CASES / VONNISSE

When Might an Assault be so Trivial as to Not Justify a Criminal Conviction? Assault With Intent to do Grievous Bodily Harm, *De Minimis Non Curat Lex*, and the Case of

S v Rahim 2024 JDR 3448 (KZP)

1 Introduction

As Hall (*General Principles of Criminal Law* 2ed (1960) 216–217) cogently points out, criminal harms differ in gravity: "[F]irst, because of the differential external effect upon the victim and the community … and secondly, by reference to the degree of moral culpability of the offender". When might criminal conduct be regarded as so trivial as to not be appropriate to visit with the stigma of a conviction? This question engages some important issues concerning criminalisation, and finds practical application in the *de minimis non curat lex* maxim, which insists that "mere trifles and technicalities must yield to practical common sense and substantial justice" (*Diageo SA (Pty) Ltd v Commissioner for the South African Revenue Services* 2023 JDR 2422 (GP) par 56), or to put it in simple terms, that the law does not concern itself with trivial things (for a detailed discussion of this rule see Hoctor "Assessing the *de minimis non curat lex* defence in South African Law" in Schwikkard and Hoctor (eds) *A Reasonable Man: Essays in Honour of Jonathan Burchell* (2019) 119).

This maxim is well-established in South African law, not only finding application in criminal law but also in relation to such fields of law as insolvency, property law, contract and delict (Labuschagne "*De minimis non curat lex*" 1973 *Acta Juridica* 291 301–302). The *de minimis* maxim certainly fulfils a practical function, in preventing state resources being wasted on inconsequential wrongs, but in the criminal law context, its functioning underscores the need to protect the rights of the individual accused. These rights may be unjustifiably limited by the state, in the context of the exercise of the blunt instrument which the criminal justice system represents, following the commission of a trivial misdeed. In essence, the maxim concerns itself with prosecutability, with deciding whether the "machinery of the criminal law … [ought to be] set in motion" (*R v Roux* 1946 EDL 248 252, cited in *R v Kuyler* 1960 (3) SA 834 (O) 839E–F), rather than as a defence excluding unlawfulness (Hoctor *Snyman's Criminal Law* 7ed (2020) 121). In Snyman's turn of phrase, prosecution should never amount to persecution

(Snyman "Die Papiertjie Moet Bloemfontein Toe Gaan: Waar is die Amptenary se Diskresie? *S v Kgogong* 1980 3 SA 600 (A)" 1980 *SACC* 313 314). On what is the decision to prosecute (or not) based? In essence, this appears to be a value judgment or policy decision (*S v Dimuri* 1999 (1) SACR 79 (ZH) 89D–E; *Diageo SA (Pty) Ltd v Commissioner for the South African Revenue Services supra* par 57).

Feinberg (*Harm to Others* (1984) 189–190) explains that legal coercion should not be used to prevent minor harms, even though in theory a choice to do so would be morally legitimate, because "chances are always good that such a use of power would cause harm to wrongdoers out of all proportion both to their guilt *and* to the harm they would otherwise cause, even when the priority of innocent interests is taken into account" (original emphasis). This reasoning applies equally to more serious crimes such as kidnapping (*S v Dimuri supra*) and assault (*S v Bester* 1971 (4) SA 28 (T)), and even to the grave crime of assault with intent to do grievous bodily harm, which may be defined as "an assault which is accompanied with the intent to do grievous bodily harm" (Milton *South African Criminal Law and Procedure Volume II: Common-law Crimes* 3ed (1996) 431).

