RAPE, LEGALITY AND INDECENCY

S v Khumalo, S v Zondi, S v Buthelezi (unreported, NPD) Case No 219/2004

1 Factual complex

The three accused were found guilty on various charges, including robbery and kidnapping, arising from the hijacking of an ambulance at gunpoint and the holding of the ambulance attendants as prisoners in the back of the vehicle. In respect of each of the accused, the court, per Combrink J, found (3) that their identities were not placed in issue; that they could be placed on the scene of the offences by their own admission; and that all other relevant facts relating to the charges were common cause, apart from the defence of coercion, which each accused raised, unsuccessfully (in the absence of any credible evidence supporting this defence (see 12, 15)). The court relied on the testimony of two accomplice witnesses, and whilst the court noted the need to be cautious in accepting such evidence, it found that there was abundant evidence corroborating the accomplices' testimony, that a number of safeguards were present in order to be able to readily accept it, and that the doctrine of common purpose provided further probative assistance (13). The focus of this note is, however, only on one portion of the events which took place, namely the additional charges against the third accused, Buthelezi, of rape, attempted rape and indecent assault. After the hijacking of the vehicle, the two ambulance attendants, Gladness Mdlalose and Mdu Zungu, were joined by Buthelezi in the rear of the ambulance, whilst the other two accused, Khumalo and Zondi, sat in front of the ambulance, with the sliding window between the front and the rear of the ambulance, closed (17-18, read with 7). The court held, in respect of these two accused, that it could not be held that they had performed any act of associative conduct in respect of the charges of rape, attempted rape and indecent assault, thus excluding the possibility of common purpose in this regard (15), and thus their liability will not be further discussed below.

Whilst the vehicle was in transit, Buthelezi forced the two attendants to undress, by slapping them (particularly Mdlalose) on the face, and by threatening them with a firearm. When they were both naked, Buthelezi instructed Zungu to engage in sexual intercourse with Mdlalose. Their refusals fell on deaf ears, resulting in further threats and assaults. Mdlalose was forced to lie on her back on a bunk and Zungu was instructed to mount her and to have intercourse with her. However, as a result of stress, Zungu was unable to attain an erection and thus intercourse could not follow. Buthelezi then inserted his finger into the complainant's vagina, ostensibly to ease intercourse between Zungu and herself. He further executed

masturbatory movements with Zungu's penis, endeavouring to arouse Zungu in order to facilitate penetration. Since that was also unsuccessful, Buthelezi used his fingers to push Zungu's semi-erect penis into the complainant's vagina, notwithstanding her protests. Zungu, according to the evidence, tried his best not to comply, but was forced to attempt intercourse (8).

Buthelezi apparently lost patience and told Zungu to get off and that he, Buthelezi, would show him how it should be done. He instructed Mdlalose to position herself in such a manner that he could have intercourse with her against her will. The complainant delayed as long as possible, but, when intercourse seemed inevitable, she asked him to use a condom. Not being able to find one in the rear of the ambulance, Buthelezi asked the other two accused in the front of the vehicle for a condom. At that time the first accused told Buthelezi to give the ambulance attendants their clothes back so that they could be released. It then transpired that they were released, and had to walk a considerable distance to summon assistance (8-9).

2 Findings

In dealing with the rape charge, the court reasoned as follows: "It matters not that Zungu did not himself have sexual intercourse with Mdlalose. Nor does it matter that the accused himself did not have sexual intercourse with her. By inserting Zungu's penis into Mdladlose's vagina, amounts to rape (sic). That conduct conforms to all the requirements of the definition of rape in our law" (16). Buthelezi was consequently found guilty of rape (18).

On the charge of attempted rape the court found that it had not been established, as a conviction requires an attempt at penetration. The facts showed that his actions never amounted to that (16).

Buthelezi was, however, found guilty on two accounts of indecent assault. As far as the complainant Zungu was concerned, the fact that he was forced to undress, the masturbatory movement of his penis and the insertion thereof into the vagina, were all held to constitute indecent assault. In respect of the complainant Mdlalose, the acts of forcing her to undress, the insertion of the accused's finger into her vagina, the manoeuvring of her body by the accused into positions which could accommodate sexual intercourse with him, and the accused's slapping of the complainant and pointing his firearm at her, directing at achieving that goal, all also constituted indecent assault (17).

