

policy issues for consideration on the basis of the specific facts of the case. After all, that is what rules, such as the *par delictum* rule, are there for.

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**REVISITING THE INTERPRETATION OF “GRIEVOUS BODILY HARM” FOR PURPOSES OF ESTABLISHING THE OFFENCE OF ROBBERY WITH AGGRAVATING CIRCUMSTANCES**

*S v Maselani* 2013 2 SACR 172 (SCA)

## 1 Introduction

Within South African criminal law, robbery is a well-established substantive crime manifesting itself frequently. In essence, robbery can be defined as theft of property by the unlawful and intentional use of violence to take the property from someone else; or threats of violence to induce the possessor of the property to submit to the taking of the property (Snyman *Criminal law* (2008) 517; Burchell *Principles of criminal law* (2013) 706; Hoctor “Examining the expanding crime of robbery” 2012 *SACJ* 361–378; Van der Merwe “Empirical phenomenological research on armed robbery at residential premises: Four victim’s experiences” 2008 *Acta Criminologica* 139; Le Roux “Vonnisoplegging by roof met verswarende omstandighede” 2005 *JJS* 146; see also recent cases such as *S v Masingili* 2013 2 SACR 67 (WCC); *S v Mabunda* 2013 2 SACR 161 (SCA)). Robbery accordingly consists of theft accompanied by an assault or violence (Snyman 517; Burchell 706). At common law, robbery, or *rapina*, was acknowledged as an aggravated form of theft and as such constituted theft by means of violence (*ibid*; Le Roux 146). Today robbery is regarded as a separate crime, distinct from ordinary theft and assault, although the requirements for the latter two offences equally apply to the offence of robbery (Snyman 517). As far as sentencing for robbery is concerned, section 51 of the Criminal Law Amendment Act 105 of 1997 (hereafter referred to as “the Act”) provides for certain minimum sentences to apply in cases of robbery where there are *aggravating circumstances* or in cases involving the taking of a motor vehicle (see s 51(2)(a) of the Act; Snyman 520–521; Burchell 714). Section 51(2)(a) of the Act reads as follows:

“Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in –

- (a) Part II of Schedule 2, in the case of –
  - (i) a first offender, to imprisonment for a period not less than 15 years;
  - (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
  - (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years.”

Part 2 of Schedule 2 of the Act, as stated above, specifically refers to robbery when there are *aggravating circumstances* or robbery involving the taking of a motor vehicle. “Aggravating circumstances” is defined in section 1(1)(b) of the Criminal Procedure Act 51 of 1977 (hereafter the CPA) as follows:

“(1) In this Act, unless the context otherwise indicates –

‘**aggravating circumstances**’, in relation to –

(b) robbery or attempted robbery, means –

(i) the wielding of a fire-arm or any other dangerous weapon;

(ii) the infliction of grievous bodily harm; or

(iii) a threat to inflict grievous bodily harm,

by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence;”

“Aggravating circumstances” in respect of sentence are limited to robbery or attempted robbery (see Du Toit *et al Commentary on the Criminal Procedure Act* (2012) 2). The decision under discussion is of particular importance as the Supreme Court of Appeal provided elucidation pertaining to the phrase “grievous bodily harm” for purposes of establishing *aggravating circumstances* in terms of section 1 of the CPA for purposes of establishing robbery with aggravating circumstances.

