IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

BASIL SLOMAN ..... Appellant

and

THE STATE ..... Respondent

CORAM: RUMPFF, C.J., RABIE, J.A., JOUBERT, A.J.A.

HEARD: 16.5.1977. DELIVERED: 1 June 1977

J U D G M E N T

RUMPFF, C.J. :

In March 1975 the appellant was convicted by a regional Magistrate at Johannesburg on three counts under Act 23 of 1957 in that he had committed immoral or indecent acts with 3 girls each 10 years old. He was also convicted under the provisions of Act 56 of 1963 in that he had taken photographs of one of the girls from an angle below a table showing her sitting with her legs apart and her one hand pulling away her

pants/.....

pants thus showing her private parts. He was sentenced to a fine of R300 in respect of the charge under the 1963 Act and to 18 months imprisonment in respect of each of the three other counts, 12 months being suspended, subject to a certain condition, on each of the three counts. The effective sentence is therefore 18 months imprisonment. The appellant's appeal to the Transvaal Provincial Division failed and he is now before us, with leave of this Court. Appellant who was represented by counsel originally pleaded not guilty to all counts. Appellant was at the time a school teacher at a primary school and according to the first witness who was a scholar in appellant's class she was asked by appellant to sit at his desk because she had previously broken her arm. Her evidence reads as follows:

> "I want to show you a photo, I am going to mark that as Exhibit E, will you have a look at it and tell us whether that is a photo of a class room? --- Yes, this is the way we were sitting. Facing with. --- With the blackboard in the front.
> COURT: Was Mr. Sloman's desk at the back of the class? ---- Yes.
> So he was also facing the blackboard? --- Yes.
> S.P. Now Michelle, you said your arm was broken and he asked you to come and sit at his desk? --- Yes.
> On the spot which you indicated and marked on that photo. Now I want you to tell us everything

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that happened from then on between you and Mr. Sloman? --- Well, I used to sit at his desk but it was in the winter and he said his feet used to get cold.

Yes? --- And then he put brown paper before the board in front of the desk and then afterwards ..... (speaking very softly).

A sort of a division? --- Yes.

As on the photo, Exhibit D. --- And I used to come and sit there every day when my arm was broken and afterwards too.

For how long was that? --- That was about for over six months, over six weeks.

Yes? --- I used to sit there and I didn't do all my work. You know this was when the students came and then I had to sit by my desk and then when the students left I went back to where I sat.

The students you are referring to, is that now teachers at college and staying there for about two or three weeks after the holidays? --- Yes.

Yes? --- So then after the students left I used to go by his desk again and that is when all this started."

She then told the trial court how appellant used to put his hand under the desk and pat her private parts and how he made her pat his private parts over his pants. This thing happened a few times a day. She also described the following to have happened:

"And/.....

„And then one day, he used to bring a camera to school, and then he took a photo of the class and then he took a photograph of my private part.

How did this happen, I want you to tell us please in detail how he did that and where? --- It was in the classroom under the desk and he stuck the camera under the desk and made me pull my pants open to see my private parts and he took a few photographs.

Can you say how many? --- I would say about five.

Yes, carry on? --- And then the day after he brought the negatives to school and I saw that he had printed them and he kept them ... them in his briefcase.

Did he show it to you? --- Yes.

The negatives? --- The negatives and the photographs.

The photographs of your private parts? --- Yes."

This witness also described how on one occasion a fluid from appellant's private parts came on to the floor which he afterwards wiped up. Although this incident was not further investigated it seems to indicate that appellant had his penis out of his pants at the time. The witness also stated that appellant sometimes used to bring his hand „into my body and sometimes he used to pat my body". The witness knew that he was doing the same sort of thing with two other girls. Appellant

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used to give this witness examination papers in advance, to look up the answers, and she used to show these papers to a few of her friends. She also showed one paper to her mother and when the mother of a friend to whom she also had shown a paper had rung her mother, the whole smutty business came out. Appellant had asked the witness to keep quiet about the whole thing.