Combrink J sentenced Buthelezi to life imprisonment for the rape and ten years for each for the indecent assaults on Zungu and Mdlalose. The last two sentences are to be served concurrently with the rape sentence (23). In sentencing the court noted the brutalisation of Zungu and Mdlalose resulted in psychological trauma and in the case of Mdlalose the prognosis appeared to be poor. The judge noted that the abuse "far exceeds anything I have had occasion to deal with. To bring about the rape through Zungu, of Gladness (Mdlalose), appears inhuman and so debased that it becomes difficult to

understand what motive moved accused 3. The indecent assault … appear[s] perverse and barbaric in the way in which it took place, without any concern for the physical and mental integrity of the victims" (21). The court concluded that society demands of the courts to make certain that women are safe and that people like the complainants can continue without fear to serve the community in the way that they are supposed to. It was further stressed that society demands that the physical and psychological integrity of the complainants be recognised (22).

3 Common law

Rape is a crime of ancient origin (Milton *South African Criminal Law and Procedure Vol II: Common-law Crimes* 3ed (1996) 443ff). The gravity of the crime is reflected in the fact that the death penalty was a sentencing option before the abolition of capital punishment (in the wake of the Constitutional Court holding the death penalty to be unconstitutional in *S v Makwanyane* 1995 2 SACR 1 (CC)). Currently, rape is one of the crimes for which a minimum sentence of life imprisonment is prescribed in certain circumstances, in the absence of substantial and compelling circumstances (s 51 of the Criminal Law Amendment Act 105 of 1997). On the other hand, an indecent assault conviction, being regarded as less serious than that of rape, would receive a lesser punishment, which could further be mitigated by provocation or lack of physical or psychological trauma (Milton 477).

3 1 Rape

In both Roman and Roman Dutch law, the violent sexual intercourse with a woman was a crime, punishable by death (De Wet *De Wet & Swanepoel Strafreg* 4ed (1985) 263ff). In terms of English law, the requirement for the crime was not violence, but the lack of consent and, as is evident from the current definition of the crime, the South African practice has been strongly influenced by the English law (De Wet 266; and Milton 446).

Rape is currently defined as the unlawful intentional sexual intercourse with a woman without her consent (Burchell *Principles of Criminal Law* 3ed (2005) 705; Snyman *Criminal Law* 4ed (2002) 445; and Milton 439). This definition is generally accepted (Snyman 445 fn 88 and the sources referred to) and it is established that sexual intercourse requires penetration by the accused (*S v J* 1998 2 SA 984 (SCA) 1006; *S v N* 1988 3 SA 450 (A) 457; and *S v V* 1960 1 SA 117 (T) 117). Under common law, rape is a crime that can only be committed personally and not through the agency or instrumentality of another (Burchell 720; and Snyman 258). It follows that the penetration must occur by means of the accused's own body, and consists of the insertion of his penis into the vagina of the victim (Milton 448).

It may be questioned whether the lack of penetration by Buthelezi himself should not be fatal to his conviction of rape? Although penetration took place, it was the coerced penetration by the complainant Zungu, which could not give rise to rape liability in terms of the common law definition, but

instead could found a conviction for indecent assault. Given that the common law rules of rape require that the crime can only be committed by means of the accused's own body, and not through the instrumentality of someone else (Burchell 573; Snyman 258; Visser and Maré *Visser & Vorster's General Principles of Criminal Law Through the Cases* 3ed (1990) 683; *S v Saffier* 2003 2 SACR 141 (SE) par [18]; *S v Gaseb* 2001 1 SACR 438 (NmS) 466g; Rabie "Verkragting – Dwang – Gemeenskap met 'n Derde – *R v D 1969 (2) SA 59 (RA)*" 1969 32 *THRHR* 308 310; and Whiting "Principals and Acessories in Crime" 1980 97 *SALJ* 199 202) it is noteworthy that the court saw fit to convict Buthelezi of rape where the required penetration did not occur. This approach is further illustrated by the indication that if a common purpose had been proved, the other accused would also have been held liable for rape (15).

