IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: A194/2016

In the matter between:

HENRICUS RENé VAN IEPEREN Appellant

And

THE STATE Respondent

JUDGMENT: 26 AUGUST 2016

ALLIE, J:

1. The Appellant was charged in the District Court, Malmesbury, with one count of contravening the provisions of section 5(1), read with sections 1, 56(1), 56A, 57, 58, 59, 60 and 61, of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 viz., sexual assault. He was charged in the alternative, with common assault.

2. On 21 July 2014 he pleaded not guilty to both the main and the alternative counts and a trial ensued.

3. On 8 September 2015 he was acquitted on the main charge on the grounds that the facts accepted by the trial Court did not disclose any act complying with the definition of sexual violation in section 1 of the Sexual Offences Act.

4. He was acquitted on the alternative charge of common assault, on the basis that the State had failed to prove the necessary intent.

5. The trial court relied on section 270 of the Criminal Procedure Act 51 of 1977 ("the CPA"), to convict the Appellant and find him guilty of *crimen injuria,* and sentenced him to a fine of R2 000.00 or 3 months imprisonment.

6. The appellant submitted that the trial Court erred in the following respects:

   6.1 finding that the State had proved its case beyond reasonable doubt;

   6.2 finding the Appellant guilty of *crimen injuria* on the basis that, in terms of section 270 of the CPA, the essential elements of the offence of *crimen injuria* were included in the original charge under Section 5(1) of the Sexual Offences Act.

7. Section 270 of the CPA provides as follows:

   "If the evidence on a charge for any offence not referred to in the preceding sections of this chapter does not prove the commission of the offence so charged, but proves the commission of an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved."

8. Section 270 is available to a court only where the "offence so charged" is not one that is mentioned in the preceding sections of Chapter 26 of the CPA.

9. The trial Court, having found that the Appellant had uttered certain remarks of a sexual nature, and slapped the buttocks of the complainant, drew a connection between the infringement of dignity that constitutes *crimen iniuria*, and the inherent infringement of dignity and/or privacy that accompanies the offence of sexual assault under section 5(1) of the Sexual Offences Act.

10. The offence of contravening section 5 of the Act is expressly referred to in section 261(2) of the CPA, which is part of the same Chapter 26 of the CPA that contains section 270.

11. The alternative charge of common assault is referred to in section 267 of Chapter 26 of the CPA. The section provides that if the evidence doesn't prove common assault but proves sexual assault or compelled sexual or self-sexual assault or pointing a firearm, air-gun or air-pistol, a conviction may follow on those competent verdicts. *Crimen injuria* is not listed as a competent verdict for common assault.

12. The court could however apply the provisions of section 270 of the CPA, to rely on the common law offence of *crimen injuria*, if the state had given the appellant notice of its intention to rely on *crimen injuria*, by applying to have the charge sheet amended to include a reference to the allegation that the verbal utterances of the appellant impaired the dignity of the complainant.

13. Section 270 is applicable to "**an offence so charged** " but since *crimen injuria* was not an offence raised in the charge sheet, the section can't be relied on.

14. Only two competent verdicts are allowed by section 261(2) of the CPA on a charge of contravening section 5 of the Sexual Offences Act. These are: common assault and having committed an act of consensual sexual violation with a child. *Crimen iniuria* is not, therefore, a statutorily provided competent verdict under s 261(2) of the CPA.

15. The court *a quo* found that one of the essential elements of the offence of assault viz., intent had not been proved.

16. I am not convinced that, having found that appellant slapped the buttocks or upper leg of the complainant after expressing an intention to do so, the court *a quo's* finding that intent was absent, is correct. The defence throughout the presentation of the State's case was a denial that the appellant touched the complainant on her buttocks at all.

