THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO: 493/05

LUZUKO KERR HOHO Appellant

and

THE STATE Respondent

Neutral citation: *Hoho v The State* (493/05) [2008] ZASCA 98 (17 September 2008)

Coram: STREICHER, HEHER, MLAMBO, CACHALIA JJA & KGOMO AJA
Heard: 15 AUGUST 2008
Corrected:
Delivered: 17 SEPTEMBER 2008
Summary: Criminal defamation – not abrogated by disuse – consonant with Constitution.

ORDER

On appeal from: High Court, Bisho (White J sitting as court of first instance)

The appeal is dismissed.

JUDGMENT

STREICHER JA (HEHER, MLAMBO, CACHALIA JJA and KGOMO AJA concurring)

[1] The Bisho High Court convicted the appellant on 22 of 23 charges of criminal defamation and sentenced him to three years' imprisonment suspended for five years and, in addition, to three years correctional supervision in terms of s 276(1)(h) of the Criminal Procedure Act 51 of 1977 ('the Act'). An application for leave to appeal against the conviction and the sentence was dismissed by the court a quo but granted by this court. In granting leave to appeal this court indicated that argument would be required 'on the question whether the crime of defamation is still extant, and if so whether it is consonant with the Constitution'. It also advised the parties that it would ensure that argument is presented on these issues independently of any argument that the appellant might wish to advance.

[2] The appellant was accused of having 'compiled, produced and/or published' several leaflets during the period 2001 to 2002 in which he defamed the Speaker of the Legislature of the Eastern Cape Province ('the Legislature'), the Premier of the Eastern Cape Province, members of the Legislature, the National Minister of Safety and Security, the National Deputy Minister of Home Affairs, the National Minister of Health, the Chief Whip of the African National Congress in the Legislature and a legal adviser to the Legislature. In these leaflets allegations of, amongst others, corruption, bribery, financial embezzlement, sexual impropriety, illegal abortion and fraud were made.

[3] At the relevant time the appellant was employed by the Legislature as a researcher. He pleaded not guilty to the charges and denied in his plea explanation that he was the author and publisher of the leaflets. He stated that any connection between him and the utterances published 'was being sought to be made' by members of the security police or members of the police services with whom he had certain difficulties.

[4] Although the appellant did not specially plead a defence of 'truth and public benefit' as is required by s 107 of the Act, in the event of such a defence being relied upon, the state called a number of witnesses to establish that the defamatory allegations were untrue. The state also called several witnesses to prove that the appellant was the author of the leaflets. The appellant testified that he was not the author of the leaflets and also called a number of witnesses. After a very lengthy trial (the record comprises 24 volumes consisting of 2946 pages), the court a quo found that the allegations made against the various complainants in respect of the 22 charges that the appellant had been convicted on, were defamatory and that the state had proved beyond reasonable doubt that the appellant was the author of the leaflets and that he had published or caused them to be published.

[5] Before us counsel for the appellant did not attack the findings of the court a quo but in effect abandoned the appeal save in so far as it related to the question raised by the order granting leave to appeal ie whether our law still recognised defamation as a crime. They advised us that they were of the view that should it be held that the crime of defamation is still extant and that it is consonant with the Constitution the conviction and sentence should stand and addressed us only in respect of these two issues.

Consequently these are the only issues that must be dealt with in this appeal.

[6] It should be stated at the outset that we are indebted to Mr G Marcus SC and Mr S Budlender who kindly agreed to appear as *amici curiae* in the matter and whose heads of argument and very fair and balanced oral submissions at the hearing of the appeal were of considerable assistance to us.

IS THE CRIME OF DEFAMATION STILL EXTANT**?**

[7] In *R v Japel* 1906 TS 108 the court had to decide whether 'ordinary verbal slander was punishable as a crime under Roman-Dutch law'.[1] Innes CJ with whom Smith and Mason JJ agreed, after having stated that there was no doubt that serious verbal defamation was so punishable and having referred to Voet 47.10.15 and Matthaeus *de Criminibus* 47.4.7, concluded 'that ordinary verbal slander is still a crime in this country, though the instances where prosecutions are instituted in respect of it are few and far between'.[2] In *R v Harrison and Dryburgh* 1922 AD 320 at 327 Innes CJ said:

'That defamation is by our law a crime admits of no doubt; it was so regarded by the Roman-Dutch authorities and has been repeatedly dealt with as such by South African Courts. But the practice has been to confine criminal proceedings to serious and aggravated cases.'

