WHAT CONSTITUTES INDECENT ASSAULT?

S v Kock 2003 2 SACR 5 (SCA)

1 Introduction

The relevant facts in this case are that K, the appellant, a 27-year-old music teacher was arrested on 18 January 2002 and, pending further investigation, was placed in detention. He had been suspected of having committed acts of indecent assault on boys under the age of 16 years. The magistrate refused an application for his release on bail. After unsuccessfuly appealing to the Johannesburg High Court, K, with leave of the court *a quo*, successfully appealed to the Supreme Court of Appeal (SCA) (see *S v Botha* 2002 1 SA 222 (SCA); and *Minister van Wet en Orde v Dipper* 1993 3 SA 591 (A)).

The State based its case on section 60(11)(b) of the Criminal Procedure Act 51 of 1997. This section reads as follows:

> "Notwithstanding any provision of this Act, where an accused is charged with an offence referred to – ... (*b*) in Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release."

Indecent assault on a person under the age of 16 years is included in Schedule 5. The State failed to present evidence of the arrest of K on specific charges and no formal charge-sheet which contained relevant detailed information on the charges had been drawn up. Furthermore, the State refused K's legal representative access to the docket. The reason provided for this refusal being that it would prejudice the continuing investigation. In his judgment on behalf of the court, Heher AJA observed that the State should have presented evidence in justification of its reliance on section 60(11)(b). This could have been done by the production of a certificate in terms of section 60(11A)(c). Notwithstanding the fact that Heher AJA did not rule out the possibility that the High Court in *Prokureur-Generaal, Vrystaat v Ramokhosi* (1997 1 SACR 127 (O) 156) might have been correct in finding that section 60(11) is only applicable if the detainee is accused of "'n definitiewe, omlynde en verstaanbare misdaad", he assumed that "the State had done enough to bring the matter within the terms of the section".

According to the (second- or third-hand) information placed before the court it would appear that the acts complained of by the state witness boiled down to "grooming" which comprises "acts designed to prepare participants

for a more adventurous stage of sexual exploration". This includes the showing of pornographic videos, indulging in suggestive games with boys, non-erotic massaging of the bodies of the boys with oil or cream and sharing a bed with them at night (10). In her judgment the magistrate proceeded from the following definition of indecent assault:

> "Indecent assault is not only an offence where the accused has to touch the private parts of the children or otherwise *but also any immoral or indecent act which is in its nature or circumstances indecent or immoral*" (quotation and emphasis by Heher AJA (10)).

2 Definition of assault

According to Heher AJA this definition is plainly incorrect. He maintains that indecent assault "is in its essence an assault (not merely an act) which is by its nature or circumstances of an indecent character" (10). As was pointed out elsewhere, court decisions are divided as to the nature and contents of indecent assault (Labuschagne "Onsedelike Aanranding, Gewelddadige Geslagsomgang en Misdaadsistematiek" 1988 *Obiter* 83 84). The crime of indecent assault originated from English law and was introduced into South African common law in the 19th century (*In re P's Petition* (1869) 2 Buch 176; *R v August* 1887 SC 116; and Labuschagne 1988 *Obiter* 84). In *R v Abrahams* (1918 CPD 590 593) Gardiner J explained the nature and contents of indecent assault as follows:

> "An assault involves an act of physical violence. The violence may be applied directly ... or indirectly ... It may take the form of a threat ... When, therefore, assault is qualified by the term 'indecent', it seems to me that it is the act of violence that is qualified; there must be an act of indecent physical violence. *I do not think that the qualification refers to the motive or purpose of the offender*" (my emphasis).

According to Gardiner J indecent acts of a person committed on or with him- or herself cannot constitute indecent assault (593). This view of indecent assault, namely that there should be an act of indecent physical violence, has been endorsed by numerous courts (see for instance *R v Jacob* 1920 SWA 9 12; *R v Taylor* 1927 CPD 16 18; *R v Hart* 1931 OPD 102; *R v Herbst* 1942 AD 434 435; *R v M* 1947 2 SA 489 (W) 493; *R v Muraki* 1985 4 SA 317 (Z) 318; *S v M* 1984 4 SA 111 (A) 112-113; and Redgment "Nothing is but thinking makes it so" 1986 *SALJ* 27).

In *S v M* (1961 2 SA 60 (O) 63) Smuts AJ explained that South African case law does not regard the application of violence as an element of indecent assault. He adds:

> "Die aantasting van 'n ander persoon se liggaam op 'n onsedelike wyse waar dit geskied teen die wil en sonder die toestemming van daardie persoon is nog altyd beskou as 'n aanranding."

Paradoxically, violence (*vis*) is described by Ulpianus (Dig 4 2 1) as an act perpetrated against the victim's will (*necessitas imposita contraria*

voluntati). *Vis compulsiva* is viewed by our common law as a form of violence (see Van den Heever JA in *R v M* 1953 4 SA 393 (A) 398; *S v A* 1993 1 SACR 600 (A) 610; and Labuschagne "Die Skisofreniese Ontwikkeling van die Geweldsbegrip in die Suid-Afrikaanse Strafreg: Opmerkinge oor 'n Regte-oriënterende Benadering tot Misdaadomskrywing" 2003 *Stell LR* 401).