After this witness had given evidence the Court adjourned by consent and when it resumed on another day counsel for appellant announced that he would tender a plea of guilty on the three charges in respect of the girls. No plea of guilty was tendered on the other count. When the other girls were called to give evidence, details were not examined for obvious purposes. The effect of the evidence of the second girl was that appellant committed the same act with her as he did with the first witness at least on one occasion. The third girl also told the trial court how on a number of occasions appellant had touched her private parts. Evidence was led by a police officer who found the photos of the first witness in the appellant's

briefcase. The negatives were found in the accused's house and the appellant explained to the police officer that he had taken the photos by accident. Appellant, who was an amateur photographer, had developed the negatives himself. After some evidence about the ages of the children the State closed its case. The appellant did not give evidence under oath. Instead a fully-qualified and experienced psychiatrist was called to explain the personality problems of the appellant. Obviously what the appellant did was the result of a character defect, an abnormal interest in small girls, which unfortunately, is not an extremely rare phenomenon. The layman would call him a typical dirty old man because in fact the appellant was already 55 years old. Dr. Shubitz, the psychiatrist, explained that it took some time to establish a therapeutic relationship with the appellant but that this was eventually accomplished. I shall try and summarise the facts Dr. Shubitz relied upon and his opinion based on those facts. Appellant was born in the United Kingdom and his father died at a relatively young age. He was the youngest of three children

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and was dominated by an "aggressive and competent" mother. He grew up as an unsecure person. He is an undersized person and was solitary and timid. He left school at 14 because he did not do very well. He could not cope with various jobs. He returned to school for a short time when he was 16 and was then conscripted into the army where he became a wireless operator in the Royal Air Force. He was discharged after a few years because of L.M.F. (Lower Moral Fibre), in plain words cowardice, and as "suffering from an acute anxiety state with claustrophobia". Dr. Shubitz was in possession of the actual document from the Royal Air Force in which his discharge is thus described. Appellant was married in 1945 and in 1949 he and his wife emigrated to South Africa. Here, in South Africa, his wife urged appellant to study. He matriculated in 1957 and went to a teachers training college in the evenings and after 2½ years qualified as a teacher with distinction. The home life of appellant and his wife was complicated in that they have a son who at the time of the trial in March 1975 was 19 years old and who is mentally retarded. In addition there was the following

said about appellant's marriage:

> "the kind of marriage that this man has and as so often happens, your Worship, undersized, frightened and incompetent little men often marry very strong, tough, powerful females as in the same way as he saw his mother as when he was a little boy and this is what he did. I found her to be a very determined person. She was a demanding person and she was a controlling person."

Dr. Shubitz also said the following:

> "Now from the sexual point of view he has never been a competent person and for a long time in the early stages of the marriage he suffered a good deal of difficulty. He just could not cope. I don't think it is necessary for me to go into all the details. And as the years went by things between them became more and more of a problem from a sexual point of view and eventually it all but ceased. There was very little going on between them. He failed to make advances to her, whatever advances were made by her."

Dr. Shubitz also referred to a sense of depression as being one of appellant's psychological problems, indicating that he really suffered from that state of mind since childhood and more so after he was discharged from the army. It developed over the years and became worse and the witness described it as follows:

"I see this all building up to a kind of a climax and at this stage where an adult male cannot function as an adult male, unfortunately it happens that he reverts to what one might call an infantile form of behaviour, he becomes a little boy again instead being a grown man and this is regarded as a sickness and this is what, as I say, led to infantile forms of sexual gratification and he finally indulged in the described pedofilac activity, pedofilac really meaning involvement with children, having things to do with children. Activities pertaining to relationship with children. Now it seems that it was only in the classroom where he felt fairly happy and contented because it was only at this kind of level of relationship ... relationship with children where he could be big and strong and the children are weak and helpless, whereas in the adult world he felt weak and helpless and everybody else to him appeared to be big and strong, which they in fact were."

The charge sheet alleged the offences as having being committed over a period between August and November 1974, although no specific dates were mentioned by the witnesses. According to Dr. Shubitz, who had prepared a report to which he referred during his evidence, it was at this time, September 1974, that a niece of appellant came to stay with them at the invitation of appellant and his wife. The presence of the niece Dr. Shubitz regarded as a precipitatory factor of what happened. He said the wife became resentful and jealous and that the marriage which had been very

shaky/.....

shaky and very precarious for a long time, principally because of the sexual difficulties seemed to be thrown off balance. In the absence of any previous convictions proved against the appellant, this explanation of appellant's conduct might of course reasonably be correct.