[8] Since 1922 very few convictions for criminal defamation have been reported. The last such reported conviction was in the case of *S v Revill* 1970 (3) SA 611 (C). The case concerned the defamation of a judge in contravention of s 1 of the Cape Libel Act 46 of 1882 which was repealed

[1] At 110-111.
[2] At 111.

in 1977.[3] The last reported conviction for criminal defamation in terms of the common law was *R v MacDonald* 1953 (1) SA 107 (T). It is probably for this reason that the question was raised in the order granting leave to appeal whether the crime of defamation was still extant ie has it not been abrogated by disuse? Mr Budlender who presented the argument of the *amici curiae* in respect of this issue submitted that there must have been, since these cases were decided, many instances of defamation in respect of which convictions could have been secured and that the absence of reported convictions indicated that the South African community no longer considered defamation to be a crime.

[9] The doctrine that law may be abrogated by disuse is well established in our law.[4] The basis of the doctrine is the tacit repeal 'through disuse by silent consent of the whole community'.[5] It is therefore necessary to consider whether it can be said that the South African community tacitly consented that defamation should no longer constitute a criminal offence.

[10] The problem with Mr Budlender's submission based on the absence of reported convictions for a long period of time, is that it is unlikely that prosecutions would, in the absence of special circumstances, have been instituted in the high courts. Regional courts have at all relevant times had jurisdiction to impose substantial periods of imprisonment. At the moment they may impose sentences of up to 15 years' imprisonment.[6] In these circumstances, if there were prosecutions for defamation, they are more likely to have been instituted in the lower courts and the judgments of the lower courts are not reported in the law reports. The absence of reported

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[3] Section 1 of the Pre-Union Statute Law Revision Act 43 of 1977.
[4] *Green v Fitzgerald and others* 1914 AD 88 at 111; *R v Chipo* 1953 (4) SA 573 (A) at 578-579; and *R v Sibiya* 1955 (4) SA 247 (A) at 265D-F.
[5] *Green v Fitzgerald supra* at 110; and *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* 1974 (1) SA 747 (A) at 771G-H.
[6] Section 92(1) of the Magistrates' Courts Act 32 of 1944.

convictions in the law reports can therefore not be taken as evidence of tacit consent that defamation should no longer constitute a criminal offence.

[11] In any event, although there have not been reported convictions for defamation since *Revill* there have been reported prosecutions. See in this regard *S v Gibson* 1979 (4) SA 115 (D & CLD) at 140G-151A, *S v Bresler and another* 2002 (4) SA 524 (C); and *S v Moila* 2006 (1) SA 330 (T). In *Moila* and *Bresler* it was not necessary for the court to consider the defamation charge as the charge was in the alternative to a contempt of court charge, which the court found to have been proved. In *Gibson* the court did consider the defamation charge and acquitted the accused. The basis of the doctrine of abrogation being a supposed tacit repeal 'through disuse by silent consent of the whole community', not only convictions but also prosecutions are relevant in determining whether there had been such a tacit repeal. See in this regard *Green v Fitzgerald*[7] where the fact that there had been no criminal prosecutions for adultery for 85 years was a factor that weighed with the court in finding that adultery as a crime had been abrogated by disuse. Unsuccessful prosecutions can, however, be no more than a factor to be taken into account. The unsuccessful attempt to secure a conviction for defamation by a prosecutor, who may be uncertain as to whether the crime still exists or who may not even have considered the question, can hardly constitute conclusive proof of the attitude of the community.