However, the view that a person can be held liable for rape without personally effecting penetration by using his own body is not without support. In the recent case of *K v Minister of Safety and Security* (2005 3 SA 179 (SCA) par [7]), Scott JA made the following remark in the context of an application of the common purpose doctrine: "If only one had physically raped the appellant, all three could nonetheless have been convicted of rape." In *S v Saffier* (*supra* par [19]), Nepgen J noted that it is extremely unsatisfactory that an accused who compels another to have intercourse with a woman without her consent should escape liability for rape, and recommended the matter to the legislature. Further, as detailed below, there is indeed a pending legislative response in the form of the Sexual Offences Bill, which will specifically establish liability where the accused compels another to penetrate the victim.

Nevertheless, it is submitted that the conviction of Buthelezi for rape is an intrinsically flawed, and even dangerous, verdict in that it infringes the principle of legality (in its most basic form, *nullum crimen sine lege*, which holds that there can be no conviction of, or punishment for, an act not previously declared to be a crime at common law). This principle is a "fundamental constitutional imperative" (Burchell 97), which is enshrined in section 35(3)(1) of the Bill of Rights, and has been applied by the courts prior to the inception of the 1996 Constitution (see, *eg*, in relation to the common law crime of extortion, *S v Von Molendorff* 1987 1 SA 135 (T) 169; and *Ex parte Minister van Justisie: In re Sv J; S v Von Molendorff* 1989 4 SA 1028 (A) 1041I-J). Burchell cogently sets out some of the factors which are pertinent to common law crimes in relation to the principle of legality (100):

> "[T]he existing definitions of common-law crimes should not be replaced by new or different definitions; in cases of conflict or uncertainty the interpretation favouring the established definition of the crime or an element should be preferred; the use of analogy so as to extend the definition of a crime to include analogous conduct must be avoided; where there are lacunae in the law the courts should not usurp the function of Parliament nor rush in where the Legislator declines to tread."

Adherence to the principle of legality means that a court may not create new crimes of itself, and may not punish simply because the conduct of the

accused was held, on anyone's standard, to be deserving thereof (Snyman 43). Previously, South African courts have arrogated to themselves the role of "custos morum", most notoriously in the Cape case of *R v Marais* ((1889) 6 SC 367) where De Villiers CJ created the crime of public indecency (370; and see also *R v Brough* 1905 26 NLR 81 84). However, this approach has been subject to criticism, and our courts simply do not claim to be *custodes morum* in this sense (Burchell, Milton and Burchell *South African Criminal Law and Procedure Vol I: General Principles of Criminal Law* 2ed (1983) 58). It is perhaps noteworthy that Combrink J describes his role as "a custodian of the values and morals which operate in society" (22), in other words, a *custos morum*. Although it is unlikely that Combrink J views such a role in the same way as De Villiers CJ did in 1889, the unfortunate effect of his finding regarding rape has the same practical consequences as the wide approach to the role of *custos morum* adopted in the cases of *Marais* and *Brough*.

3 2 Indecent assault

As far as the charges of indecent assault are concerned, it is submitted that the judge was correct in his findings. The actions of Buthelezi meet the elements of the crime as he did unlawfully and intentionally assault, touch and handle both of them in circumstances where the acts themselves were indecent. As far as Zungu is concerned, the fact that he was forced to undress, the masturbatory movements with his penis and the inserting thereof into the vagina all constituted indecent assault. In respect of Mdlalose, the acts of forcing her to undress, inserting his finger into her vagina, manoeuvring her body into positions which could accommodate sexual intercourse with him, slapping her and pointing his firearm at her towards that goal, all also constituted indecent assault. As discussed above, it is submitted that the penetration of her vagina by Buthelezi using Zungu's penis also constituted an act of indecent assault.

3 3 Attempted rape

The court held that Buthelezi had not committed the crime of attempted rape, as he had not reached the point of actually attempting penetration of the complainant (16). Thus, the accused's actions were deemed to still be in the stage of preparation, as a result of which liability could not follow. However, this finding is questionable. In the cases of *R v B* (1958 1 SA 199 (A) 204) and *R v W* (1976 1 SA 1 (A)) it was held that where the accused, in trying to rape the complainant, had as yet only assaulted her, this constituted attempted rape, as the accused in each case was in the stage of execution.