17. The appellant raised the defence of having lightly touched her on her back for the first time when he testified.

18. During cross examination, the appellant conceded that he touched the complainant on her thigh.

19. The defence raised the following hypothetical scenario: "*I want to put the hypothesis to you. This is not the accused's version and it is not my instructions. The hypothesis is the following: If I walk behind you…. And I touch you on your buttock and tell you get a move on I am in a hurry here. And I realise listen, this is a bit too low and I say sorry, I did not mean to do that. Would that have been acceptable to you?*" The complainant answered as follows: "*Okay. If he apologised for touching me in the wrong place, it would have been fine if he apologised. He --- But you don't hurry someone up on their buttocks. You wouldn't do that to someone you don't know. Maybe a child if it is your child but you don't do that to a-a stranger*."

20. During his evidence in chief, the appellant, for the first time revealed that he lightly touched the complainant's back to hurry her on. This allegation wasn't put to the complainant during cross examination. The defence counsel simply questioned the complainant on what would be considered to be appropriate

and acceptable touching. At the end of the cross examination of the complainant, the prosecutor raised the fact that the defence counsel didn't put the appellant's version of how he would have hurried her. The defence didn't avail itself of the opportunity to do so at that stage.

21. The appellant admitted that he touched the complainant in the manner that she described but he alleged that he didn't have the intention to sexually assault her.

22. The appellant couldn't provide a reasonable explanation for why he thought it was necessary to touch the complainant to hurry her on when she was already in the doorway in the process of exiting the courtroom.

23. Despite the complainant feeling humiliated and undermined, she was prepared to accept an apology from the appellant at court after Mr Swarts, the regional court prosecutor informed the appellant of the complainant's allegation against him. The appellant chose to dismiss the allegation as nonsense. In so doing, he demonstrated a callous disregard for the complainant's feeling of impaired dignity.

24. In my view, intent was clearly established. The trial Court entirely dismissed the alternative charge from consideration with the following words: *"die hof gaan nie verder daarop uitbrei nie"*.

25. The court *a quo*, failed to apply the law relating to common assault correctly. The State could therefore have appealed against the acquittal on common assault on a question of law. The State however elected not to appeal the acquittal on common assault and the conviction on *crimen injuria* under section

310(1) of the Criminal Procedure Act. In **S v Zoko 1983(1) SA 871 (N) at 875 C** the court held that the magistrate's decision that his factual finding supports a conviction of a crime that the accused was not charged with, is a decision on a question of law. This court is therefore, not in a position to interfere with the court *a quo's* finding that the State failed to prove the necessary intent required to establish that the appellant assaulted the complainant.

26. Appellant's counsel argued that if the court *a quo* couldn't find intent to assault, it could also not have found intent to commit *crimen injuria*. I disagree for the following reasons.

27. The intent to commit *crimen injuria* in this case, clearly relates to the verbal utterances of the appellant, whereas the assault relates to slapping the buttocks of the complainant.

28. The trial Court relied upon the verbal utterances that the appellant allegedly made to the complainant, namely that he wanted "to smack her bum"; that "she wore sexy shoes" and "she needs a man." The court *a quo* relied on those words to conclude that the appellant harmed the dignity and reputation of the complainant.

29. *Crimen injuria* is a crime under South African common law, defined as the act of "*unlawfully, intentionally and seriously violating of the dignity or privacy of*

another."[1] What is protected by the crime is dignitas, all the rights of personality other than reputation and bodily integrity

30. There are no reported cases where sexist utterances have been found to amount to *crimen injuria*. It is a serious oversight on the part of the State that it failed to charge the appellant with *crimen injuria* nor did it refer to the verbal utterances that the complainant alleged the appellant had made to her and which were clearly a source of grave injury and offense to her.