The crime of assault with intent to do grievous bodily harm, which is a separate substantive crime rather than merely an aggravated form of assault (Hoctor *Snyman's Criminal Law* 400), consists of the following elements (Milton *SA Criminal Law and Procedure* 432): (i) an assault (that is, following Snyman's definition, "any unlawful and intentional act or omission (a) which results in another person's bodily integrity being directly or indirectly impaired, or (b) which inspires a belief in another person that such impairment of her bodily integrity is immediately to take place" (Hoctor *Snyman's Criminal Law* 395); which is (ii) committed with intent to do grievous bodily harm. What constitutes "grievous bodily harm" is a factual question for the courts to decide, but it is clear that the actual infliction of grievous bodily harm is not required for the crime to be committed, but only that the accused *intended* to commit such harm (Hoctor *Snyman's Criminal Law* 400). In this regard, the practice of listing "grievous bodily harm" as an additional element of the crime (as in Burchell *Principles of Criminal Law* 5ed (2016) 599, and Kemp (ed) *Criminal Law in South Africa* 4ed (2022) 339) is therefore inaccurate and misleading.

The application of the *de minimis non curat lex* maxim to the crime of assault with intent to do grievous bodily harm, and the considerations involved in making such decision (GF "*De minimis non curat lex* in assault cases" 1971 11 *Rhod LJ* 85 comments in the context of assault that a value judgment is required), arose for consideration in *S v Rahim* (2024 JDR 3448 (KZP)).

2 Facts

This case arose out of a domestic dispute: the appellant was the daughter-in-law of the complainant. Relationships between the parties were strained. The appellant lived in a garden cottage, adjacent to the home of the complainant. According to the appellant, her living circumstances were far

from ideal, in that she was locked in this dwelling, and would receive food at the mercy of her husband (par 3). The appellant had complained that her minor child was being withheld from her, and her complaints prior to the incident involving the alleged assault had resulted in the South African Police Services being called to the residence (par 4).

On the day of the incident, the complainant was located outside the entrance of the appellant's dwelling place, the appellant was in the unit's kitchen area, and the appellant's husband was busy unpacking the three knotted grocery packets brought to the unit by him. It is not disputed that there was an emotional exchange between the complainant and her husband about the whereabouts of their minor child (par 3–4). However, there are differences in the versions of the three parties about what transpired next.

The complainant stated that during the course of her heated discussion with her husband, the appellant picked up the knotted packet closest to her, and threw the packet at him, saying "here you can have it" (par 5, this version did not entirely accord with his statement to the police). For his part, the appellant's husband stated to the police that the appellant had picked up and thrown the packet of groceries towards the complainant. His version in court was not entirely consistent with his police statement, as in court he stated that the appellant picked up the packet on her left side, and turning to the right flung it towards the complainant standing at the door, saying "here you can have it" (par 6).

Whilst the appellant denied throwing a packet of groceries at or towards the complainant, there was a concession on her part during the leading of evidence that she had indeed thrown a packet of groceries, but a denial that she intended to assault the complainant (par 8). The focus of her evidence was on her alleged maltreatment by the complainant's family, and in particular the restrictions on her access to her child, and to her liberty, only ameliorated by her obtaining an interim protection order after the intervention of a social worker (par 7).

The nature of the injury sustained by the complainant, having been struck by the packet of groceries, was swelling to his right ankle (par 2). The packet of groceries did not merely comprise soft goods but contained cans (par 10, 11).

The appellant was convicted of assault with intent to do grievous bodily harm in the trial court, and duly sentenced to a R5 000 fine, or in the alternative, five months imprisonment, wholly suspended for five years on condition that the appellant was not convicted of assault with intent to do grievous bodily harm during the period of suspension (par 1). The matter was heard on appeal by the KwaZulu-Natal Division of the High Court, Pietermaritzburg.

3 Judgment

On appeal, the court confirmed the ongoing onus of proof borne by the State, even if the court disbelieved the evidence of the appellant (par 9,

citing *Juggan v S* [2000] JOL 7459 (A) par 12 (per Zulman JA), which in turn relied on *S v Mtsweni* 1985 (1) SA 590 (A) 593I–594E). The court then proceeded to examine whether the required *mens rea* element of the crime of assault with intent to do grievous bodily harm had been established beyond reasonable doubt: was there indeed an intention to cause grievous bodily harm by means of the assault?

