

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A366/10

In the appeal between:-

<u>ISAK SCHALK VAN DER MERWE</u>	First Appellant
<u>JOHN ROBERTS</u>	Second Appellant
<u>ROELOF CHARLES MALHERBE</u>	Third Appellant
<u>DANIE GROBLER</u>	Fourth Appellant

and

<u>THE STATE</u>	Respondent
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<u>CORAM:</u>	RAMPAI, J <i>et</i> MOLEMELA, J
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<u>HEARD ON:</u>	13 JUNE 2011
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<u>JUDGMENT BY:</u>	RAMPAI, J
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<u>DELIVERED ON:</u>	23 JUNE 2011
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[1] This is an appeal against sentence. The four appellants were each sentenced to a fine of R20 000,00 or twelve months imprisonment in default of payment. In addition to this each of them was sentenced to a further six months imprisonment which was wholly and conditionally suspended. All of them were aggrieved by the sentence

which was imposed on them on 30 July 2010.

[2] They now come on appeal with the leave to appeal granted by the court *a quo* on 31 August 2010. They were sentenced following their conviction in the Bloemfontein District Court on 27 July 2010. They were convicted on a charge of *crimen iniuria* committed at the University of the Free State in Bloemfontein during September 2007. The crime flowed from a video recording which the appellants collectively produced while they were resident inmates of the Reitz Hostel at the university.

[3] The appellants were charged with the crime of *crimen iniuria*. They pleaded guilty to the charge and a statement in terms of section 112(2) of the Criminal Procedure Act, 51 of 1977, was submitted on their behalf. Neither the version of the state nor that of the defence was orally narrated. Subsequent to the verdict, no oral evidence was given by or on behalf of any of the appellants in mitigation of sentence. Similarly no such *viva voce* evidence was given by or on behalf of any of the complainants in aggravation of sentence.

[4] The record consists of the following relevant documents on

which both the verdict and the sentence components of the judgment were crafted. The written indictment, the written plea and explanation, the appellants' heads of argument plus seven annexures thereto, the video taping and a transcript of its soundtrack. By and large the available material of the evidence placed before the court *a quo* was documentary in nature.

- [5] The prelude to the charge was almost a one page document. I deem it expedient to sum up the charge. However, I think no serious harm will be done if I skip the prelude and briefly capture the essence of the charge. The prosecution alleged that the four appellants unlawfully and intentionally impaired the human dignity of the four complainants at the University of the Free State in Bloemfontein between 31 August 2007 and 1 April 2008, both dates exclusive; that the appellants did so by preparing "a meal of some sort" or by brewing a concoction of some sort; that they urinated into the plates containing the brew so concocted; that they offered such concoction to the complainants to ingest; that they videotaped the complainants as they were vomiting the concoction so ingested and referred to the complainants as

difebe, in other words, whores (sefebe – whore); that the appellants depicted the complainants as inferior and unintelligent human beings; thereby impairing their human dignity and finally, that by impairing the human dignity of the complainants as they did, the appellants extensively or tacitly impaired the human dignity of the blacks in general or the black students as well as the black personnel of the University of the Free State in particular.

- [6] It will be readily appreciated that I have paraphrased the wording of the charge sheet. In case I have done any violence to it, I apologise. The idea was to elucidate and not to brew yet another distasteful controversial concoction. Hopefully my good intentions will also be appreciated.
- [7] The appellants pleaded guilty to the charge of *crimen iniuria*. Their common plea was an eleven page document. The circumstances which they said were prevailing at the time they committed the crime, differed from those outlined in the charge sheet in certain important respects. It follows, therefore, that the factual foundation of their plea was not strictly in accordance with that of the prosecution which

underlined the charge. However their plea explanation and the charge sheet overlapped to a certain extent. On each side of that common ground, was an exclusive zone. In the one zone were the facts alleged by the prosecution, but not admitted by the defence. In the other zone were facts alleged by the defence and not disputed by the prosecution. When the plea, as explained, was accepted, the exclusive zone of the prosecution was completely erased, but the exclusive zone of the defence was preserved and completely incorporated into the common ground. The common ground so enlarged became common cause between the prosecution and the defence.

- [8] The appellants were convicted on their plea and sentenced as follows:

“Each accused is fined R20 000.00 (twenty thousand rands) or to undergo 12 months imprisonment in default of payment of fine. In addition, each accused will undergo six months imprisonment wholly suspended for five years on one of the following conditions:

1. That accused is and/or are not convicted of crimen injuria or criminal defamation committed during period of

suspension,

OR

2. That the Equality Court does not, in terms of Section 21 of Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000), determine that accused has, in terms of Section 7 of the said Act, unfairly discriminated against any other person/s on the grounds of race, which discrimination is committed during period of suspension.”

[9] The grounds of the appeal were stated as follows in Afrikaans:

“Die voorgenome appèl is gerig teen die geheel van die vonnis opgelê en op die volgende gronde:

- (a) Die vonnis is buite verhouding tot die misdryf in die konteks daarvan en die relevante omstandighede;
- (b) Die boete oorskry die jurisdiksie; (was later abandoned)
- (c) Die gebruik van die bewysstuk persartikel om die gemeenskapsoortuiging te weerspieël tot nadeel van die Beskuldigdes, was nie veroorloof nie;
- (d) Die pleit en feite waarop dit berus het, was nie gebaseer op ‘n rasse belediging nie – die gedrag waarop skuldig

gepleit is het die eer van die klaers as mense geskend;

- (e) 'n Vonnis van opgeskorte gevangenisstraf was nie gepas nie en die opskortingsvoorwaarde gekoppel aan Artikel 21 van Wet 4 van 2000 in besonder nie 'n toelaatbare of gepaste voorwaarde nie.”

