

SOUTH AFRICA / JUDGMENT

S v De Graaff (488/90) [1991] ZASCA 140 (27 September 1991)

[1991] ZASCA 140**COURT**

Supreme Court of Appeal

BEFORE

Nestadt, F H Grosskopf, Nienaber

CASE / FILE NUMBER

488/90

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Source record**CASE NO. 488/90/cc****IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION) In the
matter between:DAVID BARRY DE****GRAAFF APPELLANTandTHE****STATE RESPONDENTCORAM: NESTADT, F H GROSSKOPF et NIENABER****JJA DATE HEARD: 12 SEPTEMBER 1991 DATE DELIVERED: 27 SEPTEMBER
1991****JUDGMENT NESTADT, JA:Appellant was convicted by a magistrate on
two counts of indecent assault. He was sentenced to pay a fine. In addition a
suspended
period of imprisonment was imposed. He unsuccessfully appealed against
his****2/****2.****conviction to the Cape Provincial Division. This is a further appeal against
his conviction, leave to do so having been granted by
this Court.The****offences are alleged to have taken place during 1986. Appellant was at the time
a 26 year-old teacher at the Beaumont Primary
School in Somerset West. He taught
English to the standard three class. The two complainants were pupils of his.
One was Calvin Renda.****He turned twelve during September of that year. The other
was Grant Reichenberg. It would seem that he was of a similar age. Their
evidence was to the effect that on a number of occasions during the year in
question appellant felt or touched their private parts.**

This took place in class

when they individually came up to the desk where appellant was sitting to have a book marked or inspected.

Appellant then put his hand inside their pants and handled their penis. It will be necessary in due

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3. course to canvas appellant's version in some detail.

Suffice it at this stage to say that in his evidence he denied that he committed any offence. The trial court, however, held that the State had proved its case and accordingly convicted appellant. Before us, an able, wide-ranging and detailed attack was made on behalf of appellant against the magistrate's credibility finding.

The argument was to the following effect:

(i) Having regard to the nature of the offence and the ages of the complainants, the cautionary rule applied and it had not been satisfied.

(ii)

There are a number of material contradictions between the respective versions of the complainants. They were

(a) Calvin testified that the assaults occurred "three to four times per week...continuously

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throughout the year". According to Grant, on the other hand, they were "not very often...(T)wice I think".

(b) Regarding the manner in which the assaults took place, Calvin said that appellant put

his hand underneath his underpants from the top of his trousers. Grant's description was that appellant felt his private part by

putting his hand over his underpants from the leg side of his (short) trousers.

(c) Most important was that Calvin said that each time the offence took place, they sat on appellant's lap (at his desk). Grant denied this. He

said he never sat on appellant's lap. His evidence was that he was always standing next to appellant when he put his hand up his pants.

5/ 5. These contradictions, so it was submitted, cast serious doubt on the reliability of the two complainants; indeed it was impossible

to reconcile their two versions. (iii) It was inherently improbable that appellant would act in the manner alleged in front of the whole class (consisting of some 23 pupils). It was also improbable that if the assaults were as regular and blatant as Calvin testified, no-one in the class reported the incidents for a period of about two years. Nor apparently were they discussed amongst the pupils themselves or with their parents. (iv) The magistrate's reasons for convicting appellant showed him to have been unduly critical of appellant. The contention was that insufficient allowance had been made for the fact that

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appellant was unrepresented at the trial; the fact that he was (in the words of the magistrate) "educated" and that he "understood the procedure in court" had been over-stressed. Instead of, in these circumstances, assisting appellant in presenting his case, the magistrate had unjustifiably taken into account appellant's failure to properly put his version to the State witnesses as well as the lack of clarity in his sec 115 statement and evidence-in-chief. The magistrate should rather have drawn an adverse inference from the State's failure to call other named pupils in the class in support of complainants' allegations. Indeed he should have called them himself. In the result, appellant had not received a fair trial. (v) Even on the State version, there was insufficient

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proof that appellant had the necessary mens rea to commit the offences. The argument is not without merit. Plainly, the cautionary rule applied. This meant that there had to be some satisfactory indication of complainants' trust-worthiness. It cannot be said that the evidence of the two State witnesses is beyond criticism. The contradiction arising from whether complainants sat on 'appellant's lap ((ii)(c) above) is an important one. And it cannot be explained away on the basis that each witness was testifying as to his own experience. One does get the impression that Calvin was perhaps exaggerating the case against appellant. He appears to be a somewhat precocious youth; he refers in his evidence to subjects like "child molestation" and "pervert(s) on the loose". I am not impressed by the reason he gives for reporting the matter (to a teacher and then to the police) only after

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8. the lapse of 2 years. Regard must,

however, he had to appellant's evidence. As I read his sec 115 statement and his subsequent cross-examination of Calvin, appellant's initial defence was a denial of the acts he was alleged to have committed. But his evidence paints a different picture.