After referring to a certain standardized and accepted test, the Thermatic Apperception Test (T.A.T.), which confirmed the clinical facts which Dr. Shubitz had mentioned, the witness gave his opinion as to a sentence of imprisonment in this particular case. Dr. Shubitz said, inter alia:

> "I go on to say, your Worship, that although the mentally ill is not certifiable in terms of the Mental Disorders Act, and then I talk about, with respect, my feelings about this man's future and I say that sending an individual like this to prison would because of his personality structure, the claustrophobia particularly would cause him to experience extreme anxiety and panic and he may well respond with suicide or gestures and I must say that when I first met him this was uppermost in his mind and I have in fact whilst undertaking the psychiatric investigation, I have been treating him, I have put him onto anti-depressive medication and we have been talking about his life and his problems and I think in a kind of a way I could say that treatment has already started. And in

any case, imprisonment, in my opinion, would not act as a deterrent because it would not remove any of the deepseat psychological problems from which he suffers and I recommend, with respect to the Court, that he be allowed to benefit by extensive and prolonged psychiatric treatment which would involve periodic visits to my consulting rooms over at least a period of a year and that would be at least once a week. On the last page I say it is confident that if he were allowed to undergo the benefit of such treatment and he is strongly motivated in obtaining assistance, that he would be restored to society eventually as a useful citizen. It is clear that he is as a result of his illness unfit to be in the vicinity of or be employed in any situation where he would come into contact with young children and I have accordingly issued a certificate to the Transvaal Education Department recommending that he is permanently unfit to continue with his normal duties. He is thus effectively debarred from teaching ever again. It is therefore, with respect, recommended to the Court that he be allowed to have this treatment and as is customarily recommended by the Court, periodic reports regarding his progress and conduct will be made available by me. That is my report, your Worship."

As to the position of the wife, Dr. Shubitz said:

"It would be terribly important for her to realise what she has been, what her role in this whole setup has been. At first I don't think she had any inkling at all of how her conduct had influenced his behaviour. There is of course no blame attached to her but in today's kind of psychiatric treatment we would like to treat the family, not only the patient and she will be a part of the treatment. Her behaviour will have to modify

herself/....

> herself and she will have to look at her husband in a different kind of light and this of course is very helpful, particularly in view of the fact that he can now be a little boy which he is instead of being expected to behave like a grown male. So the wife will be part of what we call the therapeutic process."

In cross-examination Dr. Shubitz explained that the appellant would not develop claustrophobia in the film developing room at his house because he could leave it at any time and his house was a place where he psychologically felt safe. In the classroom he did not feel trapped because he could leave the room at any time and also because he had control over the situation. He also said:

> "It is a question of whether you feel trapped in a situation or not trapped. If you feel safe in a situation you do not suffer the anxiety. But as soon as the situation is one in which you become trapped, this is when there is the tremendous panic and one has seen these people faint from panic."

The magistrate quite rightly put a number of questions to Dr. Shubitz concerning the effect of appellant's conduct on the three little girls. His answer was, inter alia:

"I think that if the situation is managed properly and that is an investigation into the current emotional state of the child, if the situation is ventilated, talked about with the children, that if the homes are satisfactory homes and secure homes and loving homes and homes in which the child need not feel guilty or feel that the child has done something terribly wrong, then the outlook is extremely good because children have a natural capacity for recovery from all sorts of terrible things that might happen to them."

And also:

"So if there is no intervention, what is the term you use, inhibition or traumatic scars can be left in the sub-conscious that could have serious repercussions in later life?-- Yes, if it is left in the sub-conscious, that is why I say if it is talked about, the thing is discussed it is much better and the children are aware why the thing is being talked about and the parents co-operate in the whole scheme of things, then the outlook is extremely good. In other words, it never goes into the sub-conscious, it remains there and the child knows it, it is accepted, the family understands, the social welfare worker understands, it never goes into the subconscious. In other words, it is faced by the entire family as any problem should be as far as possible."

The appellant was found guilty on all counts and sentenced as set out at the beginning of this judgment.