[10] As regards the crime, the court *a quo* remarked:

“It equally remains abundantly clear that complainants were manipulated and tricked into eating what contained an ingredient of urine or simulate urine.”

[11] The appellants contended that as a whole the sentence actually imposed was so significantly at variance with the sentence which ought properly to have been imposed and that it could not be described in any other way than a misdirection, be it an error or irregularity, on the part of the court *a quo*, which had a significant adverse impact on the actual sentence imposed.

[12] Mr. Kemp, counsel for the appellants, submitted that the variance was so huge that it indicated an unreasonable exercise of the sentencing discretion. Mr. Kruger, counsel

for the respondent, disagreed. He submitted that taking into consideration the gravity of the offence and all the relevant circumstances, it could not be contended, as the appellants did, that the sentence imposed was disproportionate to the crime committed.

- [13] In general, the sentencing of an offender is pre-eminently a matter for the discretion of the trial court - **S v GIANNOULIS** 1975 (4) SA 867 (AD) at 868 F per Holmes JA. Sitting as we are in a appellate mode, we cannot interfere with the exercise of the sentencing discretion entrusted to the trial court merely because we would have exercised the discretion differently if we had sat as the court of first instance - **S v SALZWEDEL AND OTHERS** 2000 (1) SA 786 (SCA) 790 par. [10] per Mahomed CJ. Notwithstanding our limited appellate powers to interfere, there are ways in which it may be shown that the sentencing discretion was, as a result of material misdirection, not properly exercised to warrant appellate interference and amelioration of the sentence imposed – **S v BLANK** 1995 (1) SACR 62 (A) at 65 h.

[14] In **S v PILLAY** 1977 (4) SA 531 (A) at 535 E – F Trollip JA had this to say about the word misdirection:

“Now the word "misdirection" in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence. That is obviously the kind of misdirection predicated in the last quoted *dictum* above: one that "the dictates of justice" clearly entitle the Appeal Court "to consider the sentence afresh" (cf. *Nel's* and *Hockley's* cases, *supra*).”

[15] In **S v KGOSIMORE** 1999 (2) SACR 238 (SCA) at 241 G it was pointed out that there were only two basic ways in which to exercise a discretion:

“Either the discretion was properly and reasonably exercised or it was not. If it was, a Court of appeal has no power to interfere; if it was not, it is free to do so.”

[16] In the original reasons for sentence, the learned district magistrate, while dealing with the aggravating factors said that the case was dominated by negative racial connotations. He then went on to say:

“That this is a racially motivated crimen injuria admits of no doubt. Even more telling is the fact that black were, according to the admissions of the accused, targeted by virtue of their colour for the accused to reach their destination.”

These comments were made before the appellants were sentenced.

[17] In the supplementary reasons for sentence, the district magistrate, while dealing with the grounds of appeal commented as follows about the charge sheet:

“4.1 The charge (as embodied in the charge sheet) to which all 4 accused pleaded guilty read as follows at the end ‘...

and therefore the dignity (dignitas) of the complainants and/or black students and/or black personnel of the University and/or black people in general were impaired’.

4.2 Immediately above this, the charge alleged ‘... and/or to depict the complainants as inferior and unintelligent human beings...’.

4.3 It is common cause that all complainants are blacks and all accused white. It is also common cause that all accused did not, in their Section 112(2) of the Criminal Procedure Act, 1977 (51/1977) plea explanation, controvert these two allegations which formed the crux of the charge against them.”

The comments were made after the appellants had been sentenced.

[18] Still in his supplementary reasons the learned district magistrate went a step further and commented as follows about the plea explanation given by the appellants:

“4.4 On the contrary, the accused expressly and/or impliedly acquiesced both allegations in their plea explanation in the following paragraphs:

4.4.1 Paragraph 1.2:

The issue of integration of the Reitz Residence was a contentious and emotional subject ... Even for the rugby a quota system was introduced ... Many residents were dissatisfied with the issue (my underlinings).

4.4.2 Paragraph 1.5:

The basic theme and purpose of the video was to demonstrate how ... integration of the Reitz residence would be and that the University's decision to integrate Reitz was out of place (my underlinings).

4.4.3 Paragraph 1.6:

The complainants were asked to participate because they were the only black persons available ... (my underlining).

4.4.4 Paragraph 1.7:

The video then consists of sketches where the complainants play the role of black residential students ... (my underlining)."

[19] The first of the foregoing three passages demonstrated that before sentencing the appellants, the court *a quo* took into account certain racial averments contained in the charge sheet and treated or used or held them against the appellants. The second and third passages indeed verified

or supported the observation that the court *a quo* went beyond the plea explanation and revisited the charge sheet. It was apparent, upon careful reading of the last two passages, which reflected the views of the court *a quo* subsequent to the imposition of the sentence, that the trial magistrate believed that he was still entitled to have regard to all the factual averments embodied in the charge sheet. The trial magistrate reckoned that he was entitled to do so on the grounds that such factual allegations had not been specifically refuted by the appellants by way of their plea explanation or in any other manner.

- [20] The foregoing reasoning of the court *a quo* was, with respect, incorrect. The sentence imposed on the appellants should have been premised on the factual foundation as set out in the plea explanation. The appellants did not plead as charged. Had they done so, the trial court would have been perfectly correct to rely on all the facts as set out in the charge sheet. But they did not merely plead guilty. They went a step further. They gave an elaborate explanation. Their explanation embodied the exclusive facts on which they pleaded guilty. The respondent state accepted their

plea. The court *a quo* itself neither questioned the correctness of the divergent facts, as alleged by the appellants, nor expressed any reservation about their unqualified acceptance by the respondent.

[21] In those prevailing circumstances the court *a quo* could not have approached the matter of sentence anyhow save on those facts plus the undisputed facts whereby those facts were amplified by the prosecution and defence during the course of the closing argument – **S v JANSEN** 1999 (2) SACR 368 (C) 370 – 371; **S v CALENI** 1990 (1) SACR 178 (C); **R v SHUBA** 1958 (3) SA 844 (C).

