

38/92

CASE NO 458/91

IN THE SUPREME COURT OF SOUTH AFRICA
APPELLATE DIVISION

In the matter between:

CHARLES STEPHEN CALDECOTT

APPELLANT

and

THE STATE

RESPONDENT

CORAM: HOEXTER, VIVIER et NIENABER JJA

DATE HEARD: MARCH 18, 1993

DATE DELIVERED: MARCH 18, 1993

TRANSCRIPT OF REASONS ORALLY DELIVERED IN OPEN COURT ON THURSDAY 18 MARCH 1993, BY NIENABER JA AND CONCURRED IN BY HOEXTER AND VIVIER JJA.

NIENABER JA:

The appellant was convicted in the regional court at Camperdown on a charge of indecently assaulting one Thandi Biyase ("the complainant") on 10 February 1989. He was sentenced to four years imprisonment of which two years was suspended on appropriate conditions. His appeal to the Natal Provincial Division against his conviction failed. With leave of the court a quo he now appeals to this court.

The appellant, at the time, was a white police constable, 19 years old. On the day in question he was accompanied by Sgt Otto. They went to a compound near the Umgeni Water Board in Hammarsdale, Natal, where the complainant, also 19 years old, and another woman, Nellie Goge, resided with their respective boyfriends. This was at about noon. The men were absent, they were at work. According to the complainant she was lying in her room. Nellie Goge was in the interleading room next to hers.

There was a loud knock on her door. She enquired who it was. The reply came: "We are the SAP". She and Nellie, who had joined her in her room, were reluctant to open the door for fear that these were "isegebengus" but eventually it was pushed open and the appellant entered. Otto remained outside. There is a dispute as to whether the appellant forced Nellie Goge to leave the room. The fact is that she did so. The appellant remained behind with the complainant and closed the door. It is common cause that the complainant thereafter performed an act of fellatio on the appellant. She says he forced her to do so by threatening her with his service revolver. He says she made advances to him and seduced him.

The regional magistrate believed the complainant and disbelieved the appellant. He made strong credibility findings in favour of the complainant and against the appellant. These findings were endorsed when the matter came before McCall J and Fabricius AJ in the Natal

Provincial Division. In this court, as in the court a quo, counsel for the appellant argued that the regional magistrate erred in his approach, in his reasoning, in his assessment of the evidence and in his conclusion. It was submitted that the appellant's version, if properly approached, was reasonably possibly true.

We do not agree. Admittedly there were some discrepancies in the evidence of the complainant but these were, with one possible exception, relatively minor ones and explicable on the basis that she was so distressed by the incident and cowed into submission as not to be alert to the precise sequence of events. The one possible exception is her evidence, elicited under cross-examination, that she screamed when the appellant closed the door. Her explanation of why she did not mention it in her evidence-in-chief is not particularly convincing. Nor did Otto or, what is perhaps more to the point, Nellie Goge, hear a scream. So, either the scream

was more of a wail or a whimper than a howl, or the complainant invented it in order to bolster her evidence that she was not consenting to the appellant's advances. Even on the latter hypothesis it does not follow that the remainder of her evidence is to be rejected. Both the magistrate and the court a quo took account of these discrepancies. Like them I am of the view that these do not detract from her general credibility. Her version is supported, in particular, by the monumental improbability that, on the appellant's version, the complainant, on her own initiative, without encouragement from him, for no apparent or ulterior reason, would have seduced him to submit to oral sex, in the shortest space of time, when his colleague and her friend were standing outside the room, and when her boyfriend was about to return for lunch. Her version is furthermore largely corroborated by Nellie Goge and supported by the fact that the incident was immediately

reported to her boyfriend's employer and the police where a charge of indecent assault was laid against the appellant. It is no answer to suggest that she falsely incriminated the appellant in order to cover up her seduction of him in the face of possible reprisals from her boyfriend. That does not meet the fundamental improbability of the incident taking place in the manner described by the appellant.

Aside from the improbability mentioned, the appellant's evidence was singularly unimpressive. His reason for proceeding to the compound and his explanation for manoeuvring Nellie Goge out of the room, and for closing the door, in order to be alone with the complainant, were far from convincing. There can be only one cogent explanation for what had happened: that the appellant sought out the complainant with a view to a sexual encounter; that he abused his position as a policeman and that he thereafter threatened and forced

her to commit the act in question. It is indisputable that it was of an indecent nature. In my view the regional magistrate committed no misdirections in convicting the appellant. Nor did the court a quo do so in dismissing his appeal. This appeal must likewise and for the same basic reason be dismissed. It is so ordered.



P. M. Nienaber
Judge of Appeal

Hoexter JA)

CONCURRED

Vivier JA)