This crucial inquiry was rendered more difficult in that neither counsel was able to refer the court to evidence relating to intention in the trial court (par 10). The court noted that a conviction could only follow if the appellant's intention was, at a minimum, established on the basis of *dolus eventualis*. Clearly, the trial court concluded that there was such intent to assault based on the appellant's actions in throwing the packet of groceries, along with the appellant's words that the complainant could "have" the groceries (par 11). The State contended that such evidence was sufficient for the inference of the necessary intent to assault, but this was denied by the appellant (par 10). For its part, the court noted that it was not possible to properly comment on the trial court's reasoning in arriving at the conclusion it did in the absence of any further clarificatory evidence in this regard (par 11).

It was therefore incumbent on the court to address the factual question whether the required intent to do grievous bodily harm had been proved by the State beyond reasonable doubt. In doing so, the court held, *inter alia* the following factors pertain: "(a) the nature of the weapon used and in what manner it was used; (b) the degree of force used and how such force was used; (c) the part of the body aimed at; and (d) … the nature of the injury, if any, … sustained" (par 12). Taking these factors into account in the present context, the court held that the necessary intention on the part of the appellant to do grievous bodily harm to the complainant had not been established (par 13):

> "This being supported by the uncontested evidence that the complainant 'had not done anything wrong' as stated by him, that there existed no reason or basis for the appellant to want to cause harm to the complainant, and that the relationship between the complainant and the appellant was better than that between the appellant and [her husband]."

Holding that the trial court erred in accepting one version of events (that of the complainant) while disregarding the evident contradictions in the evidence underpinning the State case (par 13), the court concluded that the conviction of assault with intent to do grievous bodily harm had not been proved beyond a reasonable doubt, and it was set aside (par 14).

The court continued that even if such a conclusion was not correct, there was an alternative basis for upholding the appeal against conviction: the application of the *de minimis non curat lex* maxim (par 15). It was accepted by the court that the context for the charges being laid against the appellant was the acrimonious divorce proceedings between the appellant and her husband, in the absence of which the incident would have been brushed aside (par 16). The court proceeded to discuss the *de minimis non curat lex* maxim as applied in the case law, stating that in terms of the operation of the maxim, where the offence is regarded as trivial, it ought to be regarded as not having been committed, and should lead to an acquittal (par 18, citing

the leading case of *S v Kgogong* 1980 (3) SA 600 (A) 603). The court, in particular (par 19), referred to the case of *S v Visagie* (2009 (2) SACR 70 (W)), where it was held that the assault which had taken place was of so trivial a nature that based on the *de minimis* maxim the conviction should be set aside. Holding that assessing the application of the *de minimis* maxim entailed "a policy decision to be exercised according to all the relevant circumstances of the case" (par 20), the court concluded that in the case at hand the assault was "of such a trivial nature as to warrant the court ignoring it altogether" (par 22). Consequently, the appeal was upheld, and the conviction and sentence were set aside.

4 Discussion

The case of *Rahim* raises a few interesting issues which require further analysis. In the discussion which follows, two matters are considered: (i) the nature of the intent requirement for the crime of assault with intent to do grievous bodily harm; and (ii) the *de minimis non curat lex* maxim.

4 1 The intent to do grievous bodily harm

As mentioned above, the court in assessing whether the State had proved that the appellant had the necessary intent to do grievous bodily harm, focused on factors such as the nature of the weapon, the degree of force, the part of the body at which the attack was directed, and the nature of the injury. In this regard, the court cites the case of *S v Dipholo* (1983 (4) SA 757 (T) (par 12)). These factors are noted at 760E–G of *Dipholo*, which in turn refers to *S v Mapasa* (1972 (1) SA 524 (E) 525D). The *Mapasa* dictum derives from what appears to be the original framing of these factors in *S v Mbelu* (1966 (1) PH H176 (N)) (which the *Mapasa* judgment cites at 525C–F):

> "Where the court is confronted with the problem whether it should draw the inference that an assault was accompanied by this particular intent it usually has to rely on four main factors which provide the index to the accused's state of mind. I am not suggesting that these four factors are exhaustive; I do suggest that in the large majority of cases these are the factors which provide a guide to the accused's state of mind. They are, first, the nature of the weapon or instrument used; secondly, the degree of force used by the accused in wielding that instrument or weapon; thirdly, the situation on the body where the assault was directed and fourthly the injuries actually sustained by the victim of the assault."