31. In section 1 of the Constitution, human dignity is expressed as a foundational value of our democratic state and section 10 of the Constitution provides:

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

32. The State bears the onus of alleging and proving, both objectively and subjectively, in which respects the words uttered impaired the dignity of the complainant. In **S v Jana** [2] the court said: *"Crimen injuria is concerned generally with impairments of dignitas and not with impairments purely of fama or bodily security. The concepts of self-respect, mental tranquillity and privacy are judged both objectively and subjectively in that it depends upon the particular person and the circumstances whether it can be said that his dignitas has in fact been impaired."*

33. The complainant testified about how shocked she was that the appellant spoke to her in that way because she is an attorney of 11 years standing, the

[1] Criminal Law by Snyman 6th ed at 461
[2] 1981 (1) SA 671 (T) at 675 A –B

manager of the Legal Aid Board's Judicare offices in Malmesbury, Atlantis and Vredenburg and, therefore, a professional person, who was engaged in rendering professional services to her clients at the time when those words were uttered. The complainant considers herself to be on an equal footing with the appellant. She had difficulty understanding why the appellant humiliated her and attempted to diminish her standing.

34. In my view, the offending words collectively, used in the context where both the appellant and the complainant are attorneys present in a court room where other colleagues and members of the public were present, had the effect of humiliating and belittling the complainant.

35. The State's case is, however, hamstrung by a substantive irregularity, namely, the absence of an allegation in the charge sheet that the complainant's dignity was impaired by certain verbal utterances of the appellant and by the alleged slap on the complainant's buttocks.

36. The State has an obligation to set out the *facta probanda* that it intends to rely on to prove the existence of the essential elements of the offence because the accused is entitled to know the nature of the charges and what alleged misconduct the state intends relying on to prove its case.

37. Section 84 of the CPA provides as follows:

*" **84 Essentials of charge***

(1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at

which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.

(2) Where any of the particulars referred to in subsection (1) are unknown to the prosecutor it shall be sufficient to state that fact in the charge.

(3) In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient."

38. In **S v Mashinini** [3] the Supreme Court of Appeal repeated the warning that it made in **Legoa** [4] and **Makatu** [5] that a charge sheet should be drawn up with great care to ensure that the correct and essential averments are embodied in it.

39. Concerning the need to set out in the charge sheet, the facts necessary for the accused to prepare his/her defence without him/her suffering prejudice in trial preparation, the court in Mashinini held as follows at paras 11 & 12:

"*[11] To my mind, the solution to this legal question lies in s 35(3) of the Constitution. Section 35(3)(a) of the Constitution provides that every accused person has a right to a fair trial which, inter alia, includes the right to be informed of the charge with sufficient detail to answer it. This section*

[3] 2012 (1) SACR 604 (SCA) at 614 b-c
[4] [2002] 4 All SA 373 (SCA)
[5] 2006(2) SACR 582 (SCA)

appears to me to be central to the notion of a fair trial. It requires in clear terms that, before a trial can start, every accused person must be fully and clearly informed of the specific charge(s) which he or she faces. Evidently, this would also include all competent verdicts. The clear objective is to ensure that the charge(s) is sufficiently detailed and clear to an extent where an accused person is able to respond and importantly to defend himself or herself. In my view, this is intended to avoid trials by ambush.

[12] *In S v Legoa, Cameron JA stated with regard to the constitutional right to a fair trial:*

'Under the common law it was therefore "desirable" that the charge-sheet should set out the facts the State intended to prove in order to bring the accused within an enhanced sentencing jurisdiction. It was not, however, essential. The Constitutional Court has emphasised that under the new constitutional dispensation, the criterion for a just criminal trial is "a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution of the Republic of South Africa Act 108 of 1996 came into force". The Bill of Rights specifies that every accused has a right to a fair trial. This right, the Constitutional Court has said, is broader than the specific rights set out in the sub-sections of the Bill of Rights' criminal trial provision. One of those specific rights is "to be informed of the charge with sufficient detail to answer it". What the ability to "answer" a charge encompasses this case does not require us to determine. But under the constitutional dispensation it can certainly be no less desirable than under the common law that the facts the State intends to prove to increase sentencing jurisdiction under the 1997 statute should be clearly set out in the charge-sheet.

The matter is, however, one of substance and not form, and I would be reluctant to lay down a general rule that the charge must in every case

recite either the specific form of the scheduled offence with which the accused is charged, or the facts the State intends to prove to establish it'."