## 2 Facts

The salient facts appear from the judgment delivered by Swain AJA: The first and second appellants stood trial as first and second accused, respectively, and were convicted together with a third accused of robbery with aggravating circumstances. All three accused were initially charged with murder and robbery with aggravating circumstances. The first and second appellants were sentenced to fifteen years imprisonment. During sentencing, the proceedings against the third accused were adjourned to allow for a psychiatric assessment to be conducted upon the accused in accordance with section 78(2) of the CPA. It later transpired that the psychiatric assessment revealed that the third accused suffered from a mild intellectual disability. The third accused was convicted of robbery with aggravating circumstances and sentenced to ten years imprisonment (para 29). According to the facts, it transpired that the two appellants were part of a group of three who had set out to rob the deceased. The three accused went to the home where the deceased was employed and asked for work. When the deceased stated that there was none, the first appellant asked the deceased for water (para 5). All three accused waited at the door whilst the deceased fetched the water. When the deceased returned she noticed that a cell phone which she had left at the door was gone and she asked where it was. All three accused initially denied knowledge of the cell phone and the deceased then said she was going to call the police (para 5). The third accused consequently admitted to taking the cell phone, but refused to return it to the deceased. They then asked the deceased for money for petrol and she answered that she had none (para 5). The three accused then decided to rob the deceased. They then suppressed the deceased with force and tied her up. The cause of death was confirmed as asphyxia caused by manual strangulation. According to the medical evidence, the force applied was moderate because of the presence of haemorrhage.

The trial court concluded that, according to the evidence of the appellants, the third accused was alone with the deceased for a sufficient amount of time during

which the death eventuated. However, because their evidence was not corroborated in accordance with the cautionary rule regarding evidence given by the accused, implicating a co-accused, the trial court held that it had not been established beyond a reasonable doubt that the third accused had killed the deceased (see para 17). In addition, the trial court found that a common purpose to murder on the part of all three accused had not been established and accordingly all three accused were acquitted on the murder charge (see para 24 and *S v Hlapezula* 1965 4 SA 439 (A) 440D–H). The first and second appellants appealed against their convictions of robbery with aggravating circumstances. The sole issue in respect of their appeals against conviction was whether, as a question of fact, aggravating circumstances were present in the form of the infliction of “grievous bodily harm” upon the victim of the robbery within the ambit of the term *aggravating circumstances* as enunciated in section 1(b)(iii) of the CPA (para 3). It was argued on behalf of the appellants that for purpose of determining whether grievous bodily harm had been inflicted, the inquiry was concerned solely with the *nature, position and extent of the actual wounds and injuries*, and that the consequences stemming from the infliction of such wounds and injuries to the victim had to be disregarded (para 9).

### 3 Judgment

Counsel for the appellants relied heavily on a *dictum* by Hoexter JA in *R v Jacobs* 1961 1 SA 475 (A) 478A:

“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” (para 10).

Swain AJA held that the above quote should not be construed as limiting the enquiry to the specified incidents of an attack upon a victim, but rather emphasises that the intention of the accused person was irrelevant for purposes of such inquiry (para 10). The court proceeded to refer to the majority judgment by Van Winsen AJA with whose judgment Van Blerk JA concurred in the *Jacobs* case where it was specifically held that it remained a question of fact whether aggravating circumstances were present in a particular case (see *Jacobs* 481F). The court, in addition, placed emphasis on a *dictum* by Van Winsen in the *Jacobs* decision where it was held:

“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 accused’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 two blows directed to the accused’s stomach, their severity and the results which flowed from their infliction” (*Jacobs* 485B–D).

It was consequently held by Swain AJA that the whole complex of objective factors involved in the assault should be considered in assessing whether grievous bodily harm had been established in order to determine the existence or not of aggravating circumstances (para 12). Swain AJA, in addition, noted the following:

“Common sense dictates that, where the object of the provision is to penalise ‘the infliction of grievous bodily harm’ upon a victim, the *consequences suffered by the victim* are a relevant consideration. As pointed out by the trial court, ‘what harm

can be more grievous than death?’ This must be so where the victim dies as a result of the infliction of bodily harm” (see para 13; emphasis added).

It was pointed out by the court that should the harm suffered by the victim be excluded from the inquiry into whether aggravating circumstances were present, it could result in the absurd situation where mere threats to kill could result in a conviction of robbery with aggravating circumstances, whilst actual death would not if the degree or nature of the force applied could not be classified as grievous (para 14).