The practical test established by this dictum has been applied in several cases. Apart from the *Mapasa* and *Dipholo* cases mentioned above, reference may be made to: *S v Bokane* (1975 (2) SA 186 (NC) 187B–D (to which *S v Van Wyk* 2000 (1) SACR 590 (T) 591G–I refers)); *S v Seatholo* (1978 (4) SA 368 (T) 372B–E (to which *S v Mzamo Fuma* 2008 JDR 0792 (BHC) 3 and *S v Nyikana* 2008 JDR 0866 (BHC) 10–11 in turn refer)); *S v Melrose* (1985 (1) SA 720 (ZS) 723B–D); *S v Baardman* (1998 JDR 0584 (C) 4–5); *S v Williams* (2000 JDR 0533 (T) 4–5); *S v Mvelase* ([2000] 3 All SA 48 (N) 54); *S v Kamanga* (2004 JDR 0169 (T) 2); *S v Reza* (2004 JDR 0348

(ZH) 3); *S v Maluleke* (2004 JDR 0533 (T) 4–5); *S v Mbara* ([2005] JOL 13800 (E) 2–3); *S v Sikakane* (2009 JDR 0393 (GSJ) 4–5); *S v Pretorius* ([2015] JOL 34444 (FB) par 9); and *S v Rusi* (2019 JDR 1711 (ECG) par 36).

However, as Miller J points out in *Mbelu*, this list of factors is not exhaustive. Thus, in *S v Mapasa* (*supra* 525E–G), the court also mentions that account should be taken of factors such as the age and physical condition of the participants in the incident, as well as the manner in which the instrument with which the assault is committed, is used. In a judgment preceding the *Mbelu* case, *S v Voyi* (1962 (2) PH H203 (T)), the court mentions a similar list of factors to those listed in *Mbelu* in establishing intent to commit grievous bodily harm (the nature of the attack, the dangerousness of the means used, the vulnerability of the body part targeted), but adds an additional factor: the presence of words indicating such intent.

In the case under discussion, having cited the factors which originally derived from the *Mbelu* judgment (by way of the *Dipholo* decision), the court concluded that upon the facts it could not be established that the appellant had "any intention" to injure the complainant (par 13). Therefore, neither a conviction of either assault with intent to do grievous bodily harm, nor even the lesser offence of common assault was tenable on the basis of the evidence (par 14 (in the report two succeeding paragraphs are numbered par 14)).

The application of the abovementioned factors to the factual scenario is strongly supportive of the correctness of the court's decision. The court could have concluded its judgment at this point. However, the court continued, even if this conclusion was not correct, there was a further ground for setting aside the conviction: the *de minimis non curat lex* maxim (par 15). This aspect will be considered below.

4 2 De minimis non curat lex

Since the early 20th century, when criminal conduct has been categorised as trivial by courts, this has been held to provide the basis for a defence to both common-law crimes and statutory offences (*S v Magidson* 1984 (3) SA 825 (T) 832F–I). Indeed, in the context of the common-law crime of *crimen iniuria*, it was held that even some of the Roman-Dutch jurists stated that it was not standard practice to prosecute criminally for the "lighter species of *injuria*", and consequently criminal proceedings founded on light or trivial *injuria* would not be sanctioned by the courts (*R v Umfaan* 1908 TS 62 67, as cited and discussed in *R v Howard* (1917) 38 NPD 192 196; *R v Muller* 1938 OPD 141 142).

It appears that the *de minimis non curat lex* maxim was first mentioned in a reported criminal case in *R v Sassin* (1914 CPD 972 974) (this matter pertained to the liquor laws; see also, in this context, *R v Wainstein* 1920 EDL 309 313, in the context of gambling laws *R v Weber* 1921 EDL 26 27, and in the context of breach of the peace offences *R v Innes* 1917 CPD 151 152 and *R v Robinson* 1937 TPD 117).