[22] It is clear and obvious from the original as well as the supplementary reasons for the judgment that the court *a quo* did not so approach the business of sentencing on such factual premise. On the contrary, the court *a quo* reckoned that because the appellants had not expressly and pertinently taken issue with the racial averments embodied in the charge sheet, those averments were tacitly admitted and thus constituted the facts on which sentence could be validly premised. In my view the reasoning of the court *a quo* was materially flawed. This was the first difficulty.

[23] The court *a quo* approached the issue of sentence from an obtuse angle that the appellants had made themselves guilty of the criminal offence of *crimen iniuria* as against the blacks in general and in particular the black students and personnel of the university in question. From that finding with a very wide range, the court *a quo* proceeded to punish the appellants. I am persuaded that the finding relative to racism, which the court *a quo* regarded as a strongly aggravating factor, was a monumental misdirection. This was the second difficulty.

[24] The plea was also characterised by its narrow scope which was restricted to the four complainants. Careful scrutiny of the video taping revealed that during the encounter or drama the appellants referred to one of the complainants as “sefebe”; that none of the complainants spontaneously took any strong exception to the use of the word; that none of the complainants withdrew from the video shoot; that they continued to actively participate in the video taping and that one of the complainants told one of the appellants that he was talking “crap” and none of the appellants objected.

[25] The appellants pleaded that although they considered the use of the word “sefebe” to be offensive, they did not directly intend offending the complainants. Notwithstanding their contention that *dolus directus*, in other words, direct criminal intent was lacking, they pleaded on the basis of *dolus eventualis*, that they impaired the dignity of each of the complainants by referring to them and to them alone as whores.

[26] When the offensive word is objectively considered within the context of the playful circumstances in which it was used, it becomes apparent that the impression which the video would create to the viewers, and in fact did create, was that the appellants deliberately assailed the dignity of the complainants. This was probably so perceived by the world at large especially by those viewers who understood Sesotho language but not the Afrikaans language. That much the appellants frankly acknowledged. They acknowledged that objectively seen the impression created was that they indirectly impaired the dignity of the complainants, although impairing it was subjectively not on the forefront of their

minds.

[27] There is much to be said for this contention regard being had to the jovial atmosphere prevailing at the time the offensive word was used. In saying so I am fortified by the fact that by the look of things, the complainants did not immediately feel offended at the time the offensive word was used. It appears from the plea explanation that there was no formal admission made by the appellants acknowledging criminal intent in any form (*dolus directus* or *dolus eventualis*) to impugn the dignity of black students in particular or blacks in general. The facts were not amenable to the finding that, from the impairment of the dignity of the complainants, it could be extrapolated, without more, that the appellants also had the criminal intent to impair the dignity of any other person who happened to share the same race as the complainants. In my view, there was no connective tissue at all to sustain the finding. An impairment of the dignity of complainants was not an impairment of the dignity of every other black.

[28] Notwithstanding the foregoing, the court *a quo* indeed approached the issue of sentence as if there was an

admission to that effect by the appellants. The four appellants were whites. The four complainants were blacks. The appellants were students. The complainants were not. The appellants were opposed to the idea of having black and white students staying together on campus. The complainants did not have a direct and substantial interest in the matter. On account of these contrasting features the court *a quo* deduced that the appellants were guilty of *crimen iniuria* as against black people as a whole. Indeed the court *a quo* then approached the issue of sentence on that general basis. Ultimately the appellants were punished on that broad basis.

- [29] They were then retributively and deterrently punished for what the court *a quo* saw as a crime against the black people of this country. The difficulty about such inferred crime was that it could not be sustained by the facts as pleaded and accepted. The pleaded and accepted facts did not expressly admit or tacitly profess such criminal intent on the part of the appellants. Moreover, it could not be found, beyond reasonable doubt, that their conduct implicitly had such an extended effect. Mr. Kruger conceded that the apparent reference to the case of **S v SCOTT-CROSSLEY** 2007 (2)

SACR 470 (SCA) by the court *a quo* was factually misplaced.

[30] It has been held that where an accused pleads guilty and hands in a written statement in terms of section 112(2) Criminal Procedure Act No. 51 of 1977 detailing the facts on which his plea is premised and the prosecution accepts the plea, the plea so explained and accepted, constitutes the essential factual matrix on the strength of which sentence should be considered and imposed – **S v JANSEN**, *supra*, at 370 g – 371g. Such an essential factual matrix cannot be extended or varied in a manner that adversely impacts on the measure of punishment as regards the offender. The plea, once accepted, defines the *lis* between the prosecution and the defence. Once the parameters of the playing fields are so demarcated, it becomes a foul play to canvass issues beyond. The rule of fair play has to be strictly enforced. In this instance it was not.

[31] The appellants contended that it was not a punishable criminal offence for them to express their opinion concerning their opposition to the university's policy on student integration. Indeed this is so. They, as white students, were

of the opinion that the “forced” introduction of black students into what they regarded as their exclusive and separate white residential enclave, would destroy the traditions and nature of their residence, whatever those traditions and nature were. However one may disagree with this sentiment, which smacks of racial intolerance and however large the racially tolerant and reasonable sector of the nation may condemn the separatist attitude of the appellants as a very irrational, insensitive and flawed sentiment, they cannot be denied the right to express such opinion. The right to express one’s opinion is a basic right constitutionally recognised – *vide* section 15 and 16 of the 1996 RSA Constitution.

- [32] What was impermissible in the exercise of the right to freedom of expression was the infringement of the dignity of the four complainants by the four appellants in the demeaning manner of the expression they adopted to dramatize their protest against the student integration policy of the university. The right to freedom of expression does not extend to advocacy of hatred or cynical advocacy of hatred disguised as innocent drama based on race.