He conceded that he often corrected complainants' (and other childrens') books or assignments 'whilst they stood next to him at his desk.

Occasionally they even sat on his lap. He would then "play with them", ie, "I would pinch them friendly...sometimes I (even) tickle them..." He was just trying to be "friendly and do spontaneous and natural actions". His evidence

continued:

"What do you think of Grant's evidence? Do you think it was the truth? Do you agree with everything that he said? Yes, Sir...

No, you just said to me now you never pinched them on their private parts with malicious intention? --- That's right.

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In other words, I think the logical deduction from that is that you did pinch them on their private

parts? No, Sir, they could be jumping about. What could be jumping about? The pupils could be jumping about.

So, you could have accidentally pinched them?

That's right, yes, Sir...

How can you pinch somebody accidentally on their private parts without your hand being in close proximity to their private parts? On their upper leg, Sir. On the inside of the upper leg? Ja... So, you are saying that the only time that you think that you could have pinched anybody's private parts was when you were busy pinching them on the inside of their thighs

and they were jumping around that you now accidentally pinched their private parts? Yes, Sir... I didn't ever do it

intentionally... (I)t was accidental, the things that I did. What things are you talking about? Well, if I had to pinch them, Sir, it was accidental that I

ever pinched their private parts... With hindsight I look back at it and I said to you, I have calmed down a lot. I look back on the incidents that occurred. I don't think they were wrong in the sense that they were indecent assault. Did you ever have the intention to fondle any of

these two witnesses, fondle their private parts? -

-- No, Sir. Although it could have happened accidentally? Yes."

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It seems to me that in the light of this evidence, appellant's argument loses much of its force. What emerges is that pupils, including complainants, did

come up to his desk; that they sat on his lap; that he pinched them on the

inside of their thighs; and that in the process he might have pinched their private parts. In the result a lot of what complainants say is confirmed by appellant.

And the issue between the State and the 'defence (besides appellants' state of mind) was a relatively narrow one, viz, whether he placed his hand inside complainants' pants as alleged by them.

Now I do not find the magistrate's reasons for judgment to be entirely satisfactory. For example, it is found that "(a)lthough they contradicted each

other... it is not enough to totally reject their evidence". This is not the correct approach. The correct approach was whether their evidence was to be accepted. The

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magistrate states the issue to be not whether "these offences were committed but (whether) it was the accused who committed them".

This is obviously not so.

Even so, I do not think that his acceptance of complainants' evidence can be faulted. In my view the unfortunately worded excerpts from the judgment do not amount to a material misdirection. This being so, we can only interfere with his factual

findings if convinced that they "are wrong. I am not so convinced.

Complainants were regarded as "very good witnesses". The evidence does not

reveal any apparent motive for them to have falsely accused appellant - especially after the lapse of a lengthy period.

On the contrary, both

complainants seem to have been well disposed to appellant. They corroborate each other on the crucial issue

of whether appellant put his hand in their pants and

touched their private parts. The only contradiction (which the magistrate was alive to)

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12. of substance between them was whether complainants sat on appellant's lap. Obviously, on this point, either Calvin or Grant is wrong.

But I do not think their evidence is for this reason rendered unacceptable. As I have indicated, appellant admitted that pupils

did sit on his lap. The

availability of other children to give evidence for the State was not established. Having regard to complainants'

ages, the delay in reporting the

matter and the failure to discuss it, is not I think, a point of criticism. I cannot agree that

the State version is improbable. Appellant might well have

thought that sitting behind his desk, the inserting of his hand into complainants'

pants would not be observed by the class. He was obviously unconcerned in having them sit on his lap. In my view this conduct, coupled with appellant admittedly having touched pupils on the inside on their thighs, lends support to complainants' version. It shows

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13. that appellant had the opportunity to commit the offences. I do not believe I am being unfair to him when I add that it also shows

a certain inclination to commit the offences. It is surprising that a teacher would cause a boy of almost twelve to sit on his lap.

