of the island and the narrowness of the relevant lane in the road.
23. After the State's evidence and before the appellant's evidence, an inspection *in loco* was conducted at the relevant scene of the incident. The appellant then gave evidence. In his evidence in chief he was asked would it be possible to pass the vehicle blocking the road by passing on the right hand side. To which he replies: "Nee, edelagbare die pad is te nou en daar is baie vortuie van voor af. Dit sou baie dwaas wees om verby te gaan op daardie nou gedeelte." Then in answer to a further question by his attorney, appellant states: "Aan my regterkant was die eindpunt van die eiland, daardie vlugheuwel en net na dit is die sperstreep." Further on appellant states that it is against the law to cross the solid white line that starts at the end of the island that was on his right hand side as he sat in the drivers seat of his vehicle.

24. One must remember the genesis of this version used by the appellant. It was put to both the complainant and Ms De Wee when cross-examined by the appellant's attorney that it would be impossible for appellant's vehicle to draw level with the complainant's vehicle, due to the narrowness of the relevant lane in the road and the physical presence of the island made of concrete kerbstones.
25. Then after the inspection *in loco* this is watered down somewhat by the appellant's own evidence. The end point of the island is now next to him on his right hand side as he sits in the driver's seat of his vehicle. Now the only barrier to appellant in his vehicle drawing level with the complainant's vehicle is the solid white line. This is an entirely different scenario to that presented to both State witnesses. Furthermore, the issue of oncoming traffic preventing the appellant in his vehicle from drawing level with the complainant's vehicle was never put to either State witness.
26. Secondly, the complainant and the appellant got together before the trial with the consent of the prosecutor to try and see if they could reconcile and pre-empt the matter from going to trial. Evidence was led as to what transpired during this discussion. In his evidence in chief and in response to a question from his attorney, the appellant describes what transpired at this discussion as follows: "Edelagbare ons het gepraat en ek het pertinent aan hom gesê dat ek kan dit nie glo dat ek dit sou gesê het nie en ek kan dit nie onthou dat ek sulke woorde gebruik het nie, maar indien ek – as hy dit afgelei het van my af vra ek hom om verskoning, maar dit is nie woorde wat ek sou geuiter het teenoor hom nie."
27. When asked directly by his attorney whether he used the words or not, he replies: "Edelagbare, ek is 'n baie senior person in die verkeer in uniform kan ek nie myself indink dat ek ooit so woorde sal uiter nie. Dit is vir my net, dit is nie hoe ek as person is nie." What is noteworthy when asked this question directly in this manner is that there is no flat out and emphatic denial. The appellant, as in the conditional apology set out in the preceding paragraph, seems to rely on a lapse in memory. Then by contrast the appellant maintains that he is able to remember other details. I cannot escape the conclusion that the appellant's lapses in memory are self-serving.
28. Thirdly, there is the issue of how the complainant got the appellant's registration number if the appellant did not draw level and subsequently pass the complainant in the manner described by the complainant. The complainant's description of how he obtained the said registration number is simple and logical and fits in comfortably with his version. By contrast the appellant's version is improbable. Appellant states that he cannot recall if complainant used the now vacant parking bay and that he passed complainant in that manner. This would be unlikely because the reason why complainant needed a parking bay in the first place was to wait for Ms De Wee. Ms De Wee was in

the car before complainant could park. In these circumstances complainant would simply have driven off. There are of course other possibilities, but neither the trial court nor this court are required to engage in speculation when considering whether the state has proved its case beyond a reasonable doubt.¹ In my opinion these possibilities would, in any event, appear to be too remote for the court to consider. It would have required the complainant to double back and speed in order to catch up with appellant or it would have required him to pull over further up the road and risk either another incident or the appellant turning onto another street before passing the complainant.

29. Having regard to the reasons set out above, the inescapable conclusion is that the appeal must fail and it is accordingly dismissed.

L.G LEVER

ACTING JUDGE

I concur.

H J LACOCK

JUDGE

Dates of hearing: 11 August 2014

Date of Judgment: 21 November 2014

¹ S v Glegg 1973 (1) SA 34 (AD) at 38H – 39A

APPEARANCES:

Counsel:

For the Appellant: **Adv I.J Nel**

For the Respondent: **Adv K.M. Kgatwe**
(Director Public Prosecutions)