In his judgment on sentence the magistrate referred

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to a few cases, including a case reported in Justice Circular 1935, a decision in the Transvaal in 1958 and a decision of this Court in 1945, which deal with the object of punishment generally. This Court has over the last ten years on many occasions expressed its views on punishment generally and it might be useful for any court to refer to those cases for a proper appreciation of what the present approach to punishment should be. In any event, even in very old (although relatively unknown) authorities may be found sentiments which should not be igmored today. In his judgment according to the record the magistrate said the following:

> "In R. v. Swanepoel, 1945 A.D. 444, the honourable Mr. Davis, Judge of Appeal, regarding sentencing stated 'The end of punishment therefore is no other than to prevent a criminal from doing further injury to society' and the honourable Judge no doubt meant not only the criminal in the dock but criminals as a whole. And as a result we have what is known as the deterrent effect of sentences. Sentences must not only relate to the accused person himself but must relate also to the protection of society against crime."

Swanepoel's case dealt with culpable homicide as a result of negligent driving. The Provincial Division of

the Transvaal had increased a sentence of a fine imposed by a magistrate to a sentence of imprisonment. This Court set aside that order and restored the fine and whether or not the driver's licence should be suspended was considered. Davis, A.J.A. quoted a number of old authorities on sentence, starting with the law of Moses. After quoting from Grotius and referring to Cocceius, he also said the following at p. 454:

> "A great authority on punishments, Beccaria, says (Ch. 12): -
> 'The end of punishment, therefore is no other, than to prevent the criminal from doing further injury to society, and to prevent others from committing the like offence. Such punishment, therefore, and such a mode of inflicting them, ought to be chosen, as will make the strongest and most lasting impressions on the minds of others, with the least torment to the body of the criminal'."

It will be seen that it was not Davis, A.J.A. who stated that the end of punishment is no other than to prevent a criminal from further injury to society but Beccaria (who was born in 1735) and that even Beccaria considered that punishment should be inflicted with the least torment to the body of the criminal. In what kind of society Beccaria lived, is disclosed in Chap.

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XX of the Commentary in which it is, inter alia, stated:

> "In these our own times, it is the custom at Rome to castrate young children, to render them worthy of being musicians to his holiness; so that Castrato and Musico del Papa are synonimous."

In any event, after quoting Beccaria, Davis, A.J.A. referred to some other authorities including Salmond, Jurisprudence, 3rd Ed., who mentions the purposes of punishment as being Deterrent, Preventive, Reformative and Retribution, the first being essential and all important. As to this statement, Davis, A.J.A. says that it may well be an over-simplification of a most difficult problem. Today, there are people who also think that the way in which the word "retribution" has been used, is wrong. Helen Silving in Essays in Criminal Science Vol. 1 expresses the following opinion on the subject of retribution:

> "It is rather an expression of the law's censure of a conduct which the law thus qualifies as a crime and which, in contract to religion and ethics, it cannot 'censure' in any other manner. Retribution operates in the form of punishment, and the latter always is retribution, whatever other goals, e.g. deterrence or reformation, it may serve, for there is implied in 'punishment' a 'retribution' connection with the conduct the like of which is to be averted by

deterrence/.....

> deterrence or reformation. The distinctive feature of 'retribution' proper is its exclusive orientation to a specific act, leaving intact the personality of the offender. The 'act-orientation' of 'retribution' has a dual aspect. It bears on legal technique and operates as a political principle."

The magistrate in his judgment correctly considered the effect of appellant's conduct on the minds of the three girls. The judgment then reads as follows:

> "The result of your offence is serious. In the State vs. Kilian, 1964 (1) S.A. 188 C it was said that 'although in sentencing an accused the magnitude of the tragedy should not be allowed to obscure the true nature of the wrong acts done by the accused, depending on the facts of each case, the result of an accused person's negligence cannot and should not be ignored'."

Actually, what is quoted is part of the headnote of the case. At page 191 there is a reference to certain cases and the judgment itself reads as follows:

> "There is no doubt that in these cases the Court did take into consideration the consequences of the act. I do not, however, read these cases to indicate that the magnitude of the tragedy should be allowed to obscure the true nature of the wrong act done by the appellant. Depending on the facts of each case it

seems/.....

> seems clear that the results of an accused person's negligence cannot and should not be ignored."