[12] A more reliable indication of the attitude of the community is to be found in the fact that the then Minister of Internal Affairs, in August 1982, requested the South African Law Commission 'to investigate the possibility of extending criminal defamation to include the publication of untruths

[7] Above at 112.

concerning a person in public, and group defamation'. The request arose out of a recommendation by a Parliamentary Select Committee in respect of a proposal by a Cabinet Committee that the Electoral Act 45 of 1979 be amended to make the publication of false or defamatory allegations about an election candidate punishable.[8] The Parliamentary Select Committee would seem not to have considered criminal defamation to have been abrogated by disuse. The Commission reported that it investigated the matter and that more than 60 persons and bodies responded to a questionnaire prepared by it. The investigation did not, however, reveal any need for the proposed amendment of the law and the opinion poll showed a substantial majority feeling against it.[9] It thus recommended 'that the legal position regarding criminal defamation be left unchanged'.[10] Of even more importance to the present enquiry is the fact that notwithstanding the investigation there is no suggestion in the report that criminal defamation had by 1982 been abrogated by disuse.

[13] Notwithstanding the Law Commission's report, the extension of the crime of criminal defamation was subsequently introduced by the Legislature in terms of the Electoral Act 73 of 1998. Schedule 2 of that Act contains an Electoral Code of Conduct which provides in para 9(1)(b) thereof that no registered party or candidate may publish false or defamatory allegations in connection with an election in respect of a party, its candidates, representatives or members or a candidate or that candidate's representatives. In terms of s 94 of that Act no person or party bound by the Code may contravene a provision of the Code and in terms of s 97 such a contravention constitutes an offence.

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[8] South African Law Commission Annual Report 1983 p 15.
[9] Op cit p 16.
[10] Loc cit.

[14] I have not been able to find and we have not been referred to any suggestion by an academic or anybody else, before this case, that criminal defamation has been abrogated by disuse. The text books on criminal law that I consulted contain a section dealing with the crime without any suggestion that it has been abrogated by disuse.[11] Even more telling is the fact that it is not suggested by those academics who are in favour of the abolition of the crime. They would, because of that attitude, certainly have raised the possibility that the crime had been abrogated, had they considered that to be a possibility.[12]

[15] In the light of the foregoing it cannot be said that criminal defamation has been repealed as a crime by silent consent of the whole community.

IS THE CRIMINALISATION OF DEFAMATION CONSONANT WITH THE CONSTITUTION?

[16] Criminal defamation is defined by JRL Milton as the unlawful and intentional publication of matter concerning another which tends to injure his reputation.[13] But he then says that although not authoritatively decided, criminal defamation should be restricted to serious cases.[14] The inclusion of the additional requirement that the injury to reputation should be serious is supported by CR Snyman[15] but not by John van der Berg (although he is in favour of the abolition of the crime)[16] and F F W van Oosten.[17]

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[11] JRL Milton *South African Criminal Law and Procedure* Vol ll *Common-Law Crimes* 3 ed p 520-535; and CR Snyman *Criminal Law* 5 ed p 475-477; and Jonathan Burchell *Principles of Criminal Law* 3 ed p 741.

[12] JRL Milton loc cit; CR Snyman loc cit; Jonathan M Burchell *The Law of Defamation in South Africa* p 332-333; and John van der Berg 'Should There be a Crime of Defamation' (1989) 106 *SALJ* p 276.

[13] JRL Milton op cit 520. See also Jonathan Burchell *Principles of Criminal Law* 3 ed p 741.

[14] JRL Milton op cit 531.

[15] CR Snyman op cit 477.

[16] John van der Berg 'Is gravity really an element of *crimen injuria* and criminal defamation in our law?'(1988) *THRHR* 54 p 72.

[17] FFW van Oosten 'Seriousness, Defamation and Criminal Liability' (1978) 95 *SALJ* p 505.

[17] I referred above to the statement by Innes CJ in *R v Harrison and Dryburgh* that 'the practice has been to confine criminal proceedings to serious and aggravated cases'. It is implicit in this statement that Innes CJ did not consider seriousness to be an element of criminal defamation. In *R v Fuleza* 1951 (1) SA 519 (A) the court had to determine whether slander, or *injuria verbis*, was a crime in the Colony of the Cape of Good Hope as at 10 June 1891. Van den Heever JA examined the Roman Dutch authorities, referred to Voet 47.10.15 who says 'all injuries, whether grave or slight, may be prosecuted criminally'[18] and concluded, in relation to the question whether gravity was an element of the offence of criminal defamation, that 'it is abundantly clear therefore that the apparent conflict between the Roman-Dutch authorities relates to procedure and policy in regard to prosecution not to the elements of the offence'.[19] In respect of Van Leeuwen (*Romeinse Hollandse Reg*, 4.37.1 *in fin*) who 'avers that a criminal prosecution does not lie in respect of oral defamation "unless it is an uncommon defamatory statement which affects the commonwealth because of its results"' Van den Heever JA said:

