WHEN IS INDECENCY "PUBLIC"?

Rose v Director of Public Prosecutions [2006] 1 WLR 2626 (QBD)

1 Introduction

The crime of public indecency is not without controversy in the context of the new constitutional dispensation in South Africa. The criminalisation of behaviour that is assessed as having offended the sensibilities of the public inevitably limits the right to freedom of expression, protected in section 16(1) of the Constitutional of the Republic of South Africa, 1996. Nevertheless, the operation of this right is qualified by the public's interest in not being confronted with disgusting visual or auditory stimuli (see discussion in Milton *South African Criminal Law and Procedure Vol II: Common-law Crimes* 3ed (1996) 272; and Snyman *Criminal Law* 4ed (2002) 359).

A further difficulty with the crime is the breadth and vagueness of its definition (which is set out below). As Snyman points out, expressions such as "which tends to deprave the morals of others" and "which outrages the public's sense of decency" are so vague as to possibly violate the principle of legality (Snyman 359). The notion of when the *indecent* act can be regarded as being of a *public* nature presents its own expository difficulties, particularly in the light of the adoption in the case law of an interpretation which goes beyond the commonplace meaning of the term "public". This note sets out to outline the application of the requirement that the indecency must be "public" in order to found liability for the crime of public indecency, in the light of the recent English case of *Rose*, which dealt with a similar question.

2 Facts and judgment

The matter involved an appeal by way of case stated from a conviction of committing an act outraging public decency, by behaving in an indecent manner contrary to common law, in the Sheffield Magistrates' Court. The conviction was based on the conduct of the defendant and his girlfriend, who, at about one o'clock in the morning, engaged in oral sex in the foyer of the Lloyds TSB University branch in Glossop Road, Sheffield. Access to the foyer, which was well lit, was available to the general public using a swipe card to enter in order to use the automatic teller machines (ATMs) situated in the foyer. It was not disputed that passers-by would be able to see into the

foyer if they chose to do so, nor that the interior of the foyer was subject to 24-hour closed circuit television (CCTV) surveillance (par 2).

The CCTV video footage of the events was viewed by the manageress of the branch, whose duties included the perusal of the footage taken by the CCTV during the hours between the closing of the branch and the reopening of the branch the next morning (par 3). Whilst the defendant had acknowledged in his police interview that he and his girlfriend "just forgot about the camera", and did not dispute the factual basis of the allegation, he chose not to testify. No adverse inference was drawn by the trial court regarding his failure to give evidence (par 5).

It was argued on behalf of the defendant that the act complained of could not have outraged public decency, in that the constituent elements of the offence had not been proved: the act had not actually been witnessed at the time of its commission, and there was no intention to insult or annoy (par 6). The trial court held that the viewing of the CCTV material by the manageress was sufficient to satisfy the requirements for the offence, and that the defendant had the necessary *mens rea* since he knew of the existence of the camera and of the possibility that the conduct could be seen by passers-by (par 8). The question stated for the opinion of the High Court was:

> "Was [the deputy district judge] correct in finding that the witnessing of an event captured on CCTV by a person acting in the course of her employment is sufficient to satisfy the requirements of the offence of outraging the public decency?"

Thus the focus of the appeal was "whether the public constituent of the offence was proved in this case", and in this regard the appeal court (per Burnton J) identified three real issues: (i) Whether showing that only one person other than the participants in the act saw the act in question is sufficient to prove the offence? (par 10); (ii) Whether, if the only witnessing of the act is on a private CCTV system subsequently, this constitutes a sufficient public element for the offence to be proved? (par 12); and (iii) Whether the manageress, whose private duty it was to view the CCTV footage and who saw it in private, could be regarded as a member of the public for the purposes of the offence? (par 12).