Where, however, the court was of the view that the offence in question was not consistent with a slight infraction being overlooked for the purposes of criminal liability, the question of triviality was not regarded as relevant to conviction (*R v Marcuse* (1908) 25 SC 355 358, 359; *R v Ah Pong* 1946 AD 884 890; *R v Mkolo* 1939 EDL 91 100; *R v Du Plessis* 1956 (1) PH H115 (SR)).

Any doubt or uncertainty as to whether the *de minimis non curat lex* maxim finds application in the criminal law was put to rest in *R v Dane* (1957 (2) SA 472 (N)), which dealt with the successful appeal against a conviction of malicious injury to property arising out of the trimming of a hedge between neighbouring properties. The court held that "the damage done, if any, was so trifling that the matter should never have come to court", and that the whole matter ought to have been regarded as "so trivial as not to be worthy of…judicial attention" (473D–E). It was emphasised by Kennedy J that the *de minimis* maxim applies in criminal cases, and that "in charges of extreme triviality, it can and should … be applied, as, for instance, a charge of the isolated theft of a pin should be dismissed" (473D–E). Holmes J delivered a pithy concurring judgment: "I think the Crown has made a mountain out of a mole-hill" (473E).

In the years since *Dane*, the *de minimis non curat lex* maxim has been confirmed in the criminal law context on a number of occasions. Notably, the Appellate Division applied the *de minimis* maxim in the leading case of *S v Kgogong* (*supra*), further confirming its use in *S v A* (1993 (1) SACR 600 (A) 607d–f), where the court confirmed the well-established practice of applying the *de minimis* maxim to ensure that people are not found guilty of trivial assaults.

Apart from being raised in the context of a number of statutory charges, most notably drugs offences (as discussed by Hoctor in Schwikkard and Hoctor *A Reasonable Man: Essays in Honour of Jonathan Burchell* 129–130, the criminalisation of conduct relating to cannabis being a particular focus), the *de minimis* rule has found application in the context of a number of different common-law crimes since its application in *Dane*: in relation to theft (*S v Mbala* 1969 (1) PH H44 (E), *S v Kgogong supra* 604A–B where a "mere scrap of paper" serving a guide to a policeman conducting an interrogation was stolen, and *S v Du Toit* 1983 (1) PH H31 (O) where a bunch of grapes of undetermined size and nature was stolen); assault (*S v Bester supra* where the accused slapped an 11-year-old boy who had tripped his daughter and caused her slight injuries, and *S v Visagie supra*, where whilst arguing the appellant pushed the complainant which resulted in accidental injury); and malicious injury to property (*S v Windvogel* [2007] JOL 19378 (E)). It is further accepted that the *de minimis* rule could find application to the crimes of defamation (*S v Hoho* 2009 (1) SACR 276 (SCA) par 21–22; this crime has been repealed by s 34 of the Judicial Matters Amendment Act 15 of 2023) and kidnapping (*R v Long (1)* 1969 (3) SA 707 (R) 709A; *S v F* 1983 (1) SA 747 (O) 752C; *S v Dimuri supra* 84B, 90D–E). Moreover, while the *de minimis* rule does not apply to *crimen iniuria*, the triviality inquiry in this context is analogous to that of the *de minimis* rule (*S v Bugwandeen* 1987

(1) SA 787 (N) 796A–B, followed in *S v Seweya* 2004 (1) SACR 387 (T) par 17 and *S v Mostert* 2006 (1) SACR 560 (N) 571C–F).

