

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No: A234/2006

In the case between:

TSAPELLO RABAKO

Appellant

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THE STATE

Respondent

CORAM: MALHERBE, JP *et* C.J. MUSI, J *et* MILTON, AJ

JUDGMENT BY: C.J. MUSI, J

DATE HEARD: 07 MAY 2007

DATE DELIVERED: 07 JUNE 2007

[1] I have had the privilege of reading the judgment prepared, in this matter, by Malherbe JP. I agree with the facts¹ as set out by him and his finding that no irregularity that resulted in the appellant's right to a fair trial being affected occurred in this matter.

1. The salient facts are that on 29 May 1999, late at night, the appellant was requested to accompany the complainant to her home. En route, he threw

her to the ground and raped her. Whilst raping her he stabbed her several times with a knife. She sustained three stab wounds on her chest which were superficial; three deep lacerations on her right hand. She also had a stab wound on the back of her neck and two lacerations on her left elbow. She

I have only one substantive disagreement with his judgment and that relates to whether this rape involved the infliction of grievous bodily harm. That difference of opinion means that I have to regrettably and respectfully dissent for the reasons stated hereunder.

[2] **Section 52 (1) of the Criminal Law Amendment Act, No**

105 of 1997 (the Act) reads as follows:

“If a regional court, following on:

- a) a plea of guilty; or
- b) a plea of not guilty,

has convicted an accused of an offence referred to in –

- i) Part 1 of Schedule 2; or
- ii) ...

The court shall stop the proceedings and commit the accused for sentence as contemplated in section 51 (1) or (2) as the case may be, by a High Court having jurisdiction.”²

received medical treatment, the next morning, and the wounds on her chest, hand and neck were sutured.

2. Section 51 (1) reads as follows:

“Minimum sentences for certain serious offences. – (1) Notwithstanding any

other law but subject to subsections (3) and (6), a High Court Shall –

- a) if it has convicted a person of an offence referred to in Part 1 of schedule 2; or
 - b) if the matter has been referred to it under section 52 (1) for sentence after the person concerned has been convicted of an offence referred to in Part 1 of Schedule 2,
- sentence the person to imprisonment for life”

[3] The regional magistrate was of the view that the appellant committed rape “involving the infliction of grievous bodily harm”³ as mentioned in Part 1 of Schedule 2 and referred the matter to this court for sentencing. Knoetze AJ, without requesting the regional magistrate for reasons for her findings,⁴ was of the view that the rape did not involve the infliction of grievous bodily harm and proceeded to sentence the appellant to 20 years imprisonment. Knoetze AJ’s reasoning is set out in Malherbe JP’s judgment.

[4] Grievous bodily harm is not defined in the Act. I could not find any South African authority in which the words grievous bodily harm, as used in this schedule, have been interpreted. In **R v Jacobs** 1961 (1) AD 475 at 478 Hoexter JA succinctly and correctly distinguishes between intent to do grievous bodily harm and inflicting grievous bodily harm. He states it

thus:

3. See Schedule 2 part 1(c) of the Act.
4. Contrary to section 52 (3) b) which provides that:
 “The High Court shall, after considering the record of the proceedings in the regional court, sentence the accused as contemplated in section 51 (1) or (2), as the case may be, and the judgment of the regional court shall stand for this purpose and be sufficient for the High Court to pass such sentence: Provided that if the judge is of the opinion that the proceedings are not in accordance with justice, he or she shall, without sentencing the accused, obtain from the
 “The question whether grievous bodily harm has been inflicted depends entirely upon the nature, position and extent of the actual wounds or injuries, and the intention of the accused is irrelevant in answering that question.”

[5] In **Matzukis v The King** 1940 SR 76 at 78 – 79 Lewis J although dealing with assault with intent to do grievous bodily harm said the following:

“The crime of assault with intent to do grievous bodily harm is one which is peculiar to South African jurisprudence and is recognised in the penal code of this Colony as an indictable offence distinct from other types of assault. Though it has not its exact counterpart in the systems of Roman Dutch or English Law, it bears a closer affinity to the statutory offence in English than to anything in Roman Dutch law, and in fact the whole conception of the crime of assault in South African jurisprudence

as was pointed out in the case of *Rex v Jolly and Others* (1923, A.D. 184, KOTZE, J.A.) appears to have developed in imitation of the nomenclature and principles of the English system.

The English Act 24 and 25 (Vict. C. 100, s. 18) creates the offence of unlawfully and maliciously causing grievous bodily harm or discharging firearms with the intent.

regional magistrate who presided at the trial a statement setting forth his or her reasons for convicting the accused.”

