

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

CASE NO. 318/90

In the matter between

ANTHONY HOWARD ANSELL

Appellant

and

THE STATE

Respondent

Coram: NESTADT, F.H. GROSSKOPF JJA et HARMS AJA

Date heard: 20 September 1991

Date delivered: 27 September 1991

J U D G M E N T

HARMS AJA:

The appellant was found guilty of crimen injuria in the Durban Regional Court. The appeal against his conviction was dismissed by the Natal Provincial Division. Leave to appeal against the conviction was, however, granted by that court.

The case against the accused was that on 27 July 1988 and at the Esplanade parking garage he insulted and impaired the dignity of the complainant by exposing his penis, erecting it and masturbating in her presence. The complainant was at that stage a school girl in std 7 and 14 years of age. She described herself as a person of smaller build than the

average 14 year old girl.

Many of the surrounding facts are not in dispute. The appellant is the owner of a number of businesses in the central business district of Durban. He is involved with organised commerce and has a special interest in security; he attempted to spearhead an awareness and education campaign about the seriousness of shoplifting. He has strong views on the issue and in a magazine interview published shortly before the events that led up to the alleged crimen injuria, he expressed the following sentiments:

"Major stores have to prosecute because of the volume of goods taken from them. I understand that. In my case I like to try and save the youngsters from further disaster and act according to the circumstances. I will involve the parents if I think it's necessary. But if the kids are arrogant or cheeky, I will charge them then and there."

He went on to stress the importance of education in trying to combat shoplifting and said further:

"I am very concerned about the problem because the shoplifter of today is often the hardened criminal of tomorrow. I feel there is not enough education in schools regarding the seriousness of shoplifting. Most school-going shoplifters we catch don't even know that it's a criminal offence, which will give them a criminal record for life, and they don't realise that the courts don't play around with shoplifters."

On 15 June 1988 the complainant was caught shoplifting from the appellant's place of business. The appellant took her to his office and, in the presence of a female staff member, interviewed the complainant. The complainant was, in spite of her age, aggressive, and denied the allegations. She later confessed. The appellant took down her particulars and established, inter alia, her age, details of her school, that her parents were divorced, that her father lived in the then South-West Africa and that she had an elder sister who had behavioural problems due to truancy and some or other

dagga offence.

The complainant was then told to acknowledge, in writing, the theft. She was given a sermon on shoplifting and handed the said article to read. She was told that she would not be prosecuted. She also had to undertake to return to the appellant for a further interview during the period 18 July to 23 July 1988. The reason for the return visit was, according to the appellant, that such visits break down barriers and establish a friendly relationship between the shoplifter and the appellant so that no "hard feelings" remain.

The complainant did not return on the agreed date. The appellant then telephoned her at home and made an appointment for the fateful day. She honoured the appointment. After another discussion on shoplifting and the complainant's holidays the discussion took a strange turn towards (in complainant's words) "sex and rape". What

apparently happened was that the appellant enquired about the complainant's school work. She then mentioned that she was doing a project on a rapist who had been imprisoned for interfering with young girls on the Berea. The complainant had the relevant press clipping with her. Although the complainant stated initially that she did not know how the subject arose, there can be little doubt that it was raised under the circumstances sketched. It should be noted that the complainant had a lively interest in sex and the learned magistrate remarked correctly that she is not an innocent, ignorant young girl with little or no knowledge of sexual matters.

At the end of this meeting the appellant offered the complainant a lift home. They went to his motor vehicle which was parked at the Esplanade parking garage. It was approximately 16h00. It was there in the motor vehicle that the appellant, according to the complainant's version, committed the acts referred to above. It is, for purposes

of this judgment, not necessary to relate the discussion that took place in the car, or to colour the picture.

After the alleged injurious acts the appellant took complainant home. He mentioned the possibility of another return visit. She told her sister what had happened and a friend of the sister who is a policeman was informed. The matter then took its ordinary course.

The learned magistrate was aware of the fact that the prosecution relied on the evidence of a single witness and that the cautionary rules applicable to the evidence of children and of complainants in matters of a sexual nature should be borne in mind. It was argued before the court a quo (and again in this court) that the learned magistrate paid lip service to the cautionary rules. The court a quo dismissed this submission and found that the magistrate had subjected the complainant's evidence to an analysis which was in some respects unduly critical, that he had given due

consideration to the fact that her evidence was not unblemished and that he had found correctly that she was nevertheless a satisfactory witness. I agree with this assessment of the learned magistrate's judgment on this aspect of the case.

The appellant's evidence did not impress the learned magistrate because, in his view, aspects of his evidence were improbable. He did not comment on the appellant's demeanour as a witness. The court a quo pointed out that the unsatisfactory features found by the magistrate, each taken on its own, do not demonstrate the untruthfulness of the appellant's evidence but that the appellant's evidence had to be rejected as being improbable.

In assessing the evidence of the complainant it must be borne in mind that, in the words of Lewis AJA in R v J 1966 (1) SA 88 (SR AD) 91:

"---the reason for the special cautionary approach [in this type of case] is that, where there is no clear corroborative evidence to show that the offence in question has been committed, then one is faced with the danger that the whole episode complained of may have been a figment of the child's imagination."