The court reviewed the case law in point, consisting of three 19th century cases (*R v Watson* (1847) 2 Cox CC 376; *R v Webb* (1848) 3 Cox CC 183; and *R v Farrell* (1862) 9 Cox CC 446), and concluded that these cases "are consistent authority for the proposition that if in fact only one person did see or could have seen the act complained of, there was no and is no common law offence" (par 25). This conclusion having disposed of the first issue, the court did not need to decide the remaining issues. Nevertheless the court regarded the submission on behalf of the defendant, that the private viewing of a private recording of an act which had not previously been seen by any person is insufficient to constitute the offence, as having "considerable force" (par 29):

> "This is because the offence is committed when it is committed. It would be curious if the offence was completed by a private viewing of a recording and if it could make a difference, for example, as to whether the bank manageress was in the company of somebody else when she saw the video or not, or whether she showed it to someone else afterwards or not."

However, the court reiterated that neither these issues nor the issue whether the viewing in carrying out the duty of examining the CCTV sufficed for the offence needed to be decided (par 30), stating that the answer to the question (set out in par 8) was "No". Burnton J concluded the judgment by re-emphasising the crucial fact for the purposes of the court: that there was only one person acting in the course of her employment who viewed the CCTV footage (par 31).

3 Comment

3 1 English law

The common law crime of outraging public decency may be defined as "to do in public any act of a lewd, obscene or disgusting nature which outrages public decency" (Rook and Ward *Sexual Offences Law and Practice* 3ed (2004) par 14.25). The *actus reus* of the crime includes the commission of a lewd, obscene or disgusting act (Rook and Ward par 14.30), which must outrage public decency (Ormerod *Smith and Hogan Criminal Law* 11ed (2005) 966; and Rook and Ward par 14.33), and must be likely to disgust and annoy members of the public generally (Rook and Ward par 14.39). A further requirement, crucial to the outcome of the *Rose* case, is the "two person" rule, first established in 1848 in *R v Webb* (*supra*), which provides that for a conviction on the offence to be established, the act must have been witnessed, or have been able to be witnessed, by at least two persons, that is, the complainant and one other person (Ormerod 966; Rook and Ward par 14.40). In addition, the act must have been done in a place where there existed a real possibility that members of the public might witness it (Rook and Ward par 14.43; and see *R v Walker* [1996] 1 Cr App R 111). Given that this last requirement was satisfied on the facts in *Rose*, it is evident that the result of the case turned on the non-fulfilment of the "two person" rule.

3 2 South African law

Although the roots of the crime of public indecency have been sought in the Roman-Dutch law (see *R v Marais* (1889) 6 SC 367 370; and *R v Hardy* (1905) 26 NLR 165 171), and in particular the discussion of the *crimina extraordinaria* by Voet (*Commentarius ad Pandectas* 47 11 2), it seems clear that the crime is a creation of the Cape courts during the 19th century, under the influence of English law (De Wet and Swanepoel *Strafreg* 2ed (1960) 491; and Snyman 359). Public indecency may be defined as:

> "[U]nlawfully, intentionally and publicly committing an act which tends to deprave the morals of others or which outrages the public's sense of decency and propriety" (Milton 271; and Burchell *Principles of Criminal Law* 3ed (2005) 876).

Thus the crime is committed by the intentional commission of an unlawful act which tends to deprave or which outrages public decency, which takes place in public (Milton 274). In this note we shall focus only on the last element of the crime, the requirement that the conduct must occur publicly.

The term "public" has been variously interpreted in the context of differing statutory provisions in which it has appeared. As noted in *R v Cohen* (1915 CPD 236 239):

> "[T]he meaning of 'public place' or of the word 'public' depends on the particular offence that it is used in connection with, or the particular statute in question, and the evil which the Legislature intended to prevent".

In addition, "publicly" does not have the same meaning as "in a public place", at least if the latter phrase is interpreted literally (Milton 279). It is not required that the crime be committed in a public place (although this is usually the case), but rather in a place where members of the public can perceive the conduct (Burchell 876; Milton 279; and De Wet and Swanepoel 494).

What is meant by the term "public" has been interpreted in a number of cases. In the case of *R v Marais* (*supra*), in which the crime of public indecency was apparently first recognised in South African law, the accused had indecently exposed himself on a number of occasions in the presence of young girls, although never to more than one of them at any one time. It seems that the indecent exposure took place in a private house, but in sight of a place to which the public had access. Significantly, the court (per De Villiers CJ) did not link the word "public" to a place as such, but to the morals that would tend to be depraved by such an act (De Wet and Swanepoel 492). Thus it was concluded, in relation to the "public" nature of the crime, that:

> "It is in my opinion of a sufficiently public nature if committed in sight of a place to which the public has access, and it certainly tends to the depravation of morals if seen by only one person" (*R v Marais supra* 370-371).