It thus differs from the crime as it exists under our system in that it is confined to the actual causation of grievous bodily harm, and to a limited species of assault (namely by the use of firearms) in so far as the intent to do grievous bodily harm is concerned. Nevertheless the English decisions upon the questions as to what constitutes bodily harm and the intent within the meaning of the statute afford useful guidance. They are referred to in *RUSSEL on Crimes* (8th Ed., Vol. 1, at pp. 812, 813). In *Rex v Ashman* (1 F. & F. 88) the following instruction was given by WILLIES, J., to the jury: “You must be satisfied that the prisoner had an intent to do grievous bodily harm: it is not necessary that such harm should have been actually done or that it should be either permanent or dangerous: if it be such as seriously to interfere with comfort or

health it is sufficient.”⁵

Lewis J accepted the approach in **Rex v Ashman** that for harm to constitute grievous bodily harm it must be such as seriously to interfere with comfort or health. In fact the **Rex v Ashman** definition became the *locus classicus* in the United Kingdom.

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5. Historically, the words grievous bodily harm antedates the United Kingdom’s Offences Against The Person Act of 1861. R v Ashman is a matter that was decided in 1858.

- [6] The **Ashman** definition was reconsidered and overturned by the House of Lords in the matter of **DPP v Smith** 1961 (A.C.) 290. Viscount Kilmuir L.C. with the agreement of all members of the House came to the following conclusion:

“My Lords, I confess that whether one is considering the crime of murder or the statutory offence, I can find no warrant for giving the words “grievous bodily harm” a meaning other than that which the words convey in their ordinary and natural meaning. “Bodily Harm” needs no explanation, and “grievous” means no more and no less than “really serious.” In this

connection your Lordships were referred to the judgment of the Supreme Court of Victoria in the case of *Rex v. Miller* (1951) V.L.R 346, 357. In giving the judgment of the court, Martin J., having expressed the view that the direction of Willes J. could only be justified, if at all, in the case of the statutory offence, said: It is not a question of statutory construction but a question of the intent required at common law to constitute the crime of murder and there does not appear to be any justification for treating the expression 'grievous bodily harm' or the other similar expressions used in the authorities upon this common law question which are cited above as bearing any other than their ordinary and natural meaning." In my opinion, the view of the law thus expressed by Martin J. is correct, and I would only add that I can see no ground for giving the words a wider meaning when considering the statutory offence. It was, however, contended before your Lordships on behalf of the respondent that the words ought to be given a more restricted meaning in considering the intent necessary to establish malice in a murder case. It was said that the intent must be to do an act "obviously dangerous to life" or "likely to kill." It is true that in many of the cases the likelihood of death resulting has been incorporated into the definition of grievous bodily harm, but this was done, no doubt, merely to emphasise that the bodily harm must be really serious, and it is unnecessary, and I would add inadvisable, to add anything to the expression "grievous bodily

harm” in its ordinary and natural meaning.”

- [7] There is nothing in the Act or Schedule that indicates that the words should be interpreted restrictively or widely. In my judgment the words should be given their ordinary, natural meaning. I agree with the words of Viscount Kilmuir L.C. that they only mean really serious. The words “really serious” should be illuminated lest it leads to confusion or overemphasis. The New Shorter Oxford English Dictionary: Lesley Brown (Ed) 1993 defines the word “really” as *“In a real manner; in reality; actually. Used to emphasise the truth or correctness of an epithet or statement: positively, decidedly’ assuredly.”* The word therefore does not indicate degree of seriousness. In this context it only serves to emphasize that the harm inflicted must actually be serious. In essence then if the injury inflicted by the accused on the body of the rape survivor is serious then it involves the infliction of grievous bodily harm. A serious injury at one extreme may mean an injury so serious as to endanger life, necessitate hospitalisation or to result in permanent loss of bodily or mental faculty at the

other; it may include a wound that heals rapidly. It should not be a trivial or insignificant injury. A serious injury therefore need not necessarily be an injury that is permanent, life threatening, dangerous, or disabling. Whether the injuries were life-threatening, necessitated hospitalisation or immediate medical attention will generally be relevant to determine the degree of seriousness but not necessarily the seriousness itself. Whether an injury is serious will depend on the facts and circumstances of every case.

- [8] In **S v Ferreira** 1961 (3) SA 724 (E) at 725 F – G Cloete AJ albeit in another context opined that:

“One must assess the question of whether the injuries are serious or not directly with reference to the particular victim who has suffered them and not some arbitrarily defined average human being.”⁶ I agree.