As indicated above (section 1), the assessment of whether the matter before the court may be regarded as too trivial to ascribe legal consequences to it is a factual inquiry. Such inquiry may be guided by various factors. (The principal factors contained in the schema developed by Veech and Moon "*De minimis non curat lex*" 1947 *Michigan Law Review* 537 are briefly referred to below. This schema has been adopted by other writers such as Inesi "A Theory of *de minimis* and a Proposal for its Application in Copyright" 2006 *Berkeley Technology Law Journal* 945; Ruedin "*De minimis non curat* the European Court of Human Rights: The Introduction of a New Admissibility Criterion (Article 12 of Protocol No 14) 2008 *European Human Rights Law Review* 80; and Hoctor in Schwikkard and Hoctor *A Reasonable Man: Essays in Honour of Jonathan Burchell* 119.) First, the court may have regard to the *purpose* of the provision, that is, the purpose, policy or legislative intention underlying the criminalisation of the offence in question (Veech and Moon 1947 *Michigan Law Review* 545). Secondly, the court may take into account the *practicality* of the provision, which is considered along with the promotion of the practical and speedy administration of justice (Veech and Moon 1947 *Michigan Law Review* 552–553). Thirdly, the court may take into account the *value*, size and type of the harm caused (Veech and Moon 1947 *Michigan Law Review* 558). Lastly, the court may consider *intent*, in terms of which the presence (or absence) of intent may be regarded as indicative of the reasonableness of the accused's actions (Veech and Moon 1947 *Michigan Law Review* 556).

4 3 When is an assault trivial?

This question falls to be considered in the context of the fact that assault may be committed by even slight application of force to the body of another, subject to the application of the *de minimis* maxim (*Freedom of Religion South Africa v Minister of Justice and Constitutional Development* 2020 (1) SACR 113 (CC) par 35). Gross (*A Theory of Criminal Justice* (1979) 187) sets out three varieties of conduct, using the context of assault, in discussing "inoffensiveness as an exculpatory claim". Gross notes (187) that the first two varieties are *de minimis* defences (the third variety will be mentioned below), and describes these as follows:

> "Sometimes there is no harm because the act is too trivial as an encroachment upon the interest in question. For that reason a slight deliberate shove as one makes one's way to the back of a crowded bus cannot be an assault. But even when the encroachment is more substantial it may fail to be offensive because the give-and-take of social intercourse requires toleration of certain encroachments – at least if no refusal to tolerate them has been communicated to those who may otherwise rely on conventions of toleration. Thus, e.g., a hearty slap on the back, even though thoroughly disagreeable to the recipient, may nevertheless be inoffensive from a criminal point of view, since it is within the ordinary bounds of social intercourse, and no narrower bounds have previously been set by the victim."

In the context of South African jurisprudence (including cases from the erstwhile Rhodesia), it is notable that the intent factor of the inquiry into whether the *de minimis non curat lex* maxim applies has primarily found application in assault cases, frequently in the context of preceding provocation (Labuschagne "*De minimis non curat lex* as strafregtelike verweer in 'n regstaat: Opmerkinge oor strafsinvolheid en die groeiende rasionele dimensie van geregtigheid" 2003 66 *THRHR* 455 462 approves of taking provocation into account as a basis for the *de minimis* rule.). The instances of successful reliance on the *de minimis* maxim (or where the court was prepared to accept the operation of the maxim) are consistent with the second category of conduct identified by Gross – "where the give-and-take of social intercourse requires tolerance of certain encroachments" (*A Theory of Criminal Justice* 187).

Thus, in *R v Van Vuuren* (1961 (3) SA 305 (E) 307E–H), in the course of overturning an assault conviction on the grounds of lack of unlawfulness, the court indicated that the *de minimis* rule could possibly apply in relation to the force employed by the second appellant when he led the complainant away from the appellant's wife in order to restrain the complainant from insulting her further. In the Rhodesian case of *R v Maguire* (1969 (4) SA 191 (RA) 192E–F) the appellant's conduct in pulling his wife away from the telephone when he thought she intended to phone the police was regarded as *de minimis*, based on the provocation encountered. Furthermore, in *Van Staden v Cilliers* (2009 JDR 1384 (GNP) 4), a delict case relating to assault, provocation was also determinative of the application of the *de minimis* maxim, where the court held that the assault "if any was minimal, and in response to the Plaintiff's unseemly resort to the physical". The court in *S v Bester* (*supra*) did not specifically indicate that it found the complainant's provocative conduct, in tripping the appellant's daughter so that she fell, to be the primary reason for the court to set aside the appellant's assault conviction, for slapping the complainant, on the basis of the *de minimis* maxim. Nevertheless, the blow followed a "woordewisseling" ("argument") (29) between the child complainant and the appellant, making it clear that the element of provocation played a role in the subsequent assault.