'The distinction, if it relates to the definition of the offence and not to policy in regard to its prosecution, seems to me arbitrary, variable and uncertain. It is as incapable of practical application as the Byzantine degrees of *culpa*, descriptions of which read well, but which no one has been able to apply to practical affairs and which have now generally been discarded.'[20]

[18] The other members of the bench in *Fuleza* were Hoexter JA and Fagan JA. Hoexter JA found it unnecessary to express a view as to whether the gravity of the defamation was an element of the offence.[21] Fagan JA, having stated that he wished to guard himself against a finding which could

[18] At 525G-H.
[19] At 526E-F.
[20] At 525E-G.
[21] At 529F-G.

encourage prosecutions for less serious cases of slander, accepted the statement by Innes CJ 'that the practice has been to confine criminal proceedings to serious and aggravated cases'. But he left open the question 'whether this limitation is merely a matter of policy depending on the decision of the public prosecutor in each individual case in which a complaint is lodged with him, or whether the practice has in the course of time hardened into a legal rule which should also be applied by a court trying the criminal charge'. He conceded that it may be difficult to draw a line, for the purpose of applying this limitation as a legal principle, between cases that are serious and those that are not.[22] It follows that he agreed with Van Heerden JA that the apparent conflict between the Roman-Dutch authorities relates to procedure and policy in regard to prosecution not to the elements of the offence.

[19] In *R v MacDonald*[23] the accused had been convicted of defamation and sentenced to a fine of £10. On appeal the court did not consider the defamation in question to be an aggravated defamation but concluded that the weight of modern authority precluded it from deciding that a court had a discretion as to whether to convict according to the seriousness of the offence.[24]

[20] Milton submits that the Roman-Dutch (and the pre-1951 South African) position is sufficiently equivocal for our courts to decide this matter on considerations of policy without worrying about problems of desuetude.[25] According to him a third group of Roman-Dutch jurists 'actually qualifies the definition of criminal defamation by requiring "an extraordinary case of defamation, affecting the common weal in its

[22] At 532E-G.
[23] 1953 (1) SA 107 (T).
[24] At 110G-H.
[25] JRL Milton op cit p 531.

results"'.[26] Burchell, on the other hand, agrees with Van den Heever JA that the Roman-Dutch writers fall into two groups, the one holding that the criminal remedy lay whether the injury was serious or slight and the other, apparently accepting that view, holding that for policy reasons only serious cases should be prosecuted. According to him Van Leeuwen and Van der Keessel, who, according to Milton fell into the third group, would 'appear to be commenting on the fact that prosecutors do not prosecute for slight, as opposed to serious, injuries'.[27] According to Van der Berg the correct interpretation of the Roman-Dutch authors 'seems to be that non-serious *iniuriae* were regarded as crimes, but were, as a matter of policy, infrequently prosecuted.[28] Van Oosten rejects seriousness as a requirement for criminal defamation and states that the view that it is a requirement leads to uncertainties, anomalies, inconsistencies and confusion in regard to criminal liability.[29]

[21] In the light of these authorities I am not persuaded that the authoritative analysis of the law by Van den Heever JA in *Fuleza* is wrong and that a degree of seriousness was an element of the crime of defamation in Roman-Dutch law or that it is an element of criminal defamation in our law. I am also not aware of any evidence that the practice of confining criminal proceedings for defamation to serious and aggravated cases has hardened into a legal rule, being the possibility mooted by Fagan JA in *Fuleza.* In the case of a common assault seriousness is not an element of the offence (that is not to say that the *de minimis* rule does not apply in cases where the offence is so trivial that a court should not take notice

[26] Op cit p 529.
[27] Jonathan M Burchell *The Law of Defamation in South Africa* p 326.
[28] Van der Berg 'Is gravity really an element of *crimen injuria* and criminal defamation in our law?' (1988) *THRHR* 54 p 59.
[29] FFW van Oosten op cit p 507-508 and 512-513.

thereof).[30] I can see no reason why the position should be different in the case of an injury to a personality right such as a person's reputation.