I am not impressed

by appellant's reasons for his conduct. It does not seem to me to have been "natural". Finally, there is the consideration that appellant does not

'effectively deny the State case. I leave aside that he did not do so in his evidence-in-chief. That may

have been due to ignorance of what was required of

him. But under cross-examination he concedes, as I have mentioned, the possibility

that he accidentally pinched complainants' private parts. This too, so it seems to me, gives credence to complainants' evidence rather than

indicating appellant's candidness (as was argued). More importantly, there is his acknowledgment that Grant's

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14. evidence was correct. On a conspectus of the

evidence, I am satisfied that the magistrate was justified in finding that the cautionary rule had been complied

with. Nor do I think that there is substance

in the complaint that appellant did not receive a fair trial. The only prejudice he

suffered was from his answers to questions, not from any improper conduct of the trial. It was not in dispute that the handling of complainants' private parts was an assault of an indecent character. This being so, the remaining

issue is whether it was proved that appellant acted with the necessary mens rea. This means that he must have intended not only to assault complainants but to assault them indecently (S vs Muvhaki 1985(4) SA 317 (ZHC) at 319 C-D; Snyman: Strafreg, 2nd ed, 487). In my opinion the only reasonable inference to be drawn from the facts as deposed

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to by complainants is that appellant had such intention. It is true that Grant's evidence may give a different impression. He stated:

"He'd then start pinching your leg but and then up onto your private parts but then I think that it was just - I don't know, I don't think it was anything meant...that he was doing anything on purpose..."

I didn't really think it was wrong...
But you say you don't think his intention was anything other than to give you punishment?
Yes. I don't think he intended anything else...Do you think I ever had sexual intentions in my mind when I did it? No."
The court cannot be bound by this opinion. The objective facts must be looked to. On complainants' evidence, their private parts were not handled by appellant accidentally when they were jumping around. On repeated occasions appellant deliberately inserted his hand in or under their pants with the object of touching their private parts.
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16. The appeal is dismissed.
NESTADT, JA F H GROSSKOPF CONCURS
CASE NO. 488/90
/RW
IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION) In the matter between: DAVID BARRY DE GRAAFF APPELLANT and THE STATE RESPONDENT
CORAM: NESTADT, F H GROSSKOPF et NIENABER JJA DATE HEARD: 12 SEPTEMBER 1991 DATE DELIVERED: 27 SEPTEMBER 1991
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JUDGMENT

NIENABER JA:

I have read but find myself in respectful

disagreement with the judgment prepared by Nestadt JA. In my view the appeal ought to succeed. The evidence before the trial court was simply too thin and too contradictory to sustain a conviction - not even on what is essentially an accusation of child molestation.

The appellant was a primary school teacher.

He was charged on two counts of indecent assault

"deurdat op of omtrent gedurende 1986 en te of naby Beaumont Skool in die distrik Somerset Wes die beskuldigde wederregtelik en opsetlik vir Calvin Renda [for which read "Renda"] onsedelik aangerand het deur sy privaatdele te betas."

That was count 1. Count 2, relating to Grant Rigkenheng (for which read "Reichenberg"), is couched in identical terms. These offences are alleged to have been committed in full view of a class of approximately 23 boys and girls in the 11 to 12 years age-group. It was supposed to have happened in 1986 but a complaint about

2 the appellant's conduct was only mooted in 1988, two years later. That complaint came from Calvin Renda. He had by then left the Beaumont Primary School. During a lecture at his new school about self-defence he became frustrated, so he said, by the flippant remarks of other pupils and promptly decided to tell the teacher of his earlier experiences at his previous school.

Why his annoyance should have caused him to do so was neither explored nor explained. The appellant was eventually confronted, not, however, with the incidents in respect of which he was charged, but, so he stated during his plea explanation, with something entirely different - that he had exposed himself to children under his charge during a school outing to Montagu. The appellant was the school's swimming coach. Calvin had apparently complained to his father that the appellant had exposed himself in a change room when all that happened, so the appellant said, was that the whole group had changed in the change room before proceeding to the hot baths. This episode, curiously enough, was never mentioned again, not by the appellant himself, either during the cross-examination of Calvin

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Renda, or during his own evidence-in-chief, nor by the prosecutor during the cross-examination of the appellant. To the actual charges the appellant pleaded not guilty saying:

"I don't know where they originate from. I don't fondle anyone's private parts. I have never intentionally fondled anyone's private parts, Sir."