The learned Judge proceeded to state (at 92) that:

"In the case of all females alleging sexual assaults, the need for similar caution, in the absence of corroboration, flows from the fact that such charges are easily laid and difficult for the accused to disprove, and a multiplicity of motives may exist for their being falsely laid. This has been recognised since time immemorial, and a classical example of such a false charge can be found in the Biblical story of Potiphar's wife and Joseph."

Concluding this issue, the learned Judge stated:

"The main purpose, therefore, of applying the cautionary rule in cases involving young children and in sexual cases generally, where the commission of the offence is not established by corroborative evidence, is to guard against the danger of invention."

Similar sentiments were expressed by Botha JA in S v

Balhuber (1987 (1) PH H22 (A); case 30/1985 dated 25

September 1986) and quoted with approval and applied in S v F 1989 (3) SA 847 (A). It was there pointed out that the risk of a false accusation may be present even though the motive may not be readily apparent, and that there is a wide variety of possible motives for invention and laying of false charges in these cases. It was said that the complexity of such motives and the difficulty of perceiving them lie at the very foundation of the cautionary rule. The following words of Botha JA appear to be apposite:

"The laying of a false charge, judged by objective standards, is an irrational act, but the intrinsic improbability of it is much attenuated in cases of sexual assault by the knowledge, gained from experience, that a variety of possible motives do induce complainants to act in that way."

Both the trial court and the court a quo did consider the question of motive. Both found that the complainant could not have had a motive to implicate the appellant falsely because she feared the possibility of a prosecution for shoplifting and had every reason to refrain from mentioning

the matter and thereby provoking her own prosecution.

The complainant did testify that, in spite of the appellant's assurance that he would not prosecute her, she feared that a prosecution could still follow. She also testified that when she arrived home after the event and had told her sister of what had happened, the sister wished to telephone the police and she then asked her sister not to telephone because she did not want to get into any trouble. The sister nevertheless telephoned the police and after having been assured that the appellant's undertaking not to prosecute was binding, the complainant decided to lay a charge. The complainant's sister did not corroborate the complainant on this aspect of the case. She merely testified that the complainant made the report and that she thereafter telephoned the police. In other words, what the trial court and the court a quo did was to rely on the complainant's own evidence to corroborate her evidence relating to the absence of a motive.

They did not err in so doing. The apparent discrepancy was not raised with the sister who, as a witness, tended to be taciturn. The complainant's evidence on this aspect was never challenged; it is also probable because, in spite of the appellant's undertaking not to prosecute, he had retained the confession and her particulars. Why, he could not explain satisfactorily. It was submitted that there is an equal and opposite probability that the complainant had made the allegation in order to pre-empt a prosecution by transforming herself from an offender to a victim. This supposition is not based upon any fact: it was not the complainant's evidence that she feared that a prosecution would follow. It could follow if she did not toe the line: she had to submit to further meetings; she had to behave; she may not be cheeky or arrogant.

I gave anxious consideration to the possibility of any other motive to implicate the appellant falsely. Some spring to

mind but they have no factual basis and require a conspiracy between the complainant and her sister. That possibility was not mooted with either witness or in argument. It follows that the trial court and the court a quo did not err in holding that the complainant had no motive to implicate the appellant falsely.

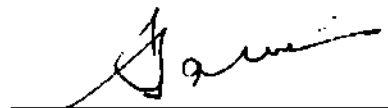
Much was made in the trial court and the court a quo of the appellant's so-called modus operandi with shoplifters. It would seem that they deduced from this modus operandi that the appellant used his position to force sexual advances upon female shoplifters. There is nothing untoward (as distinct from amateurish) in the modus operandi as set out in the magazine article quoted above. What does not appear from the article or his evidence is that it formed part of his scheme to obtain a confession from the shoplifter; nor does it appear that there was an insistence on a return visit. There was no evidence to justify the assumption of other improper behaviour. The fact of the matter is that

the appellant gave to the police, at their request, a list of other shoplifters who were subjected to his modus operandi and no evidence came to the fore to the effect that the appellant had misbehaved himself with any of those shoplifters.

I am of the view that the matter must be considered on the basis that the appellant did not, at the initial stage, have any ulterior designs on the complainant. However, his handling of the second interview is suspicious. He got involved in a lengthy discourse on aberrant sexual behaviour with a 14 year old girl who was known to him as a shoplifter. One would have expected that when she mentioned her school project he would have changed the subject. He did not. Her uncontested evidence is that he even told her what contraceptives were sold in his shop. It is probable that this lurid discussion aroused the appellant. He then decided to take her home and used the occasion to end the sex lecture with a demonstration.

To conclude, and without dealing with all the subsidiary arguments which were convincingly dealt with by the trial court and the court a quo, the appellant was properly convicted.

The appeal is dismissed.

A handwritten signature in dark ink, appearing to read 'Harms Aja', is written over a horizontal line.

HARMS AJA

NESTADT JA)

F.H GROSSKOPF) CONCUR