[22] It would seem to be accepted that seriousness is a requirement for the crime of *crimen injuria*[31] but it is not clear what the test for seriousness is. In this regard I agree with Thirion J that '[t]he test requiring the *injuria* to be "serious", in so far as it can be called a test at all, is so nebulous as to lead to arbitrariness in its application'. There is in my view no reason to extend this requirement, accepting that it is a requirement in the case of *crimen injuria*, to criminal defamation. There has been no suggestion that the courts' valuable time has unduly been taken up by serious criminal defamation cases, let alone non-serious ones. Should the prosecuting authority oblige and prosecute for non-serious defamation, which seems to me to be highly unlikely, the fact that the defamation is not serious would be reflected in the sentence. In trivial cases it may be found that the *de minimis* rule applies.

[23] I, therefore, conclude that the crime of defamation consists of the unlawful and intentional publication of matter concerning another which tends to injure his reputation.

[24] In regard to the element of unlawfulness it has long been recognized that if defamatory matter is true and published for the public benefit, or constitutes fair comment or is published on a privileged occasion, the publication is not unlawful. But those are not the only circumstances that would render the publication of defamatory matter lawful. In *National Media Ltd and others v Bogoshi* 1998 (4) SA 1196 (SCA) this court had to

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[30] *S v Kgogong* 1980 (3) SA 600 (A) 603G-604A; and *S v A and another* 1993 (1) SACR 600 (A) at 607 d-f.

[31] *S v Bugwandeen* 1987 (1) SA 787 (N) at 794D-796E; John van der Berg 'Is gravity really an element of crimen iniuria and criminal defamation in our law?'(1988) *THRHR* p 54.

consider whether the publication by the press of false defamatory statements may in appropriate circumstances be lawful. In his judgment, with which all the members of the court agreed, Hefer JA said that the three mentioned defences do not constitute a *numerus clausus* of defences and added:[32]

'In our law the lawfulness of a harmful act or omission is determined by the application of a general criterion of reasonableness based on considerations of fairness, morality, policy and the Court's perception of the legal convictions of the community.'

Hefer JA then, after having referred to the competing rights, namely the right to reputation and the right to freedom of expression, the way in which these two interests have been weighed in this country in the past and the way the matter has been resolved elsewhere, concluded 'that the publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time'.[33]

[25] In *Q v Shaw* 3 EDC 323 at 328 the court held that the onus in respect of a plea of justification rests on the accused. That statement does not, however, accord with the fundamental principle of our common law that the State has to prove all the elements of an offence. The common law recognised only two exceptions to that general principle namely where an accused raised a defence of insanity and where a statute created an exception (*R v Ndhlovu* 1945 AD 369 at 380-381 and 386-387). In the absence of any statutory exception the fundamental principle applies in the case of criminal defamation.[34] This fundamental principle of the common law has now been entrenched in s 35(3)(h) of the Constitution which provides that every accused person has a right to a fair trial, which includes

[32] At 1204D-E.
[33] At 1212G-H.
[34] See *Worme and another v Commissioner of Police of Grenada* [2004] UKPC 8 para 24 where the Privy Council came to the same conclusion.

the right to be presumed innocent, to remain silent and not to testify during the proceedings.[35]

[26] It follows that the state must prove the unlawful and intentional publication of defamatory matter. Intentional publication also requires proof that the accused knew that he was acting unlawfully or that he knew that he might possibly be acting unlawfully.[36] As in any other criminal case the degree of proof required is proof beyond reasonable doubt.[37] It does not follow that the state has to negative merely hypothetical possible defences.[38] It would be necessary, for example, for an accused, whose defence is that the alleged defamatory allegations were true and made for the public benefit, to plead that defence as is required by s 107 of the Act. Precisely what circumstances would require the state to negative other defences will depend on the particular circumstances and will be left for decision when the need to do so arises.