[33] In **S v HOHO** 2009 (1) SACR 276 (SCA) on 288 par [29] Streicher JA had this to say about everyone's right to freedom of expression and everyone's fundamental right to human dignity:

“But the freedom of expression is not unlimited. Although it is fundamental to our democratic society it is not a paramount value. It must be construed in the context of other values such as the value of human dignity.”

[34] On the one hand the controversial video visually depicted one of the appellant's urinating into the concocted brew. The essential factual matrix as pleaded and accepted was that none of the appellants actually urinated into the assorted meal, consisting of leftover's of meat, garlic, Oros and some other unknown ingredients as the video suggested; that the appellants play acted the urination scene by means of a plastic bottle containing water which was hidden in the pants of one of the appellants; that he mischievously pretended to be urinating into the concocted brew by squeezing the hidden plastic bottle. That was the first very important

dimension of the scene which deluded the viewers.

[35] On the other hand the video also visually depicted the complainants throwing out the urine contaminated foodstuff. The essential factual matrix as pleaded and accepted was that none of the complainants really ingested whatever the appellants had concocted and offered to them; that the complainants were expressly asked by the appellants not to eat, let alone to swallow the mixed leftovers or concocted brew; that the complainants were not at all nauseous as the video suggested; that they mischievously faked vomiting and that they were also play acting. That was the second very important dimension of the scene, which also deluded the viewers and sparked the global outcry.

[36] What emerges from the foregoing two paragraphs was that the whole visual depiction was unreal. The whole urination saga was optical delusion. On the facts, I am persuaded firstly that, in truth and in fact, there was no urine ingredient in the concoction. Secondly, I am convinced that there was no concoction ingested by the complainants. The vomiting saga was equally and optical delusion. Those two features

of the case were of utmost importance as regards the issue of sentence. Their significance lay in the fact that they certainly reduced the moral blameworthiness of the criminal conduct of the appellants. Put differently: the gravity of the *iniuria* was really not as huge and appalling as it seemed or was thought to be.

[37] Obviously the court *a quo* could not come to terms with these hard facts. The undisputed facts strongly militated against the finding that the complainants were deviously and inhumanely made to actually ingest what was deliberately contaminated with an ingredient of human urine. The crime we are here dealing with was video taped by the appellant's themselves. The entire drama was video taped by one of the appellants on the scene of the crime. The video was viewed in court before the sentence was imposed. One of the complainants was employed as a cleaner at Reitz Hostel. The appellants were senior inmates of the particular hostel. With the aid of the cleaner in question, the appellants recruited three more black workers to participate as black students in the production of a video for the purpose of the so-called initiation culture. Besides the use of the aforesaid

offensive words no insulting racist remarks were hurled at the complainants. It was that video which was globally distributed and that was ultimately viewed in the court *a quo*. That court witnessed the incident as it unfolded.

[38] Certain scenes from the video obviously haunted the mind of the learned magistrate and seemingly filled him with revulsion and indignation. He became emotionally troubled. He was deeply hurt. I can understand why. The manner in which the appellant conducted themselves, the demeaning roles they assigned to the unwary and unsophisticated complainants, the criteria used to select them, the clandestine filming of the urination episode behind the backs of the unsuspecting complainants and the perceived racist motive for the dramatisation of the appellant's opposition to the deracialisation of the student residence(s) – all these factors evoked, on the part of the court *a quo*, and probably as well as on the part of many viewers of the video, memories of deep and hurtful divisions of our recent past, the past that was characterised by horrendous violations of the human dignity of the blacks by the apartheid regime.

[39] About eight or so years ago Marais JA commented as follows in the case of **S v SMITH** 2003 (2) SACR 135 (SCA) on 138 par. [4] about judicial mind beclouded by emotions induced by viewing the video of brutal violation of human rights:

“[4] Yet, for a Court intent upon dispensing justice in a calm and dispassionate manner, the **emotions** which well up on viewing the videotape can be a hindrance rather than a help, if not properly controlled. That does not mean, of course, that a justified sense of **indignation** at the gross affront to society's sensibilities has no place at all in sentencing an offender. It undoubtedly has. **But it cannot be permitted to so overwhelm all other factors which are relevant to just sentencing that they are virtually ignored.**”

S v SMITH 2003 (2) SACR 135 (SCA) on 138 par [4].

[40] In this instance the video depiction of the crime, within the context of the sentencing, was more significant for what it did not reveal than what it did. In the first place it is of great significance to point out that after viewing, the trial magistrate

himself acknowledged that he did not really observe the actual urination. Such observation from the bench materially supported the version of the appellants that they did not actually urinate into the concocted brew. That being the case, the court *a quo* should have found that the urination scene was indeed simulated, as the appellants averred.

[41] In the second instance no actual eating of the brew whatsoever was depicted or could be witnessed by viewing the videotaping. The undisputed fact was that the complainants were never made to drink the concoction. The vomiting was simulated just as the urination was. Virtually nothing contaminated or uncontaminated, was eaten or ingested. Although very unpalatable, the great variety of the constituent ingredients of the concoction did not include human urine as at first blush might have appeared. Let us for the sake of argument assume that the appellants seriously contemplated humiliating the complainants and that they in fact urinated into the brew. If that was indeed the case then it seemed to me rather improbable that the appellants would have defeated that purpose by turning around and asking the complainants not to ingest the

concoction. If dehumanizing the complainants was indeed within their serious contemplation, the appellants would not have warned them not to ingest the concoction.