The appellant was not represented at his trial, at least not until after his conviction. This proved to be a serious error of judgment on his part, for the appellant was singularly naive and inept in the conduct of his defence - for which, I may say, very little allowance was made by the magistrate.

The charges themselves were unhelpfully vague. They do not reveal whether the prosecution proposed to rely on a single episode in respect of each charge, or whether it involved a prolonged course of conduct at different times and locations; nor does it mention how the offences were committed on each alleged occasion.

A similar vagueness also characterised the only evidence led by the prosecution, that of the two

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complainants, Calvin and Grant. Their evidence overlaps in the sense that each professed to have witnessed what happened to the other. And it was here that an astonishing disparity appeared between what each said happened to him and what each said he saw happen to the other.

Calvin was 12 years old at the time. His

description of his experience can best be illustrated by means of a series of quotations from his evidence in chief. He began by saying:

"And then the accused would tell us to bring our books forward to be marked and then throughout the year he would sometimes make us, during the week, sometimes three/four times during the week, he would make us sit on his lap and then he would stick his hand in our pants and then he would feel around..."

(The impression created by this passage, especially the use of the word "us", is that Calvin had not been

singled out by the appellant; what happened to him happened to all of them, in exactly the same manner.)

He proceeded: "Then he would mark with his one hand and then he would make us sit on his lap and then he would stick his hand in our pants and he would feel our penis."

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Under cross-examination he elaborated, saying that appellant put his hand into his pants "from the top". He was asked why he allowed the appellant to act in this manner and his reply was "At that stage, I wasn't aware that what he was doing was actually wrong." Under cross-examination he reiterated that the fondling of his private parts took place while he was sitting on the appellant's knee and while the appellant was correcting his assignment. He was not sure with which hand the appellant touched him. He did not regard the appellant's conduct, at the time, as wrong at all; indeed, he did not even think of it as "sex".

That, then, is what happened to him. As to

what happened to Grant, he said, in evidence-in-chief:

"He would also go forward to have his book marked and then he would also - Mr De Graaff would also let him - make him sit on his lap and also mark his book and at the same time, also feel around with his penis.

COURT: Did you see that? Yes.

PROSECUTOR: Could you see that Grant sat on his lap? Is that right? Yes.

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What else could you see? Now, look, you've got to be very careful now because all the Court is now interested in is what you physically could see, not what you maybe later heard or what was told to you but just what you saw? No, that was exactly what I saw. COURT: What was that?

PROSECUTOR: Ja, what exactly - what could you see? I could see that he was actually physically putting his hand in Grant's pants and I could see that he was also fiddling around. So, in other words, you could see that there was a hand in Grant's pants and that this hand was moving around? Yes."

He was asked how long each such incident lasted. His guess was between 2 to 3 minutes - clearly it was not something that happened in a trice. The passage just cited, particularly the repeated use of the word "also", creates, at the very least, the strong impression that the appellant's methods, according to Calvin, were the same in both cases. But Grant tells an entirely different story, both as to what he experienced and what he observed - and according to him it was also the same in both cases.

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He would go to the desk, he testified, where

the appellant was seated and stand next to him, one anda half metres or so away, while the appellant correctedhis assignment. If he had made a mistake the appellantmight slap him lightly - "as most teachers do" - or pinch the inside of his leg in a playful manner.

"He'd then start pinching your leg but . . . and then up onto your private parts but then I think that it was just - I don't know, I don't think it was anything meant, anything or anything, that he was doing anything on purpose to do anything like that or anything. I don't think."

He would be wearing shorts. The appellant would pinch him inside his pants but not inside his underpants. This did not happen frequently

- perhaps twice during 1986.

He was asked: "You say you think this pinching - why do you think he would pinch your private parts? As punishment maybe. I don't know really.

Would it hurt you? Not really so

bad, just not ... a bit. Do you think that the only reason why he did this was to punish you? Yes."

All of this would occur in full view of the entire class. Indeed, sometimes there would be a queue

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of boys and girls nearby at the desk waiting for theirassignments to be corrected. He did not discuss these

incidents with anyone. And when he was asked why not,his reply was:

"Because I thought it was just - I didn't think of it in any - like I just thought he was friendly, funny - just like punishment or something. I didn't think like ...