[27] Having determined the elements of the crime of defamation and that those elements are to be proved by the state beyond reasonable doubt I shall now proceed to deal with the question whether the crime is consonant with the Constitution.

[28] In terms of s 16 of the Constitution everyone has the freedom to receive and impart information. The section reads:

'(1) Everyone has the right to freedom of expression, which includes –

(a) freedom of the press and other media;

(b) freedom to receive or impart information or ideas;

(c) freedom of artistic creativity; and

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[35] *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC) para 15.

[36] *S v De Blom* 1977 (3) SA 513 (A); *S v Hlomza* 1987 (1) SA 25 (A) at 31H-32G; and see *Maisel v Van Naeren* 1960 (4) SA 836 (C) at 840 in respect of the requirement of *animus injuriandi* in the civil context.

[37] *R v Ndhlovu* 1945 AD 369 at 386-387.

[38] Op cit at 381; see also *S v De Blom* above at 532E-H.

(d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to –

(a) propaganda for war;

(b) incitement of imminent violence; or

(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.'

[29] The importance of the right to freedom of expression has often been stressed by our courts.[39] Suppression of available information and of ideas can only be detrimental to the decision-making process of individuals, corporations and governments. It may lead to the wrong government being elected, the wrong policies being adopted, the wrong people being appointed, corruption, dishonesty and incompetence not being exposed, wrong investments being made and a multitude of other undesirable consequences. It is for this reason that it has been said 'that freedom of expression constitutes one of the essential foundations of a democratic society and is one of the basic conditions for its progress and the development of man'.[40] Although false information will not benefit a society, democratic or otherwise, the right to freedom of expression is not restricted to correct or truthful information because errors are bound to be made from time to time and to suppress the publication of erroneous statements on pain of penalty would of necessity have a stifling effect on the free flow of information.[41] 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.[42]

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[39] *National Media Ltd and others v Bogoshi* 1998 (4) SA 1196 (SCA) 1207I-1208G; *Khumalo and others v Holomisa* 2002 (5) SA 401 (CC) para 21-25; and *Mthembi-Mahanyele v Mail & Guardian Ltd and another* 2004 (6) SA 329 (SCA) para 65.

[40] *Bogoshi* at 1208.

[41] *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) at 616I-J; and *National Media Ltd and others v Bogoshi* at 1210G-I.

[42] *Khumalo and others v Holomisa* para 25.

[30] Human dignity is stated in s 1 of the Constitution to be a foundational value of our democratic state and s 10 of the Constitution provides:

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

'The value of human dignity in our Constitution . . . values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual'[43] ie an individual's reputation. In regard to the importance of protecting an individual's reputation Lord Nicholls of Birkenhead said in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 201:

'Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed choice, the electorate needs to be able to identify the good as well as the bad.'

[31] The law of defamation, both criminal and civil, is designed to protect the reputation of people. In doing so it clearly limits the right to freedom of expression. Such limitation can be consistent with the Constitution only if it can be said that 'an appropriate balance is struck between the protection of freedom of expression on the one hand, and the value of human dignity on the other'.[44] In *Khumalo* that was held to be the case in so far as the civil remedy for defamation is concerned.

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[43] Op cit at para 27.
[44] Op cit para 28.

[32] In regard to criminal defamation Burchell[45] poses the question whether a criminal sanction for defamatory words is too drastic a means of regulating free speech, especially when there is a relatively well developed civil-law remedy. Snyman[46] submits that our law will be no poorer if the crime is abolished. He bases his submission on the small number of prosecutions and the existence of a civil remedy. Milton[47] thinks that there is a strong and persuasive case for the decriminalisation of defamation and Van der Berg,[48] referring to the frequency of prosecutions, the limited redress which a victim may achieve through a criminal prosecution, the existence of a civil remedy and trends in other jurisdictions, says that the need for the crime of defamation has become highly suspect.