In the most recent case in which the *de minimis* maxim was considered in some detail, *S v Visagie* (*supra*), an assault conviction flowing from an incident in a mechanical workshop was overturned. The court examined a number of cases where it was contrary to public policy to allow the operation of the *de minimis* rule and then concluded that the case at hand was not to be regarded as falling within this category. The court, noting that provocation could be considered as a possibly important circumstance (along with other factors) in arriving at a value judgment as to whether or not, all circumstances considered, the gravity of the matter warrants the court's attention, held that the *de minimis* rule was applicable and overturned the conviction (par 27, 34, 36).

The factual considerations to be taken into account in deciding whether an assault preceded by provocation ought to be regarded as *de minimis* are highlighted in the following statement in the Rhodesian case of *R v Botha* (1939 SR 43 (cited in *S v Visagie supra* par 34)):

> "[T]here are cases where the blow or the assault committed in retaliation in circumstances of provocation is so trivial and so slight when compared with the provocation received that the law would very properly say it is not a matter with which the Courts should be concerned."

In the *Visagie* case, it was clear that the appellant and complainant were aggressively squaring up to one another in the course of their argument, immediately before the appellant's push caused the complainant to trip, accidentally falling over a low bed lift in the workshop, consequently fracturing his wrist (*supra* par 31, 35). Could it be said that the court deemed the harmful conduct to be within the ordinary bounds of social intercourse, so as to fall within Gross's second category of conduct?

This value judgment may be contrasted with assault cases where the court was not prepared to accept that the conduct could be regarded as *de minimis*. In *S v Schwartz* (1971 (4) SA 30 (T)) the court regarded the elderly male appellant's pushing over of the elderly female complainant, both dwellers in the same block of flats, as not constituting *de minimis*. The court's value judgment in this regard is evident from its reasoning (31E–G):

> "It is an assault on a woman; it is an assault in circumstance where the possibility of minor conflicts between residents of the same flat building could always arise and assault in such circumstances is a more serious matter because it undermines the whole possibility of civilised joint habitation of flat buildings as our modern urban life demands."

While the court was sympathetic to the possibility of a teacher's physical chastisement being regarded as *de minimis* in the 1977 case of *De Swart v S* (1977 (2) PH H122 (O)), it held that the appellant teacher's head-butting of the 11-year-old complainant could not be regarded as inconsequential. Neither could the first appellant's conduct in *R v Van Vuuren* (*supra*), where the complainant was seized by the arm and propelled down some stairs nor too could the appellant's act of slapping his wife across the face, which caused her to fall to the ground, as per the court in *S v Maguire* (*supra*). In *Maguire* (*supra* 193A–C), the court sought to explain the need to contextualise the value judgment to be made on the facts of a case as follows:

> "It seems to me that, wherever the defence of *de minimis non curat lex* is raised, the court has to consider all the circumstances under which the blow which is said to be trivial was delivered. In some circumstances, a blow may be considered so trivial as to justify the court ignoring it altogether; in different circumstances, a similar blow might be a relatively serious assault; for example, slaps delivered by fishwives to each other during a drunken brawl might well be ignored on the principle of *de minimis non curat lex* whereas an unprovoked slap delivered to the face of a lady, say at a garden party, could not be similarly ignored."