- [9] In **R v Jacobs** *supra* Van Winsen AJA, as he then was, stated, at 485 B – D:

“In deciding whether the Crown has proved the infliction of grievous bodily harm by the accused, the jury would, in my opinion, be entitled to have regard to the whole complex of objective factors involved in the appellant’s assault upon the deceased. It could take into consideration the shock which would inevitably result to the deceased by reason of the fact that the accused directed two blows at his face with a knife. It could have regard to the wounds resulting from the stabs in the face, their number nature and seriousness, as well as to the blows directed to the accused’s (sic) stomach, their severity and the results which flowed from their infliction.”

6. In *S v Ferreira* supra Cloete AJ had to determine what is meant by “serious bodily injury” In Section 116 (a) of Ordinance 19 of 1955 which reads as follows:

“116. Notwithstanding the provisions of sec. 115, a court convicting a person-

- (a) of an offence under para. (a) of sub-sec. (1) of sec. 107 shall, if such person’s recklessness or negligence resulted in serious bodily injury to any other person, suspend the driver’s licence of the person so convicted for a specified period or cancel such licence, or if he does not hold a driver’s licence, declare him to be disqualified, permanently or for a specified period, from obtaining a driver’s licence;”

- [10] It seems to me that in order to determine whether the injuries in a particular case are serious one has to have regard to the actual injuries sustained, the instrument or object used, the number of the wounds – if any - inflicted their nature, their position on the body, their seriousness and the results which flowed from their infliction. It must be remembered that an injury can be serious without there, necessarily, being an open wound. In order to determine this, the judicial officer will be guided by medical evidence. It is therefore advisable

that in all such cases – where a finding in relation to infliction of grievous bodily harm is considered – medical evidence should be presented. The absence of medical evidence however is not fatal. In this matter we have the benefit of the undisputed evidence of the complainant in relation to the injuries that she sustained as well as a medical report (J88) the contents of which was admitted by the defence. Although the J88 form that was completed by the medical practitioner who examined the complainant was not before us, it was before the regional magistrate. She read the doctor's relevant findings into the record. From those findings, the doctor does not make mention of a wound on the complainant's neck. The complainant pertinently testified that she sustained an open wound at the back of her neck which was sutured. The doctor did not testify. The correctness of what he recorded was not tested. Her evidence in this regard ought to be accepted.

[11] Knoetze AJ, in reaching the conclusion that he did, followed an uncontextualised and fallacious approach. He states that

“Die beserings het nie die klaagster daarvan weerhou om self, soos dit in die rekord staan, ‘n hele ent na die polisiestatie toe te loop nie.”

This reasoning is fallacious on two grounds. Firstly, it presupposes that the complainant had a choice. She had no choice but to walk to the police station to seek refuge and assistance. Secondly it loses sight of the fact that a serious injury need not be a disabling injury.

[12] He argues that

“Die beserings toe die klaagster by die polisiestasie aankom, was nie so ernstig dat die polisie dit nodig geag het om haar dadelik mediese hulp te gee nie.”

This argument does not factor in the context of this matter as well as the situation that was foisted on the complainant. Extracts from the complainant’s evidence clearly reveal a total lack of sensitivity and probably a dereliction of duty on the part of the policeman – who was the only police officer at the police station on that evening. She testified as follows:

“Dit maak nie saak of dit ‘n polisiebeampte of ‘n siviele persoon nie. Ek wil weet wie is die heel eerste persoon aan wie u vertel u is verkrag?-- Dit is daardie polisiebeampte by die polisiestasie

nadat ek daar... (onduidelik)

Het u vir hom vertel u is verkrag? – Ja.

Was u liggaam vol bloed al dan nie en u klere in watter toestand was dit? –

My liggaam sowel as my klere was vol bloed gewees.

U sê u slaap toe daar die aand by die polisiestasie? –Ja.”

[13] During cross examination she testified as follows:

“Ek sien, mevrou is dit nie so dat u vir die polisiebeampte gesê het dat u aangerand is nie? – Ek het vir hom gesê dat hierdie persoon het my verkrag. En selfs nadat u gesê het u is verkrag, wou die polisiebeampte nie u saak neem nie? – Ja want daarna het hy gesê ek moet loop.

Mevrou ek stel dit aan u dat die polisiebeampte het vir u gesê u moet loop, hy wou nie u klagte vat nie, want u was erg onder die invloed van drank gewees. – Nee ek was nie dronk gewees nie.”