40. The purpose of setting out the essential elements of an offence and the alleged misconduct of the accused that brings it within the ambit of the offence, is to safeguard an accused person's fair trial rights. The accused person must be armed with sufficient information to make a decision concerning the conduct of his/her defence.

41. An accused person cannot be expected to infer, without an express allegation of that nature, that his/her conduct caused harm/prejudice to the complainant.[6]

42. The state led the evidence of the appellant concerning how she felt after the incident to lend support for its contention that the complainant was unlawfully assaulted. The complainant's testimony about how she felt provides support for the impairment of dignity she suffered. Although the state can supplement the allegations in the charge sheet with evidence led at the trial, it cannot create a new offence by virtue of such evidence.

43. Turning to the offensive nature of the appellant's conduct, it is incumbent upon attorneys and legal practitioners generally, to develop a consciousness about Constitutional rights and obligations which they ought to apply in the course of practising their profession. It is necessary for legal practitioners to be alert to

[6] Essop v S [2014] ZAKZPHC 45

the imperative of upholding the dignity of others and to refrain from humiliating a colleague with sexist and undermining innuendos.

44. The appellant, in denying that he was guilty of a sexual offence, said the following: "*Inteendeel ek het in my lewe nog nooit iemand anders as 'n witvrou uitgeneem as dit, as ek iemand wou uitneem nie*." The appellant appears to be labouring under the misapprehension that sexual offences are committed by a man who takes a fancy to a woman. Sexual innuendos and gratuitous sexually offensive misconduct rarely arise from flirtation. They are made with a view to treating a person condescendingly and patronisingly. **Glick, Fiske et al** describe benevolent sexism as " *subjective positive attitudes that put women on a pedestal but reinforce their subordination*," while "*hostile sexism ascribes negative traits to women*"[7]

45. The Registrar ought to ensure that a copy of the record and judgment be sent to the Law Society of the Cape for consideration of appropriate measures to address the appellant's apparent misunderstanding of how sexism impacts upon the recipient of such treatment. It is important that the appellant appreciates that there is a need for him to bring his conduct in line with what is acceptable behaviour.

46. Turning to the conviction on *crimen injuria*, I am of the view that the conviction and its accompanying sentence, should be set aside.

[7] Beyond Prejudice as Simple Antipathy: Hostile & Benevolent Sexism Across Cultures by Glick, Fiske,et al- Journal of Personality and Social Psychology 2000 Vol 79 No, 5 763- 775

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R. ALLIE

BINNS-WARD J:

46. I agree that the appeal should be upheld and the conviction and sentence set aside.

47. The magistrate's reliance on section 270 of the CPA to bring in a conviction of crimen injuria as a form of competent verdict was fundamentally misdirected. According to its tenor, section 270 can apply only if the charge put to the accused person is not in respect of an offence referred to in the preceding sections of Chapter 26 of the Act. The main charge of 'sexual assault' put to the appellant is referred to in section 261(2), and the alternative charge of common assault in section 267. Both of those sections are in Chapter 26. The magistrate was therefore not empowered to invoke section 270. On that ground alone the conviction cannot be sustained.

48. In view of the narrow legal basis upon which the appeal must be upheld I have not found it necessary to consider or analyse the evidence adduced at the trial or the factual findings of the trial court. I, however, agree with my learned Colleague that allegations of the nature raised in this matter have implications bearing on the integrity and reputation of the attorneys' profession and that therefore, if it has not already been done, the matter should be independently investigated by the Law Society. I think it

appropriate in the circumstances not to express any view on the merits of the case so as not to influence the findings in any such investigation.

ORDER

1. The appeal is upheld and the conviction and sentence are set aside.

2. The Registrar is directed to send a copy of this judgment, together with a copy of the record on appeal, to the Director of the Cape Law Society.

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R. ALLIE

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A.G. BINNS-WARD