It was accordingly held that the victim died as a consequence of the injuries inflicted upon her neck and that grievous bodily harm had been established (para 15). It was stated by the court that by virtue of the provisions of section 1 of the CPA that once a common purpose on the part of the accused to rob had been established and the infliction of grievous bodily harm upon the victim had been established, the offence of robbery with aggravating circumstances had been proved against all three accused. It was as such not necessary to prove that such consequence had been foreseen by the members to the common purpose to rob, provided that it was established that one or other, or all of them inflicted such harm (para 16). It was held that the trial court had misdirected itself and erred in acquitting the third accused on a charge of murder as the evidence of the first appellant proved beyond reasonable doubt that the third accused murdered the deceased. It was further found that the first and second appellants played no part in the infliction of the grievous bodily harm upon the deceased, but that they had been found guilty of robbery with aggravating circumstances as a consequence of the deeming provisions of section 1 of the CPA (para 26). It was further held that for purposes of sentencing, the absence of any involvement by the appellants in the death of the deceased was not properly considered for purposes of sentencing having regard to the lesser sentence being imposed upon the third accused who actually caused the death of the deceased (para 29). As such substantial and compelling circumstances existed for the imposition of a lesser sentence than the prescribed sentence and accordingly the appeal against conviction was dismissed but the appeal against sentence was upheld and the sentences of fifteen years’ imprisonment were set aside and replaced with sentences of ten years’ imprisonment in respect of both appellants (para 30).

#### 4 Assessment

The decision by the Supreme Court of Appeal is to be welcomed as it sheds light upon the interpretation of the provisions of section 1 of the CPA with specific reference to its relevance for purposes of sentencing in terms of the minimum sentences provided for in the Act in respect of the offence of robbery with aggravating circumstances. Despite the fact that the offence of robbery with aggravating circumstances presents itself quite frequently, courts more often than not are not called upon to interpret the provisions of section 1 of the CPA and such to elucidate the concept of *aggravating circumstances*. The decision under discussion is topical as it emphasises that the question as to whether aggravating circumstances were present or not, remains a question of fact and had to be assessed objectively (see *S v Anthony* 2002 2 SACR 453 (C) 454j–455b 456c–d). The latter is in line with the judgment of Yekiso J in *S v Isaacs* 2007 1 SACR 43 (C) where it was held that the test for assessing the presence or otherwise of aggravating circumstances was a factual one and that onus of proving the

presence of such circumstances was on the state (see *Isaacs* paras 36–38). Du Toit *et al* 2 opine, on the other hand, that the state does not carry an onus to prove aggravating circumstances and concomitantly there is no onus on an accused to prove any absence thereof, but that the court will assess the facts before it and determine whether aggravating circumstances existed (see also *S v Makaula* 1978 4 SA 763 (SWA)). It is submitted that the state will have an onus of establishing aggravating circumstances for purposes of sentencing as such circumstances become relevant for purposes of imposing a heavier sentence in cases of more serious robberies. (See eg the recent judgment in *S v Mofokeng* 2014 1 SACR 229 (GNP) para 18.4 where Lamprecht AJ held:

“In this regard it must be noted that the definition of ‘aggravating circumstances’ in relation to, *inter alia*, robbery had been inserted in the Criminal Procedure Act, mainly to justify the imposition of a heavier sentence . . . Since the death penalty has been abolished, it plays no other role than to justify the imposition of heavier sentences than short-term imprisonment in appropriate circumstances.”)

The decision under discussion further illustrates that for purposes of determining whether aggravating circumstances and more specifically, “grievous bodily harm”, was present, all the objective facts and circumstances had to be assessed and even more so where the death of the victim eventuated as a result of the infliction of the grievous bodily harm. Another interesting feature of the judgment, albeit not the focus of the present discussion, is that it was held that once a common purpose to rob has been proven against an accused and the infliction of grievous bodily harm established, then robbery with aggravating circumstances has been established against all the accused. The latter prevails even if there is uncertainty as to which party actually inflicted the grievous bodily harm and as such it is not necessary to prove that the consequence was foreseen by the members to common purpose to rob, provided that it is established that one or other or all of them, inflicted such harm (para 16; see also *S v Dhlamini* 1974 1 SA 90 (A) 94B–D).