The theme about her state of intoxication is later put to her:

“U sien mevrou dit maak nie vir my sin nie. Ek stel dit aan u, u het so sterk onder die invloed van drank by die polisiestasie aangekom dat die polisie u maar summier in ‘n sel gesit het om u roes te laat afslaap, hulle sou die volgende dag hoor wat u klagte is. – Nee dit is nie die geval nie, ek het vroeër in my getuienis gesê dat omdat ek die persoon bang was en bang was om alleen daardie nag te loop, het ek vir die polisie gevra om my toe te laat om die nag daar by hulle deur te bring.”

It is clear that the police did not render her any assistance.

She received no service from the South African Police

Services on that evening. It was not for the police officer to assess whether she needed medical intervention. The fact of the matter is that she was a rape survivor who presented obvious injuries. The police officer had a duty to see to it that she receives medical treatment. When she eventually received medical intervention the doctor deemed the wounds sufficiently serious to have them sutured. She did not receive immediate medical attention because the police officer – whatever his reasons where – did not give her immediate access to medical treatment. She had no say in the matter. She had Hobson's choice. In deciding whether she had serious injuries the police officer's judgment is in my view totally irrelevant. He did not testify. There is no reason, on record, why he did not give her access to medical treatment. It is therefore mere speculation to say he did not deem the injuries serious enough to give her immediate access to medical treatment.

- [14] The complainant in this matter sustained various wounds and injuries. She was stabbed no less than eight times with a knife. Seemingly the three deep lacerations on her hand

were the most serious. The hand is part of the body. The wounds bled to the extent that her clothes and body was full of blood. When she received medical intervention the wounds were sutured. Even without the *viva voce* evidence of the doctor, I am of the view that those injuries were indeed actually serious to constitute grievous bodily harm. A careful reading of Knoetze AJ's judgment shows that he, at worst erroneously interpreted the words restrictively, at best, he unnecessarily adopted a restrictive approach. In my view, Knoetze AJ was wrong in his finding that the injuries did not constitute grievous bodily harm. He misdirected himself in coming to that conclusion. In my judgment, the magistrate was correct in finding that this was a rape involving infliction of grievous bodily harm. We are therefore at large to interfere with the sentence imposed.

[15] The only personal circumstances of the appellant, on record, is that he is a 31 year old first offender.

[16] I agree with Knoetze AJ that the crime that the appellant committed is a very serious crime and that it was committed in a cowardly manner by someone who was supposed to protect the complainant. The appellant was requested to

make sure that the complainant arrives home safe but instead he did the very thing and worse that he was supposed to protect her from. He sadistically stabbed her whilst he was busy raping her.

[17] Mr Nkhahle, on behalf of the appellant argued that there are substantial and compelling circumstances in this matter. Mr Botha conceded, rightfully so, that there are substantial and compelling circumstances.

[18] The following are in my view substantial and compelling circumstances. The appellant is a first offender. He spent 2 years and 3 months in custody awaiting trial. He pleaded guilty – *albeit* after evidence linking him with the crime was led. This is in my view a sign of contrition. Although the rape and the injuries are serious, this rape does not fall within the worst category of rape. **S v Mahomotsa** 2002 (2) SACR 435 (SCA); **Rammoko v Director of Public Prosecutions** 2003 (1) SACR 200 (SCA) paragraphs 12 and 13. One can easily imagine worst injuries being inflicted on a survivor. There is no evidence in relation to the psychiatric

effects of this crime on the survivor. In my view this crime calls for long term direct imprisonment. Twenty years imprisonment is not shockingly inappropriate. The court a quo however did not take into consideration the period that the appellant was incarcerated while awaiting the finalisation of this matter. That period ought to have been taken into consideration. **S v Nkomonde** 1993 (2) SACR 597 (W) at 598 b – c; **S v Stephen and Another** 1994 (2) SACR 163 (W) at 168. The period of twenty years should therefore be reduced by two years.

[19] I would accordingly make the following order:

- (a) The conviction of the regional magistrate, i.e. rape involving the infliction of grievous bodily harm, is confirmed.**
- (b) The sentence of 20 years imprisonment imposed by Knoetze AJ is set aside and replaced by 18 years imprisonment.**
- (c) The sentence is antedated to 20 August 2001.**

C.J. MUSI, J

I concur.

MILTON, AJ

On behalf of Appellant:

Mr. J. Nkhahle
Instructed by:
Legal Aid Board
BLOEMFONTEIN

On behalf of the Respondent:

Adv. D. Botha
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN

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