[42] But even if the urination was real as the court *a quo* was inclined to believe, the fact remains that the complainants did not eat the stuff. The facts as pleaded and accepted supported the contention that the urination, ingestion and vomiting were all simulated. Simulated offensive conduct towards the complainants was, without their consent, made to look real. In that secret depiction laid the *iniuria* – indeed the video was not evidence of the *iniuria* - it was *iniuria*. It has to be accepted that, as the young people would say, the two groups were performing, in other words, play-acting. To the extent that the court *a quo* found otherwise, I am of the view that it materially erred.

[43] However, by secretly video-taping the urination scene without the knowledge and consent of the complainants the appellants betrayed the complainants in a big way. It was precisely the secrecy around the urination scene which made the black playmates of the appellants to feel very badly

betrayed. It rendered the motives of the appellants suspect. Everybody who fleetingly viewed the video became sceptical about the motive of the appellants. The secrecy fuelled the scepticism and precipitated this global saga. Their secret conduct in this regard was dehumanising, degrading, humiliating and offensive. Such ignominious treatment of one by another has all the criminal hallmarks which underscored the essence of the crime of *iniuria*. Everyone is entitled, as a matter of right, to freedom from such contumelious treatment.

[44] This completes my consideration of first attack. I am persuaded that some material misdirection was made concerning the nature and seriousness of the crime. In view of this conclusion alone I am inclined to uphold the appeal. Strictly speaking, it is unnecessary to consider the two further attacks. However, I deem it advisable to deal with them in view of the huge public interest in this appeal. I suppose courtesy to the trial magistrate requires that we address all the issues raised.

[45] As regards the interest of society, the court *a quo*

commented:

“The defence tendered this document to prove that the accused have already suffered a widespread condemnation and utter disgust around the globe.”

[46] During argument in the court *a quo*, Mr Kemp handed in an article (exhibit “d”) with the consent of Mr Kruger. Counsel did so for the purpose of demonstrating that the appellants were reviled, castigated, labelled as outcasts and depicted, in the press and public media, as extremely loathsome persons who deserved very severe punishment. The existence of the article and its contents *per se* established the fact of how the appellants were portrayed. The existence of the article did not however, *per se* establish the truth of the contents of the article. The handing in of the article was not intended to serve as the truth of the averments made therein. The article was handed in for a specific limited purpose as agreed between the defence and the prosecution.

[47] The views expressed in the article by some prominent members of the public were basically hearsay statements.

None of the persons to whom those views were attributed to by the journalist testified. Notwithstanding this the court *a quo* extensively quoted passages from the article. The contents of the article were then relied upon as being true. The court *a quo* regarded the views expressed in the article as a true reflection of the legal convictions of the community. Those views adversely influenced the determination of a balanced sentence, and led to the retributive sentence which was ultimately imposed. The court *a quo* seemingly reckoned that because the defence itself handed in the exhibit, it thereby admitted the contents thereof as true; that the exhibit was part of the defence case and that the court was thus entitled to rely on those views as factors aggravating the sentence.

[48] That the court *a quo* could not do. In the first instance, it was not fair to the appellants to do so, given the specific purpose for which the press article was exhibited.

ADMINISTRATOR, TRANSVAAL, AND OTHERS v

THELETSANE AND OTHERS 1991 (2) SA 192 (A);

PAYSLIP INVESTMENT HOLDINGS CC v Y2K TEC LTD

2001 (4) SA 781 (C) at 788; **SOUTH PENINSULA**

MUNICIPALITY v EVANS AND OTHERS 2001 (1) SA 271

(C). It was also unfair to accentuate the punitive aspects of such public opinions without affording the defence an opportunity of dealing with those aspects. For instance, if the defence was forewarned, it might have asked that such people be subpoenaed in order to test the veracity of their untested public opinions. The interest of justice dictated that the court *a quo* should have invited the defence to make an input regarding such aspects if it wished to use them to aggravate instead of mitigate sentence. As a result of the press article the court *a quo* was swayed to conclude that the appropriate sentence should be retributive. Put differently, the press article was used contrary to the purpose for which it was intended and exhibited.

- [49] Secondly, there are numerous dicta in decided cases which warn against the assumption that press articles and press reporting accurately reflect the convictions of the relevant (reasonable and fair) sector of the community. Whether the exhibit in question indeed portrayed the legal convictions of our society was debateable.

[50] Thirdly, the critical comments in the article which were relied upon by the court *a quo* were not based on the facts in the context placed before the court. On the contrary, those comments were based on simulation as depicted on the videotaping. We now know that, in truth and in reality, the appellants did not urinate in the brew and did not force the complainants to ingest it. Yet, the views expressed in the article and relied upon were based on that unreal foundation.

[51] Fourthly, the court *a quo*, assumed that those critical views expressed in the press article would not have been different had those prominent individuals known the true facts. The court *a quo* recognised, albeit reluctantly, that the exhibit was not based on true facts. Despite that the court *a quo* still believed that the true facts would not have changed such views. Such a rigid stance regrettably tended to suggest that the court *a quo* had lost objectivity. Given the profiles of those particular individuals and the general belief that ours is a rational public I have difficulty with the view that the knowledge of the true facts would not have made them think differently. If the unreal situation could be superlatively described as a crime which invokes utmost moral indignation

countrywide, how else could the real situation have been described if human urination had indeed been added to the brew and the brew actually ingested?

[52] The widespread anger, revulsion and natural indignation was apparently fuelled by the widespread ignorance of the true facts. Those comments by the court *a quo* seemed to suggest that the version of the appellant about the simulated urination was merely accepted at face value. It has to be borne in mind that the complainants or the respondent could not positively disprove such a version. Moreover, the version was more probable than not as I have already indicated.

[53] The appellants asserted that the urination was simulated and explained why. Consider the toy-gun scenario. If X used a fake firearm to rob Y but A used a real gun to rob B, the interests of justice dictate that there be some differentiation made when the issue of sentence is considered. It follows, as a matter of logic, that a simulated conduct does not have the same adverse impact on the interest of society. A rational public would expect the court to impose a more severe punishment for the actual criminal misdeed

committed than for a simulated criminal conduct.