Did you think it was wrong? I didn't

really think it was wrong.

Do you think it's wrong now? Well,

ja, I suppose.

Why? Because it is private parts and

nobody is supposed to... But you say you don't think his intention was anything other than to give you punishment? — Yes. I don't think he intended anything else."

According to Grant what happened to him

happened to Calvin. Nothing different. Calvin, likehim, would be standing next to the appellant.

"And you say the boys were always standing

when they were by him? Yes, except for when like he hit them or maybe ... So they were never took in any other position? No.

They never sat on a chair next to him or

something like that? No, not that ... COURT: Or on his lap? No. PROSECUTOR: Nobody ever sat on his lap? Not that I know of.

Are you quite sure about that? Yes."

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Under cross-examination he agreed that these were all "friendly incidents" and that he did not think that the appellant ever had sexual intentions in mind.

In S v R 1977 (1) SA 9 (T), also a case

involving allegations that the appellant in question had committed acts of indecency with several young boys, Nicholas J declared at 11H - 12D:

"The general rule is of course that, where several counts are charged, the evidence on each count must be examined separately as if it were the only count charged. In respect of each count in the present case, the complainant concerned was a single witness. It has repeatedly been said that," where the State relies upon the evidence of a single witness, it is requisite to a conviction that the witness evidence should be clear and satisfactory in every material respect. It is also well recognised that cases of sexual assault require special treatment, because complaints of that kind are generally difficult to disprove and various considerations may lead to their being falsely laid. (R.v.W., 1949 (3) SA 772 (A.D.) at p. 780). There has consequently grown up a rule of practice, similar to that in accomplice cases, which requires recognition by the court of the inherent danger of relying on the testimony of the complainant in sexual cases, and of the need for. the

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exercise of some safeguard reducing the risk of a wrong conviction, such as corroboration of the complainant in a respect implicating ' the accused or the absence of gainsaying evidence from him, or his mendacity as a witness. (S.v.Snyman, 1968 (2) SA 582 (A.D.) at p. 585). There is a similar rule of practice in regard to the evidence of young children (see R.v.Manda, 1951 (3) SA 158 (AD) at p. 163). In the present case, therefore, a considerable degree of caution was plainly called for."

The passage is apt. Here, too, the complainant in respect of each count, although not strictly speaking a single witness, was still a child and the charge had a sexual connotation. All evidence implicating an accused, whoever testifies, ought to be treated cautiously and not uncritically. But where, as here, additional circumstances coincide, each of which entails its own risk of unreliability, including invention, suggestion and manipulation (cf S v Snyman 1968 (2) SA 582 (A) at 585C-G; S v F 1989 (3) SA 847 (A) at 852H-853D), the scrutiny should not only be critical, it

should be almost hypercritical (cf Schmidt, Bewysreg 3rd ed. 112).

As appears from the dictum quoted the counts

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should be treated separately. I turn, therefore, to the first one. Calvin's evidence stands alone. He is not corroborated by Grant because Grant's version of what happened to Calvin differs so fundamentally from Calvin's own version as to detract rather than to support. Grant did not testify that Calvin was molested while he was sitting on the appellant's lap; he did not confirm that the appellant put his hand inside Calvin's pants from the top; or that the incidents he described happened three to four times during the week or lasted for 2 - 3 minutes at a time.. So, too, when it comes to Calvin's version of what appellant was supposed to have done to Grant. According to Calvin he saw Grant sitting on the appellant's lap. Grant denies this. Calvin said that he could definitely see that appellant "was actually physically putting his hand in Grant's pants and I could see that he was also fiddling around." This was not Grant's evidence. In any event it is exceedingly unlikely that he would have been able to see any such fiddling. Clearly he was imagining and exaggerating.

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Conduct such as described by Calvin by a school master in front of an entire class, visible to all the other pupils, would in any event be so bizarre as to border on sheer lunacy. The only common feature between the evidence of the two State witnesses is that each of them mentions that the appellant touched him on his private parts. But viewed in the light of the wide-ranging discrepancies between the two versions as to how it happened, this, in my view, does not constitute proper corroboration at all. Calvin and Grant cannot both be right. One or both of them are guilty of invention or, at the very least, of such exaggeration as to render their evidence unreliable. Counsel for the State commenced his address in this court by conceding that conduct by the appellant, such as described by Calvin, was highly improbable. He further submitted that, of the two, Calvin's evidence should be rejected and Grant's

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accepted. I agree with him that Calvin's evidence must be rejected. One can legitimately speculate as to why Calvin should have incriminated the appellant. In

S v R supra, an infinitely stronger case on the facts

than this one, the evidence of five boys was rejected,

resulting in the acquittal of the appellant, because of

the danger that the boys,

"through their talk, influenced one another and that there was a real-possibility that the similarities in their stories were due, not to the fact that they were true, but to the fact that they had a common source in talk and gossip among the boys" (at p. 15H).