In *R v Bungaroo* ((1904) 25 NLR 28 30), which followed the *Marais* decision, the crime was held to be committed by "any indecency practised in such a way as to cause the public to see it and possibly be affected by it". A similar approach was followed in relation to analogous statutory provisions. For example, in respect of section 2(2) of Act 38 of 1909 (T) (now repealed), which criminalised indecent exposure in a public place, it was held that it was not necessary that the act should be committed in a place which is customarily accessed by the public, but merely one to which the public could have access (*R v Cooke* 1939 TPD 69 72-3). Moreover, it was held that although the indecent exposure took place on private property, provided that it was committed in sight of a place to which there was public access, the

offence was committed, even if there was no proof that anyone had actually witnessed the exposure (*R v Manderson* 1909 TS 1140 1142).

The nature of the "public" requirement was further amplified in *R v B* 1955 (3 SA 494 (D) 497E-G) (although the appellant's conviction of public indecency on the grounds of indecent exposure was set aside due to reasonable doubt as to the existence of the requisite intention), where (appropriately, given the roots of the crime) following the English Court of Appeal case of *R v Thallman* ((1863) 9 Cox CC 388 390), the court concluded that:

> "[I]t is not an essential for a conviction in such cases that it should be shown that a person has indecently exposed himself to view in, or from, a public highway or other place to which the general public has access, but that it is sufficient if he has done so in a situation in which he was, or may well have been, visible to a number of persons who are, so far as he is concerned, ordinary members of the public, even if their only means of seeing him is from the windows of their residences or their offices".

Thus, a person is acting "publicly" provided that his conduct can reasonably be expected to be perceived by members of the public, irrespective of whether those observing or hearing the conduct are in a public or private place at the time of doing so (Milton 279; and Snyman 360). Milton proceeds to state "conversely", citing *R v Arends* (1946 NPD 441), that even if the act occurs in a public place (such as a street), "it does not take place 'publicly' if the circumstances are such that it is improbable that members of the public will hear or see it" (280). This conclusion is problematic however, since the case of *Arends*, where the accused was acquitted after being accused of public indecency for having intercourse on an unlighted public pavement late at night, turned entirely on the question of intention. The court at no stage doubted that the conduct was of a "public" nature, stating that the street was "unquestionably a place to which the public had access", and in that sense was a "public place" (443). Liability for public indecency could therefore have followed, had it not been the case that the accused believed, on reasonable grounds, that she would not be observed.

The liability of the accused is not affected by the fact that the conduct is not actually observed or heard by more than one person (*R v Marais supra* 371), as long as there is a reasonable possibility that such conduct may be perceived by members of the public (*R v B supra* 497; Milton 280; and Snyman 360).

It is evident from this synopsis of the crime of public indecency that, had the case of *Rose* arisen in South Africa, there would indeed have been a conviction, since all that would be required to fulfil the "public" requirement would be the commission of the conduct in a place where it is reasonably possible that it could be observed. (Article 239 of the Dutch criminal code, the *Wetboek van Strafrecht*, which criminalises "schennis van de eerbaarheid" (violation of (public) decency) similarly emphasises the "waarneembaarheid" (perceptibility) of the conduct – see Kool "Misdrijven

tegen de zeden" in Cleiren and Nijboer *Strafrecht Tekst & Commentaar* 5ed (2004) 895 896.) The fact that the conduct was only seen by one person would not be an obstacle to a conviction in terms of the crime of public indecency.

4 Concluding remarks

Taking into account the way in which the term "public" has been interpreted in the case law dealing with public indecency, it is evident that the courts have sought to include a very wide range of offensive behaviour within the ambit of the crime. It is submitted that in the light of societal change, along with the need for definitional acuity in terms of the constitutional imperative to protect the accused's procedural rights, it may be necessary for the courts to examine more closely what mischief the crime seeks to prevent (cf *R v Cohen supra* 238), and to draw in the net of liability accordingly.

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