In its consideration of the possible application of the *de minimis non curat lex* maxim, the court in *Rahim* took account of the approach and reasoning in the cases of *S v Dimuri* (*supra*), *S v Kgogong* (*supra*), *S v Visagie* (*supra*) and *S v Maguire* (*supra* par 17–20), before concluding that the appellant's conduct should be regarded as *de minimis*. Notably, the court did locate its value judgment in this regard in the context of the incident – the "acrimonious divorce proceedings" and "related primary residence battle

between the parties", that is, between the appellant and her husband (par 16). Moreover, the factors upon which the assessment of the court are based are clear: the provocative circumstances of the appellant's ongoing dispute with her husband which seem to be the animating cause of the appellant in frustration flinging the packet towards the doorway, as well as the fact that the commission of the harm was not related to any altercation between the appellant and the complainant at the time the packet of groceries was thrown towards the doorway (relating to the "intent" factor – see above), and the fact that the complainant's injury was not severe (the "value" factor – see 4(ii) above).

There is a curiosity about the judgment. In other *de minimis* cases, the application of the maxim follows a confirmation of the blameworthiness of the accused, at least in so far as the harmful conduct in question is concerned. What follows is a statement by the court that despite the technical guilt of the accused, based on the operation of the *de minimis* maxim, criminal liability should not be attributed to the accused (see, e.g., *S v Bester supra*). However, in the *Rahim* case, the assessment of whether the *de minimis* maxim finds application follows the court conclusively holding that the appellant ought to be acquitted of any assault liability, whether assault with intent to do grievous bodily harm or common assault, on the basis of lack of intent (par 13–14). The court couches the reason for this approach in an *ex abundanti cautela* approach ("[e]ven if I am wrong in my conclusions as aforesaid" (par 15)). However, the fact that the *de minimis* maxim is discussed at all after a finding that the appellant lacked any intent to assault is somewhat jarring, as having dismissed the possibility of criminal intent, it requires one to once again invest the appellant with such intent for the purposes of demonstrating the application of the *de minimis* maxim.

Gross (*A Theory of Criminal Justice* 187) mentions a third form of "lack of offensiveness" in the assault context apart from the two varieties of conduct which fall under the *de minimis* maxim. Gross refers to the accidental blow, which does not constitute harm, even though the same blow deliberately inflicted would constitute assault:

> "[W]hen the blow is deliberate it is an offense to sensibility, since it normally humiliates the victim and puts him in fear of violence. The accidental blow, however, does not touch the dignity or security of the person who is struck, and for that reason there is no harm in it." (*A Theory of Criminal Justice* 187)

While negligent conduct can certainly cause harm, for the purposes of criminal law there is no such thing as an unintentional assault. In the *Rahim* case, the court established that there was at least reasonable doubt that the appellant had any intent to assault the complainant, and so could not be convicted of any form of assault. However, this is an entirely different conclusion to a finding of *de minimis non curat lex*, where all the elements of criminal liability are required to be complied with, before the court may on grounds of a value judgment (or policy), having assessed the various factors indicative of triviality, declare that the accused should be acquitted.

5 Conclusion

It is submitted that the court in *Rahim* clearly remedied an injustice: the conviction of the appellant for assault with intent to do grievous bodily harm. There is no indication on the facts, using the criteria which have been established and confirmed through the case law, that such a conviction was justified. Nevertheless, the courts have shown practical wisdom in allowing for the possibility of other factors to be taken into account in establishing intent to do grievous bodily harm. Similarly, in relation to the *de minimis non curat lex* maxim, it is submitted that there are settled categories of factors (discussed above) that fall to be considered in assessing whether the conduct in question is too trivial and inconsequential to be found criminal liability. It is nevertheless clear that in exercising the required value judgment or policy decision associated with such a decision, the court is not restricted to any particular consideration.

In applying the *de minimis* maxim to assault, the court in *Rahim* has carefully and correctly (it is submitted) followed the approach adopted in previous decisions based on similar factual scenarios. The judgment is a useful addition to the jurisprudence on the *de minimis non curat lex* maxim, even if, given the finding that no intent to assault was present at the time of the infliction of the harm, the portion of the judgment dealing with triviality, if not trivial, is gratuitous.

Shannon Hoctor
BA LLB LLM DJur PGDip (Latin)
Faculty of Law, Stellenbosch University, Stellenbosch, South Africa
https://orcid.org/0000-0002-5012-6491