[54] This completes my consideration of the second attack concerning the interest of society. I am of the view that the interest of society was unduly overemphasised. The misdirections were material. Public opinion was improperly relied upon. See **S v MAKWANYANE AND ANOTHER** 1995 (6) BCLR 665 (CC).

[55] As regards the appellants the court *a quo* collectively considered their personal circumstances as follows:

“I will start with the personal circumstances of the accused. Their ages range from 24 to 27 hence they can meticulously be all regarded as youths. Accused 1 and 3 were suspended from academic activities consequential upon this case. Accused 2 and 4 had the fortune of graduating. They are all working with a salary of R4 200 being the lowest earning to R10 000 being the highest. Accused 4 was precluded from playing rugby due to this case.

All the accused have shown contrition by apologising publicly in the media, by apologising with written correspondence to the Rector of the University, copies of which are tendered as exhibits in court, and also by extrapolating apology in their plea

explanation in court. They have all pleaded guilty, thereby obviating a lengthy trial. That would probably trigger hostile feelings and spark some ordeal for complainants. They are more than readily available for victim/offender mediation and the exercise was stifled at the instance of complainants. Supporting documents were also presented to the court by Adv. Kemp.

There is also overwhelming documentary evidence depicting their crucifixion by the media wherein they are labelled as faces of cruelty, racists and sadists. The accused and their parents suffered a widespread abhorrence and rejection, to such an extent that accused 4 and his family were jettisoned from their church of many years.

At a certain stage an unpleasant and unexpected scene unfolded whereby the accused's photos and residential places were massively and repulsively published in the press. Last but not least, the stigmatisation attaching to them will painfully endure for long, if not forever.

The cumulative effect of the accused's personal circumstances yield an irresistible impression that given a second chance, even if it carries a high price, they can still achieve prominent citizenry of this country. The rehabilitative and measure of mercy principle of sentence thus, in my view, ought to play a pivotal role herein."

[56] The first appellant was born on 14 September 1985. He was 21 years of age at the time he committed the crime and 24 years of age at the time he was sentenced. He originated from Christiana in North West. He was a resident student at the University of the Free State. He was studying agriculture. He was arrested in 2008. In February 2008 he was summarily suspended when the video was published in the mass media. He was in his last year of study at the time. As a result of the suspension he was unable to complete his BA Agric Degree in 2008. He remained suspended in 2009. The negative publicity of the case pending against him affected his employment opportunities. During the period of his suspension he worked on his father's farm where he earned R4 500,00 per month.

[57] The second appellant was born on 27 March 1983. He was 24 years of age at the time he committed the offence and 27 years of age at the time he was sentenced. He hailed from Hoopstad in the Free State. In 2007 he was a resident student at the same university. In that same year he completed his studies and obtained a B.Com (Accounting) degree. He was arrested early in 2008. By then he was no

longer a student. He was employed as a farm manager where he earned R10 000,00 per month.

[58] The third appellant was born on 3 March 1985. He was 22 years of age at the time he committed the offence and 25 years of age at the time he was sentenced. He came from Hertzogville in the Free State Province. He was a resident student at the university when the controversial video was released in the mass media. At the time he was in his final year of study. Soon thereafter he was summarily suspended. His study career was placed on hold as a result of his suspension. The suspension endured for two years from 2008 to 2009. The negative publicity of the case limited his employment opportunities. He was in the temporary employ of his father on a farm during the suspension. He earned R4 200,00 per month.

[59] The fourth appellant was born on 7 March 1983. He was 24 years of age at the time he committed the offence and 27 years of age at the time he was sentenced. He was a foreign student from Windhoek in Namibia. In 2007 he was also a resident student at the university. He was in his final

year of study. Precisely what he was studying does not appear on the record. In 2008 when he was arrested he was no longer a student. He was working in Namibia. He earned R9 000,00 per month. The negative publicity of the case also put his job at risk. His employer warned him that his continued employment depended on the verdict of this case. He was a high-level rugby player. On account of his involvement in this case, he was precluded from playing rugby pending the outcome of the case.

[60] It will be readily appreciated that all the appellants were relatively young at the time they committed the crime. They were 21, 24, 22 and 24 years of age. They, with the exception appellant no. 4, lived and probably grew up on the farms. The transformative values of our fairly new culture of human rights do not rapidly permeate all the social spheres of our society at the same pace. Some communities embrace those values faster than others. Some children grew up in more conservative rural communities than others. Some children grew up in more progressive urban communities than others. On account of the exposure to certain social, political and economic environment some children embrace those values faster or slower than others.

To a greater or lesser degree this may invariably determine a child's respect or disrespect for the natural dignity of fellow human beings.

[61] The appellants were all university students at the time they impaired the dignity of the victims. The second and the fourth appellant were in the last year of their studies in 2007. When the iniurious video taping was first published or first came to the attention of the university and the world at large in 2008, they were no longer students. They had already graduated. Consequently, the university could do nothing about them. It no longer had any disciplinary jurisdiction over them.

[62] The first and the third appellants did not complete their studies in 2007. When the contumelious videotape was first published in 2008 they were still students. The whole thing exploded in their face right there and then like a powerful bomb. They were then in the final year of their studies. They were on the verge of graduating. Not only did they and their co-appellants impair the dignity of the four victims, but they also seriously dented the image of their university in the

process. The university did not take kindly to their transgressions. They were summarily suspended. As a result of the suspension they could neither complete their studies in 2008 nor in 2009. Their tertiary careers were effectively derailed and retarded by two academic years. By the time the university suspended them in February 2008 they had already paid their annual fees. They did not demand any refund of the money which must have been a substantial amount. Instead they asked the vice chancellor to use the money for the benefit of those students less privileged than them.