I do not propose to deal with the references to other cases in the judgment of the magistrate in this case or to statements in the judgment such as: "You were intrusted with the care of children of tender years. You abused that trust in a savage manner". There was of course no "savage" conduct at all. I fully agree with the magistrate that it was "a disgusting and horrible offence" but what the magistrate in his judgment on sentence did not consider at all was the evidence of Dr. Shubitz concerning the appellant's acute anxiety state with claustrophobia from which he already suffered when he was discharged from the Royal Air Force and which made it difficult for Dr. Shubitz to communicate with appellant. This evidence was the most important evidence on which the defence sought to rely to avoid an effective sentence of imprisonment. About this Dr. Shubitz also said:

> "..... in my dealings with the patient he found it impossible to come to my consulting rooms and the meetings took place at a private sanatorium where I work virtually in the open because any confinement within such a closed area causes what I might describe as an overwhelming feeling

> feeling of panic and axiety and it is extremely difficult for people who suffer from this condition, not only to be treated but to be reassured that nothing serious will happen to them. The main feature of it is extreme panic which is overwhelming and they cannot cope with it."

Dr. Shubitz had referred to appellant's pathological pedofelic behaviour as a very severe sickness. The magistrate, as to this, said the following in his judgment:

> ".....there is the fact that you are a sick man, you require psychiatric treatment. The Court is aware thereof that the Prisons Department have excellent medical facilities at their disposal. In the case of S. vs. Berlinger, 1967 (2) S.A. 193, A.D. it was held that health is not a factor that should necessarily influence the Court to keep a person out of prison and it is referred there that sufficient medical facilities exist in Prison and this to the knowledge of the Court, includes psychiatric facilities or any treatment that is required by an accused."

It seems clear from the evidence of Dr. Shubitz, that appellant, who certainly required treatment, not only in his own interest but also in the interest of society, would not be able to be treated at all if sent to gaol, because of his claustrophobia. This evidence of Dr. Shubitz was not challenged in any

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way. I think the magistrate misdirected himself in not considering this important part of the problem of what a proper sentence should be in this particular case. The magistrate also failed to consider the evidence of Dr. Shubitz that in this particular case there should be a treatment of appellant in conjunction with his wife.

In view of these misdirections this Court is at large to consider what the proper sentence in this case should be. The serious nature of the offences committed by the appellant speaks for itself. The first victim particularly must have received a severe mental trauma. Fortunately, the father of this child had her examined by another psychiatrist. About this, Dr. Shubitz said in reply to questions by the Court:

> "....the psychiatrist .... had indicated to (the parents) that everything was alright with ~~xx~~ their little girl and that he did not anticipate that there would be any trauma in the future, but that he would like to see her again, I think it was in two or three years time for a recheck and I think that this is really the answer. The other thing that pleased me personally that (the father) describes his home life as a happy one and that the child felt secure

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> and that in fact recently the child appeared to be a much happier child, because, obviously because the thing had been brought out into the open and had been discussed. So in some strange kind of way after bad comes good."

Having regard to the serious nature of the offences committed, and the terms of section 22 of Act 23 of 1957, a period of imprisonment should be imposed. In my view a period of 9 months in respect of count 2, and of 3 months each in respect of counts 3 and 4 would be a suitable period. Admittedly one of the main objects of punishment is prevention, and this form of punishment should serve as a warning to people such as teachers who are entrusted with the care and education of children that they should not abuse that trust in the abhorrent manner that the appellant did. On the other hand, there arises the question in the present case: If it is not possible to treat appellant in gaol for this deepseated disorder from which he suffers, how is he or society to benefit if he is sent to gaol? Having regard to all the circumstances in the present case, and considering the various objects of punishment, I am satisfied that the appellant should receive treatment out of gaol rather than in gaol.

I therefore intend to suspend the whole sentence of imprisonment. This has been done in the past, such as in R. v. C., 1955 (2) S.A. 51 (T), where on appeal a portion of the sentence was suspended subject to the accused submitting himself for treatment for a different type of sexual deviation.

The sentences in the present case were imposed in May 1975. We have been informed by counsel for appellant that appellant has been in employment and has been, and is being treated by Dr. Shubitz and that appellant is paying for his treatment. I think the treatment should go on for at least another year and a suitable condition should be attached to the suspension. | In the circumstances the appeal succeeds and the sentences on counts 2, 3 and 4 are set aside and replaced by the following:

"Counts 2, 3 and 4: nine months imprisonment on count 2 and three months imprisonment each on counts 3 and 4. The sentence on each of counts 2, 3 and 4 is suspended for three years on condition (1) that during suspension appellant subject

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himself to such regular treatment as may be ordered for him by Dr. Shubitz and (2) that appellant is not convicted of any offence involving indecency."

CHIEF JUSTICE.

RABIE, J.A.
JOUBERT, A.J.A. } Concur.