[33] A criminal sanction is indeed a more drastic remedy than the civil remedy but that disparity is counterbalanced by the fact that the requirements for succeeding in a criminal defamation matter are much more onerous than in a civil matter. In a civil action for defamation unlawfulness and *animus injuriandi* are presumed once the publication of defamatory material is admitted or proved[49] and the onus is on the defendant to prove whatever he relies upon in justification.[50] In the case of criminal defamation not only is there no presumption of unlawfulness or *animus injuriandi*, the state has to prove both elements and has to do so beyond reasonable doubt. Media defendants in a civil action have to go even further than proving absence of *animus injuriandi* - they have to prove absence of negligence;[51] whereas in a criminal matter they would escape liability if the state cannot prove that they knew that they were acting

[45] Jonathan M Burchell *The Law of Defamation in South Africa* p 325.
[46] CR Snyman *Criminal Law* 5 ed p 476.
[47] JRL Milton op cit p 520.
[48] John van der Berg 'Should there be a Crime of Defamation', (1989) 106 *SALJ* p 290.
[49] *National Media Ltd and others v Bogoshi* at 1202G-H.
[50] Op cit 1218D-F.
[51] Op cit 1215H-J.

unlawfully or that their actions might be unlawful. It is therefore substantially more difficult to secure a conviction on a charge of defamation than it is to succeed in a civil claim for defamation and although a criminal conviction and the sanction arising therefrom may be more severe than an order to pay damages the limitation of the right to freedom of expression is, in my view, not. In any event to expose a person to a criminal conviction if it is proved beyond reasonable doubt, not only that he acted unlawfully, ie without justification, but also that he knew that he was acting unlawfully in my view constitutes a reasonable and not too drastic a limitation on the right to freedom of expression.

[34] The onerous requirements in the case of criminal defamation are probably a reason for the paucity of prosecutions for defamation compared to civil defamation actions. Another reason is probably the fact that, in civil defamation actions, plaintiffs very seldom give evidence and thus avoid being exposed to cross-examination. In criminal cases on the other hand the complainant is not in control of the proceedings and would in most cases be called to give evidence specifically in order to prove that the relevant allegations are untrue.

[35] It does not follow that there is no need for the crime. Another reason for the paucity of prosecutions may be the effectiveness of the remedy in the sense that defamatory allegations are not published when it is known that they could be proved beyond reasonable doubt, to be untrue.[52] There have been cases in the past where complainants required the state to prosecute for defamation and there may well be such cases in the future. It is true that there is a civil remedy available for defamation but there is also a civil remedy available for common assault, yet nobody would suggest

[52] *Worme and another v Commissioner of Police of Grenada* [2004] UKPC 8 at 455E-F para 42; and *R v Lucas* [1998] SCR 439 para 55.

that there is for that reason no need for the crime of common assault. There is in my view no reason why the state should oblige and prosecute in the case of a complaint in respect of an injury to a person's physical integrity but not in the case of a complaint in respect of an injury to reputation, which may have more serious and lasting effects than a physical assault. In any event, the need for the crime in addition to the civil remedy is proved by the present case. The complainants in this case did not know who was responsible for the publication of the defamatory allegations and had to enrol the assistance of the police and the prosecuting authorities to prove that it was the appellant.

[36] For these reasons I am of the view that our crime of defamation is not inconsistent with the Constitution. Support for this finding is to be found in *Worme and another v Commissioner of Police of Grenada* [2004] UKPC 8 where the Privy Council had to decide whether the hindrance to freedom of speech under s 10(1) of the Grenada Constitution constituted by the statutory crime of intentional libel was reasonably justifiable in a democratic society.[53] It concluded that the offence was reasonably required to protect people's reputations and that it did not go further than was necessary to accomplish that objective.[54] In respect of the question whether the crime is justifiable in a democratic society it held:[55]

'Of course, some democratic societies get along without it. But that simply shows that its inclusion is not the hallmark of the criminal law of all such societies. In fact criminal libel, in one form or another, is to be found in the law of many democratic societies, such as England, Canada and Australia. It can accordingly be regarded as a justifiable part of the law of the democratic society in Grenada.'

[37] For these reasons the appeal is dismissed.

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[53] Para 41.
[54] Para 42.
[55] Para 43.

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P E STREICHER
JUDGE OF APPEAL

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