In *S v F* (1982 2 SA 580 (T) 585) the accused hit other men with a piece of wood on their nude buttocks. The accused were also naked except for wearing underpants. In his judgment Ackermann J took the view that the clear sexual motive of an act is the criterion by which sexual assault is distinguished from assault as such. He continues to explain:

> "Na my mening sou so 'n benadering ook die probleme oplos wat moontlik sou kon opduik indien dit nie duidelik is of die bepaalde liggaamsdeel wel 'n 'erotiese' een is al dan nie. Indien, bv 'n beskuldigde seksuele bevrediging kry of seksueel geprikkel word deur 'n gedeelte van die klaer se liggaam te betas wat nie normaalweg as 'n 'erotiese' deel beskou word nie en by sodanige betasting dit aan die klaer laat blyk dat hy sodanige bevrediging kry of prikkeling geniet en dat dit die oogmerk van die betasting is, dan sou sodanige betasting na my mening neerkom op onsedelike aanranding" (see too *S v D* 1998 1 SACR 33 (T) 39; Labuschagne 1988 *Obiter* 86-87; and Snyman "Wat is 'Onsedelik' by Onsedelike Aanranding: die Handeling of die Opset?" 1982 *TRW* 184 186).

In the English case *R v Court* ([1987] 1 All ER 120 (CA) 122) the court stated:

> "The offence of indecent assault includes both a battery, or touching, and the psychic assault without touching! If there was touching, it was not necessary to prove that the victim was aware of the assault or of the circumstances of indecency. If there was no touching, then to constitute an indecent assault the victim must be shown to have been aware of the assault and of the circumstances of indecency" (see also Bukau *Kinders as Slagoffers van Seksuele Misdade* (LLD thesis, Unisa 2003) 23-29; and Hoctor "Motive, Intent and Indecent Assault" 1998 *Obiter* 367 372).

According to CR Snyman (*Criminal Law* (2002) 436) indecent assault "consists in unlawfully and intentionally assaulting, touching or handling another in circumstances in which either the act itself or the intention with which it is committed is indecent". He, therefore, endeavours to combine the view of Ackermann J with the view taken by Gardiner J in *R v Abrahams* (*supra*).

In his definition of (indecent) assault Heher AJA failed to properly accommodate new developments in this regard (*cf S v Matsemela* 1988 2 SA 254 (T) 256). In the English case of *R v Ireland, R v Burstow* ([1997] 4 All ER 225 (HL) 236) Steyn LJ observed:

> "The proposition that a gesture may amount to an assault, but that words can never suffice, is unrealistic and indefensible. A thing said is also a thing done. There is no reason why something said should be incapable of causing an apprehension of immediate personal violence ..."

The infliction of psychiatric injury on another through medium of the eye or the ear is generally regarded as constituting an assault (see *Bourhill v Young* [1942] 2 All ER 396 (HL) 402); *R v Chan Fook* [1994] 2 All ER 552 (CA); Labuschagne "Psigiatriese Besering, Analogiese Misdaadskepping en die Trefwydte van die Misdaad Aanranding" 1997 *Obiter* 154; "Teleterorisme, Psigiatriese Besering en die Organiese Aard van die Misdaad Aanranding" 1998 *Obiter* 175; and "Die Dinamiese Aard van die Inhoud van die Misdaad Aanranding en Geregtigheidskonforme Analogie in die Strafreg" 1998 *THRHR* 482).

In Canada a crime of sexual assault, encompassing all (traditional) violent sexual crimes, was created (Burkau 42-46; and Labuschagne "Die Penetrasievereiste by Verkragting Heroorweeg" 1991 *SALJ* 148 153). In *R v Chase* ([1987) CCC (3d) 97 (SCC) 103) McIntyre J of the Canadian Supreme Court explained that sexual assault is "an assault ... which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated ..." (see too *R v Larue* (2003) 177 CCC (3d) 20 (SCC) 22-23; and Usprich "A New Crime of Old Battles: Definitional Problems with Sexual Assault" 1986-87 *Crim LQ* 200 202-210). Similar to the Canadian law, section 177 of the German Criminal Code also creates a comprehensive crime of sexual assault (*die sexuelle Nötigung*) (see for more information Schönke *et al Strafgesetzbuch. Kommentar* (2001) 1435ev; Dreher *et al Strafgesetzbuch und Nebengesetze* (2001) 1042ev; and Labuschagne "'n Analise van Onlangse Interpretasies van die Nuwe Uitgebreide Penetrasiebegrip by Verkragting in die Duitse Reg" 2002 *TRW* 41-53).

3 Conclusion

Although Heher AJA, at least morally (*cf S v Dlamini* 1992 2 SACR 51 (CC) 58), reached the correct decision by granting bail to K, his view of the nature and contents of the crime of indecent assault is clearly out of step with modern developments and views (see in this regard Labuschagne "Aanranding en Misdaadkondensering: Opmerkinge oor die Strafregtelike Beskerming van Biopsigiese Outonomie" 1995 *De Jure* 367; and "Tele- en Sluipteistering: Opmerkinge oor die Behoefte aan Strafregtelike Beskerming van die Persoonlike Lewensfeer en Biopsigiese Outonomie" 2000 *De Jure* 274. See too *S v Rautenbach* 2001 1 SACR 521 (HHA) 526-527). The nature and extent of the research undertaken in this case is unworthy of a court with the standing and influence of the SCA.

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