[63] At the time they were sentenced in 2010, the appellants were all gainfully employed. On the one hand the first appellant and the second appellant were earning R4 500,00 per month and R4 200,00 per month respectively. On the other side of the coin was the situation of their co-appellants. The second appellant and the fourth appellant were earning R10 000,00 per month and R9 000,00 per month. They were graduates whereas the appellants were not.

[64] I guess I have adequately contrasted the profiles of the

appellants. Now I turn away from their personal contrasts to their personal similarities. The appellants were apparently all single and childless. They were all first offenders. They all publicly apologised to the victims, in particular, the university and to the public in general.

[65] They were labelled as cruel, sadistic and inhuman racists who forced the victims to ingest a filthy concoction doused with human urine. They were reviled in the media, socially ostracised and globally condemned. The fourth appellant was precluded from playing rugby on account of the negative publicity of the case with which his name was associated. Moreover he was excommunicated by his congregation from church on religious grounds for the same reason. They all pleaded guilty. They all showed and expressed genuine remorse. They have all made peace with all the victims. They were all playing together with all the victims at the time the offensive video taping was done.

[66] Lest it is forgotten, let me accentuate that there was no real urination, no real ingestion and no real vomiting. All these were share acts of playful simulation. It was not shown that

the appellants had direct criminal intent to dehumanise the victims in such a disgusting and appalling manner. They did not deliberately and directly intend to harm the dignity of any of the complainants. This lack of direct intention distinguished their matter from the vast majority of classic cases of *crimen iniuria*. This was a very rare iniurious matter. The conviction based on *dolus eventualis* is generally characterised by a lesser or lower degree of moral blameworthiness and a leniency of sanction.

[67] The foregoing concludes my synopsis of significant factors which compellingly show that the sentence imposed on the appellants was disturbingly disproportionate to the misdeed they playfully and indirectly committed. The iniurious video was not instantly released and when it was eventually released, some five or so months after it was produced, the appellants were not behind its distribution. Those two facts significantly supported the submission that they did not by video taping the incident, primarily scheme to violate the dignity of the victims.

[68] By the time they were sentenced, the appellants, especially

the first appellant and the third appellant, had already suffered severe punishment. They will all probably continue to suffer for many more years to come. The social stigma associated with their conduct is not likely to disappear very soon.

[69] There were aggravating factors as well. The victims deserved better treatment than they received from the appellants. They were adults with children as old as and even older than the appellants. It is something unheard of in any white or black culture for a man as young as the appellants to refer to an adult as a whore. That is simply not on. It does not get any better merely because it was all in the course of playing. The relationship of familiarity was cynically abused.

[70] The intellectual disparity between the two groups dictated that the appellants who were on a far higher plane of intellect than the victims, should have behaved more courteously than their victims. The fact that one of the complainants also used foul language during the course of the interaction served as no sound excuse. The appellants were opposed

to the university policy of deracialization of the campus hostels. They wanted to register their protest. The policy aimed at bridging the racial divisions of the past. It appeared to me that the underlying reasons were to dismantle the artificial barriers that had kept the students over there apart for decades on racial grounds so that they could learn to live together in harmony now and in the future as adults. As I see it, this unfortunate incident was sparked off by an irresponsible, delinquent and practical joke about a very sensitive, emotional and indeed dangerous issue of racial segregation. Inappropriate talking, let alone dramatisation of that issue, may touch on a very raw nerve of many blacks.

[71] Given their academic enlightenment, the appellants should have had the foresight to realise that selecting black workers and using them as black students for the purpose of demonstrating their opposition as white students to sharing their previously white hostel with black students, could easily be perceived and misconstrued as a racist stance of intolerance and advocacy of hatred based on race. Perceptions emanating from this kind of conduct can dangerously polarise our people. I have had the privilege of

seeing eight photographs taken on 21 May 2005 over two years before this particular incident. There the victims of the institutional “fresher initiation culture” were white just like the perpetrators or initiators. There was a striking similarity between the 2005 incident, as photographically depicted, and the 2007 incident we are here dealing with. I then realised that what happened in 2007 had previously happened in the name of initiation culture. The cutting edge was that in 2007 the initiates were black and not students. This tended to show that there was no evil or racist motive which inspired the 2007 video.

[72] In my view the court *a quo* did not properly individualise the appellants. Their outspoken position to the integration policy cast a heavy cloud on their otherwise innocent and mischievous motive. Their personal circumstances were not accorded sufficient weight. The gravity of the crime and the interests of society were unduly accentuated to the detriment of the appellants. The mitigating factors, objectively considered, outweighed the aggravating factors by far.

[73] Mr. Kemp submitted that the last two conditions of the

suspended component of sentence were inappropriate. Mr. Kruger readily conceded. The linking of the future rulings by the equality court against the appellants to their current convictions appeared undesirable. The equality court proceedings, the quantum of proof and the ultimate rulings and remedies are essentially civil in nature. I am persuaded by the submission. To allow a suspended criminal sentence to be triggered off and put into operation on the strength of a civil wrong or transgression can lead to absurd repercussions. Our domestic jurisdiction has not yet developed that far. The magistrate's findings were about uncharted waters. This much Mr. Kruger conceded.

- [74] Mr. Kemp also submitted that the six months suspended component was also inappropriate. Before suspension can even be considered as an option of sentencing an offender, the court has to consider first and foremost whether a sentence of imprisonment will be appropriate in the circumstances of the particular matter at hand. See **S v LABUSCHAGNE AND 19 OTHER CASES** 1990 (1) SACR 313 (E) on 315 – 316; **S v OLYN EN ANDER** 1990 (2) SA 73 (NC) on 74.