Here there was no similarity in the stories of the two complainants and no evidence that the two of them had discussed matters - an improbability in itself, if the appellant conducted himself in the manner described by Calvin - but the possibility of outside suggestion cannot in my view be ruled out. This is particularly

so when certain passages in Calvin's evidence is considered. I have in mind pronouncements by him such as the following:

"ACCUSED: Is the topic, sex, sex related incidents ever discussed on playgrounds, if that's the question more specifically?

All children talk about sex as in normal sex¹⁴

and sometimes they do refer to gays but child molestation is not something that people like to refer to, not even children."

And again:

"The police established a child protection unit and there was a lot of media publicity on the TV about child molestation? Yes.

Yes? That, I agree with, ja.

Sure. Then could I suggest to you that that is why you only come forward now with this story? No, look, with the constant mentioning of child molestation", fondling and what have you, in that line, it does instigate a person to come forth with it. It's like the final thing that would like bring you forth to mention something like that, or to go talk to someone about it. Sure, I quite agree with you there? But then why aren't there more people that have come forth and accused Mr De Graaff of fondling private parts? Because they are too scared of you. I've got guts. They haven't.

I don't think anyone is scared of me,

not at school or anywhere else? If you've got a pervert on the loose, you would be scared of that person. I have letters in my pocket here given...from children to me at the end of the year saying thank you for being a teacher for the year, thank you for being a friend, thank you for letting me come and discuss problems with you? Sir, we are not arguing what kind of personality you have? Even myself stated you are a nice, likeable person. You

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were very popular. You are a nice person -but in that line, you were a little mixed up."

That is not, to my mind, the spontaneous language of a 14 year old and it leaves one with the uneasy but distinct feeling that his evidence was not entirely uncontaminated by suggestions from others.

Grant did not corroborate Calvin. On the

contrary he contradicted him. Calvin also contradicted himself. So, for example, when asked in evidence-in-chief why he had not complained about the appellant's outrageous conduct for two years he said:

"I never had the courage to go up and talk to someone about it."

But when asked the same question under cross-examination why no one else in the class complained, he stated:

"Because they are too scared of you. I've got guts. They haven't."

Calvin's evidence, in my opinion, lacked the safeguards and failed to satisfy the stringent criteria of proof required for a conviction in a matter of this sort.

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What about the appellant's own evidence? Does that compensate for the inadequacies in Calvin's? The appellant, it must immediately be said, was an unimpressive witness and a poor advocate in his own cause. His evidence-in-chief, consisting of a rambling appeal to the Bible, did not deal with or deny the allegations against him. One can certainly not blame anyone for not regarding him as a model witness. In the course of his evidence the appellant made a number of apparently damaging concessions, especially in relation to count 2, but it was not my impression, on reading his evidence, that he was inexorably and reluctantly driven to give ground. It was rather as if the appellant felt himself compelled to make allowance for theoretical possibilities. I shall refer to some examples later in this judgment. As far as count 1 is concerned he conceded that pupils sometimes sat on his lap although he had no recollection that Calvin ever did so. That, in my view, was a colourless concession. So, too, it counts for little that he said that he "played" with the children. He certainly never conceded that he ever fondled or played with Calvin's

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private parts in the manner described by him or at all. The furthest he went was to explain that it was part of his teaching technique to be playful towards the children in order to put them at ease and make his classes "fun". All things considered the State, in my view, fell short of proving the *actus reus* on count 1.

Turning to count 2 the first point, once

again, is that Calvin's description of events, as appears from the passages quoted above, deviates to such an extent from Grant's evidence that it lends no support to it. But the appellant, under cross-examination, did make some concessions which tend to strengthen the State case. There are several passages in his evidence where he acknowledges the possibility that he may have touched Grant's private parts by accident when Grant was jumping around because he was being pinched or tickled. So, for example, he said:

"What do you think of Grant's evidence? Do you think it was the truth? Do you agree with everything that he said? Yes, Sir.