3 4 Assault with intent to rape

As noted above, the court found that the accused, Buthelezi, could not be convicted of attempted rape, as he had not actually made an attempt at penetration (16). It is however submitted that there could be an alternative

basis for criminal liability: the common law crime of assault with intent to rape, which consists of the elements of common assault (unlawfully and intentionally: (1) applying force to the person of another, or (2) inspiring a belief in that other that force is immediately to be applied to him (Milton 406)) along with a further intention to rape (Snyman 436). Gardiner and Lansdown state that this crime (according to them also sometimes called attempted rape) consists of an assault made with the intent to have unlawful carnal knowledge of a woman without her consent (Gardiner and Lansdown *South African Criminal Law and Procedure* 6ed (1957) Vol II 1628; see *S v R* 1971 1 SA 246 (RA); *R v B* 1958 1 SA 199 (A); *R v M* 1946 AD 1023; *R v Hattingh* 1942 (1) PH H114 (C) and *R v Abid* 1938 AD 517). Snyman argues that the necessity for this crime's existence is questionable, since it almost invariably amounts to nothing more than an attempt to commit a crime, in this case attempted rape (436; see also Milton 436). However, *in casu* the accused was found not guilty on the charge of attempted rape. If indeed the actions of the accused do not amount to attempted rape (which conclusion is open to doubt), could it not be argued that such actions amount to assault with the intent to rape, if such a crime still exists in the South African law? There can be little doubt that on the facts there indeed was an assault with intent to rape, as is evident from the fact that the accused manoeuvred the complainant's body to accommodate sexual intercourse with him and was looking for a condom for that purpose, with gun in hand. It can be argued that it would be in accordance with justice to find the accused criminally liable for such conduct, rather than for no liability to ensue.

This submission begs the question: is this crime still part of our law? As noted, Snyman argues that the existence of the crime is questionable (436). Milton (436-437) is of the view that the crime of assault with the intent to commit a crime is no longer part of the South African law, as every instance of assault with the attempt to commit a crime (rape) is also an attempt to commit a crime (rape) (Milton 436, referring to *R v B* 1958 1 SA 199 (A)). Milton bases his argument on two legs: firstly, the legislature, in the Criminal Procedure Act 51 of 1977, does not mention, under the competent verdicts, assault with the intent to commit a crime (or assault with intent to rape). Secondly, the law reports since 1977 have not recorded a single case relating to this crime which leads Milton to submit in conclusion that "the South African law no longer knows the assault with the intent to commit a crime" (Milton 437), and thus assault with the intent to commit a rape also no longer exists.

It is respectfully submitted that Milton's arguments are not convincing. First, if the legislature intended to do away with the crime, they surely would have done so explicitly. This is so in light of the hermeneutical presumption that it is the intention of the legislature – unless done expressly, which is not the case *in casu* – that legislation should amend the common law as little as possible (*H L & H Timber Products (Pty) Ltd v SAPPI Manufacturing (Pty) Ltd* 2001 4 SA 814 (SCA) par 4). The fact that the Criminal Procedure Act does not specifically include the crime, does not necessarily mean that the legislature intended the demise of the crime. There is no indication in the act

that that was its intention. Second, the fact that there are no reported cases from 1977 again does not mean that the crime is no longer part of the South African common law. The crime of *crimen iniuria*, for example, revived after a century of disuse (Milton 498ff). It is submitted that there is no legal reason why this crime is no longer part of our law.

4 Criminal Law (Sexual Offences) Amendment Bill, 2006

4 1 Introduction

Following the proposals of the South African Law Reform Commission, the most recent draft of the Criminal Law (Sexual Offences) Amendment Bill, 2006, approved by cabinet, recommends that the common law offence of rape be repealed and replacing with a new expanded statutory offence of rape, applicable to all forms of sexual penetration without consent, irrespective of gender. It further recommends that the common law offence of indecent assault be repealed and replaced with a new statutory offence of sexual assault, applicable to all forms of sexual violation without consent (preamble). The Bill is still under discussion and it is uncertain if this is the final form that it will take. Nevertheless, the provisions of the Bill are briefly applied to the factual scenario in the case under discussion.

4 2 Rape

The crime of "rape" is defined in section 3 of the 2006 Bill as: "Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape". "Sexual penetration" is defined (s 1) to include "any act which causes penetration to any extent whatsoever by (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person; (b) any other part of the body of one person or, any object, including any part of the body of an animal or any object resembling the genital organs of a person or an animal, into or beyond the genital organs or anus of another person; or (c) …"

Applying the facts of the case under discussion to this definition, it is clear that Buthelezi would have been found guilty of the crime of rape as he forcibly used his fingers to insert Zungu's penis into Mdlalose's vagina. As such, section 1(b) above would be relevant as he used Zungu's penis to penetrate her genital organs. His earlier conduct of inserting his fingers into Mdlalose's vagina would similarly constitute the crime of rape in terms of this definition.