[75] It has, on more occasions than one, been held that a court should guard against the temptation of approaching this sort of sentencing option from the narrow angle that it is a lenient sentence which an offender is not going to serve. A suspended term of imprisonment is not simply an auxiliary to the main sentence. On the contrary, it is a sentence on its own - **S v SIBEKO** 1995 (1) SACR 186 (W) 189; **S v SCHULZ** 1991 (1) SACR 676 (E) 680; **S v ROOI** 2007 (1) SACR 668 (C) 671.

[76] On appeal before us, the defence accepted that the court *a quo* was at liberty to suspend any sentence of imprisonment it decided was appropriate. The suspension of a custodial term was, therefore, not an issue. Whilst it was thus accepted, the contention of the defence was that a sentence of imprisonment, whether direct or suspended, was not an appropriate sentence in the circumstances of this particular case.

[77] It has to be mentioned, that Mr Kruger conceded that he did not argue for the imposition of a sentence of imprisonment in

the court *a quo*. On the contrary he supported Mr. Kemp's submission that a fine would have been an appropriate punishment for the appellants. In the court *a quo* the two counsels only differed as regards the amount of the fine. The court *a quo* approached the issue as if the crux of the legal arguments between the two counsels was to imprison or not to imprison.

“ ... I am eventually convinced that direct imprisonment would not be a proper sentence in this case.”

[78] The approach was incorrect. It is of cardinal importance to point out that the court *a quo* was informed, through the lips of counsel for the respondent, that the victims had made peace with the appellants; that they had forgiven them and that they did not want to see them languishing in jail. The court *a quo* hardly commented about this important aspect.

[79] Moreover, and this relates to the main prison term of twelve months, all the appellants were employed. They engaged the services of a seasoned senior counsel. They obviously had some financial backing from somewhere, probably from

their parents. All these indicated that they could afford to pay fines as intimated. The amount of the fines they intimated were not trivial. Where, as in this instant, a first offender can afford a reasonable fine and a court accepts that he is potentially rehabilitable, the interests of justice probably can still be adequately achieved and the objectives of sentencing satisfactorily attained by other various options other than imprisonment, the imposition of a straight fine is one of the alternatives.

[80] In **S v SCHEEPERS** 1977 (2) SA 154 (AD) at 159 B – C the court said the following about the foregoing principle:

“Indien daar dus met 'n alternatiewe straf as gevangenisstraf dieselfde oogmerke met betrekking tot die aard van die oortreding en die belange van die publiek bereik kan word, behoort daar, in die belang van die veroordeelde, deur vonnisoplegging voorkeur verleen te word aan alternatiewe strawwe. Ek is persoonlik van oordeel dat gevangenisstraf slegs geregverdig is indien dit nodig is dat die oortreder uit die gemeenskap verwyder word ter beskerming van die publiek en indien die oogmerke wat deur die vonnisoplegger nagestreef word met geen alternatiewe straf bereik kan word nie.”

Viljoen AJA with him Wessels JA concurred.

[81] If it is accepted, and I venture to say it should, that the imprisonment component of the main sentence, viz 12 months, was inappropriate, then it becomes evident and understandable why the 6 months suspended component, the logical derivative of the sentence of twelve months imprisonment cannot exist in a vacuum. Logic requires that it should automatically fall away. In that event, the rest of the conditions of suspension, which were themselves not without difficulties, will also die a natural death.

[82] What remains to be determined now is the issue of whether the discretion to assess the fine was properly and reasonably exercised or not. If the answer is “yea”, we have no business to interfere; but if it is “ney” we are at liberty to interfere **S v KGOSIMORE**, *supra*.

[83] It is my considered view that the disparity between the fine imposed and the fine I would have imposed if I had sat as a

court of first instance to try the appellants is very huge. There has been commendable restorative justice in this matter. There were huge differences among the appellants. Two of them were suspended, but others could not. Those suspended earned substantially less than their co-appellants. They admirably donated undisclosed, but no doubt substantial, amounts to redress the wrong they committed. They also probably paid civil compensation to the victims. These factors, in my opinion, warranted differentiation in the sentences imposed. However, all were painted with the same brush.

[84] Having considered all the pros and cons of the matter I am persuaded that the court *a quo* materially misdirected itself in certain respects as I have already alluded to. In **S v KIBIDO** 1998 (2) SACR 213 (SCA) at 216 h the supreme court held per Olivier JA that:

“A failure to take certain factors into account or an improper determination of the value of such factors amounts to a misdirection, but only when the dictates of justice carry clear conviction that an error has been committed in this regard.”

The personal circumstances of the appellants were unduly underplayed. They were not properly individualised. The misdirection was of such a nature, degree or seriousness that it showed inferentially, if not directly, that the sentencing discretion entrusted to the trial court was improperly exercised. (See Trollip JA in **S v PILLAY**, *supra*, at 535 E – G.) I would, therefore, interfere and ameliorate the sentence.

[85] There remains one more thing. This judgment is unusually long for an appeal. It had to be. This was not a usual appeal. There was and still is great interest worldwide.

[86] The acclaimed, Timmy Thomas of the USA, has a song in one of his albums:

“Why can’t we live together”.

The lyrics of that track are worth echoing in a case like this.

He sings:

“No matter your skin colour

You are still my brother.”

On that optimistic, gracious and melodious tune of brotherhood, I wrap up this appeal.

“Morena boloka sechaba sa heso.”

Accordingly I make the following order:

1. The appeal against sentence succeeds.
2. The sentence imposed on 30 July 2010 is entirely set aside and substituted with the sentences set out below.
3. The first appellant and the third appellant are each sentenced to a fine of R10 000,00.
4. The second and fourth appellant are each sentenced to a fine of R15 000,00.
5. The appellants are hereby called upon to appear in this court in person on Monday 25 July 2011, should they fail to pay the fine, so that this court can impose a sentence of imprisonment.

M. H. RAMPAL, J

I concur.

M. B. MOLEMELA, J

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Instructed by:
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