Everything that he said? I heard his evidence, yes.

Are you now thinking carefully? I

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did pinch them but I wouldn't say I pinched them on their private parts for maliciously intended pinching them on their private parts. So, in other words, you did pinch them on their private parts? No.

And again:

"So, you are saying that the only time that you think that you could have pinched anybody's private parts was when you were busy pinching them on the inside of their thighs and they were jumping around that you now accidentally pinched their private parts? Yes, Sir."

"Well, if I had to pinch them, Sir, it was accidental that I ever pinched their private parts."

"Did you ever have the intention to fondle any of these two witnesses, fondle their private parts? No, Sir.

Although it could have happened accidentally? Yes."

The appellant was challenged on why he did not put it to Grant that if he touched him he did so unintentionally. The reason, of course, is obvious.

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He never conceded doing so as a fact. Nor did he even recall doing so accidentally. He was merely conceding the possibility that it might have happened in that way. When, in the first of the passages quoted above, he stated that he agreed with what Grant had said, he obviously had in mind Grant's evidence that he pinched his leg. He specifically denied pinching his private parts. His given explanation for not putting it to Grant that he may have done it accidentally - an explanation amply borne out by the incompetent way in which he conducted his defence - was that he was not au fait with legal procedures and techniques. But having said that, the fact remains that Grant stated positively that the appellant did touch his private parts. The appellant

conceded it as a possibility. There is nothing in the appellant's evidence or in the probabilities to show that Grant was deliberately untruthful or genuinely mistaken; his evidence must therefore be accepted. To that extent the State, I believe, has proved the actus reus alleged in count 2.

Why did the appellant do it? One possibil-20

ity, of course, is that it was a means of sexual titillation. If that were so the appellant was rightly convicted. Grant, however, did not think so and he should know. It is idle to suggest that a 12 year old boy would not realise that it was inherently wrong for his schoolmaster to contrive to fondle his genitalia. He did not say, and he was not asked, where on his private parts he was pinched, whether on his penis or his scrotum. If it was an unmistakable attempt to fondle his penis he would undoubtedly have known that it was wrong. Yet he was quite specific that he did not think that the appellant did anything wrong. According to Grant it might have happened twice. At first he said that he did not think that the appellant did so "on purpose". Then, on being pressed by the prosecutor, he said that perhaps it was a form of punishment. It is not entirely clear, reading this part of his evidence, whether he meant that it was the pinching of his leg, during which his genitalia were touched, that was intended as punishment or whether the punishment was specifically the pinching of his genitalia. But even assuming the latter, it was a

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suggestion which Grant advanced but tentatively when the prosecutor clearly sought a more incriminating answer from him. Of course, if the appellant pinched his genitalia as punishment it must have been done "on purpose". To that extent Grant's evidence is self-contradictory. Grant's first answer, that it was not done on purpose, confirms the appellant's own hypothesis that it might have happened by mistake. This is further confirmed by Grant's evidence that the appellant never put his hand underneath his underpants. Moreover, according to the evidence, the appellant pinched and tickled the children. He said he did so, playfully as part of his teaching technique. One may question his wisdom but can one reject his explanation as being fanciful? I think not. Obviously the children, when pinched and tickled, would jump about. If it was the appellant's custom to pinch the soft flesh of the upper inner leg, it might well have happened that he could have touched Grant's genitalia by accident.

And if it did happen accidentally, on the one or two occasions mentioned by Grant, that would have

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been neither a case of "fondling" nor would it have been intentional. The State must prove that the appellant, intentionally, knowingly, committed an indecent act (Snyman, *Strafreg*, 2nd ed. 489). Guilty knowledge can be inferred from the inherently indecent nature of the act itself. Whether it can likewise be inferred from extraneous circumstances where the act itself is not obscene (cf *S v F en 'n Ander* 1982 (2) SA 580 (T)), is not an issue in this case for the touching of someone's genitals is unquestionably an act which is inherently indecent. But the appellant proffered an explanation: that it happened, if at all, accidentally. If that explanation is accepted it

would negate the requisite dolus. It must be accepted if it is reasonably possibly true. On a conspectus of the evidence that explanation, in my opinion, is not far-fetched. At worst for the appellant there was doubt. He was entitled to the benefit thereof. He should have been acquitted on count 2 as well. His appeal ought to succeed.

P M NIENABER JA

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