4 3 Compelled rape

In addition, the 2006 Bill creates a new crime: "compelled rape" (s 4) which is defined as: "Any person ('A') who unlawfully and intentionally compels a

third person ('C'), with or without the consent of C, to commit an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of compelled rape". It is submitted that Buthelezi's actions would amount to attempted compelled rape (as there was no actual penetration). Had Zungu been able to have an erection and been able to penetrate, it would have been compelled rape.

4 4 Sexual assault

The conduct covered by the common law crime of indecent assault is also included in the Bill in the form of the crime of sexual assault (s 5): "(1) A person ('A') who unlawfully and intentionally sexually violates a complainant ('B'), without the consent of B, is guilty of the offence of sexual assault. (2) A person ('A') who unlawfully and intentionally inspires the belief in a complainant ('B') that B will be sexually violated is guilty of the offence of sexual assault".

Sexual violation is defined (s 1) to include:

"any act which causes
- (a) direct or indirect contact between the –
  - (i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling the genital organs or anus of a person or an animal;
  - (ii) mouth of one person and
    - (aa) the genital organs or anus of another person or, in the case of a female, her breasts;
    - (bb) the mouth of another person;
    - (cc) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could
      - (aaa) be used in an act of sexual penetration;
      - (bbb) cause sexual arousal or stimulation; or
      - (ccc) be sexually aroused or stimulated thereby; or
    - (dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or
      - (iii) the mouth of the complainant and the genital organs or anus of an animal;
- (b) the masturbation of one person by another person; or
- (c) the insertion of any object resembling the genital organs of a person or animal, into or beyond the mouth of another person,

but does not include an act of sexual penetration".

It is submitted that the actions of Buthelezi for which he was found to be guilty of "indecent assault" would also fit the description of the crime of "sexual assault" and had the Bill been promulgated into an Act at the time of the incidence, he would have been found guilty of sexual assault. His actions relating to the forcing of the complainants by gunpoint to undress; the order to M to lie on the bunk and for Z to mount her and for them to have sexual

intercourse where they touched (but where there was no penetration) all fall under section 5(2). Similarly, his conduct in placing Mdlalose in a position to enable him to have intercourse with her would also constitute the crime of sexual assault (s 5(2)).The masturbation of Z by B would constitute an offence in terms of section 5(1).

5 Conclusion

The attitude of the court in sentencing the accused (evident in the *dictum* cited in par 2 above) might be the reason why it was of the view that the accused should be found guilty of rape, which would inevitably lead to the imposition of a heavier sentence, as opposed to indecent assault. No doubt the court was aware of the imminent change in the law, set out in the Sexual Offences Amendment Bill, which will resolve any such difficulties in this regard. However, whilst one may have sympathy for the court's views on the shocking nature of the crime, it is clear that in order to facilitate the handing down of a heavier sentence, the fundamental principle of legality has been violated, and the accused's right to a fair trial has been infringed. As Joubert JA stated in the case of *Ex parte Minister van Justisie: In re Sv J; S v Von Molendorff* (*supra* 1041I-J), it is not the function of the courts to broaden the definition of common law crimes. With regard to the acquittal on the charge of attempted rape, it is submitted that the solution in a similar factual scenario to that in the present case, is to make use of the common law crime of assault with intent to rape, to fill the lacuna which attempted rape cannot fill.

One final example of imprecision falls to be noted. The court, in noting the defence raised by the accused, comments that the sole issue "is whether or not the accused acted voluntarily, or whether as they claim happened, they did so under compulsion by others" (3). As Snyman correctly points out, whilst in the case of *vis absoluta* (absolute compulsion) the accused does not commit a voluntary act, in the case of *vis compulsiva* (relative compulsion), as in the present case, there is indeed a voluntary act on the part of the accused (115). Thus the defence of the accused was not predicated upon a lack of voluntariness (automatism), but rather upon a lack of unlawfulness, in the form of the justification ground of necessity.

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