The analysis of the presence of aggravating circumstances and as such “grievous bodily harm” will accordingly not be determined solely with reference to the *nature, position and extent of the actual wounds or injuries*, but also with reference to the *consequences* emanating from the infliction of such wounds. The latter finding by the court is a welcome response to the interpretation of “grievous bodily harm” for purposes of establishing aggravating circumstances and more specifically those cases, such as the decision under discussion, where the charge of murder cannot be proved on the facts in order to secure a conviction of robbery with aggravating circumstances. The court’s approach is, in addition, sound in holding that if a mere threat to kill could constitute aggravating circumstances, death resulting from the infliction of grievous bodily harm should weigh even heavier in finding that aggravating circumstances existed. The latter finding brings to mind the judgment in *Anthony* where the complainant was threatened with a toy firearm during the course of a robbery. Griesel J held that although a toy firearm did not fall within the definition of a “firearm” to resort within the ambit of section 1(i) of the CPA, it constituted a threat to inflict grievous bodily harm as enunciated in section 1(iii) of the CPA and as such aggravating circumstances existed. It was, in addition, emphasised that the presence or not of aggravating circumstances had to be assessed objectively (see paras 454j–455b; see also *S v Mbele* 1963 1 SA 257 (N) where the complainant was threatened with an

unloaded firearm and such conduct constituted a threat to inflict grievous bodily harm). Miller J held as follows:

“The wording of the relevant enactment is clear and it says that aggravating circumstances in relation to robbery mean and include threat to inflict grievous bodily harm. It is to my mind a question of fact whether the accused in any given case actually threatened to inflict grievous bodily harm . . . There is no doubt that threats can be made not only by words but also by conduct . . . There can clearly be a threat by conduct and by implication for purposes of the section” (260A–B; see also *S v Loate* 1962 1 SA 312 (A) 320C–F).

Although the latter decisions related to threats to inflict grievous bodily harm in terms of section 1(iii) of the CPA, it makes it easy to comprehend the court’s approach in the decision under discussion in terms of its finding in respect of specifically the *consequences* flowing from the infliction of grievous bodily harm to be of utmost relevance in determining the presence or not of *aggravating circumstances*. It is also important to bear in mind that a court is not bound to impose one of the minimum periods of imprisonment as enunciated above for the offence of robbery with aggravating circumstances if there are *substantial and compelling* circumstances justifying the imposition of a lesser sentence (see in general *S v Malgas* 2001 1 SACR 469 (SCA) 481f–482 g (para 25); *S v Dodo* 2001 1 SACR 594 (CC); Snyman 521).

The presence of aggravating circumstances and the construction thereof remains challenging in respect of the offence of robbery with aggravating circumstances. The question as to what will constitute “grievous bodily harm” for purposes of section 1 of the CPA will depend on the facts of each case (see also Du Toit *et al* 2). It is, in addition, preferable for the state to allege the existence of aggravating circumstances and that it seeks a conviction on that basis (see Du Toit *et al* 2 A; *Anthony* 456d–e). In the latter regard the *dictum* of Ebrahim J in *S v Saule* 2009 1 SACR 196 (CK) is relevant where it was pertinently held:

“The charge-sheet, however, did not allege that the State would seek a conviction in respect of counts 1, 2 and 3 on the basis that aggravating circumstances accompanied the commission of these offences. Even though this omission would not necessarily be fatal it is good practice for the State to allege in the charge sheet that a conviction would be sought on this basis” (para 2).

See also *R v Zonele* 1959 (3) SA 319 (A) 323 and *S v Moloji* 1969 4 SA 421 (A) 424A where Van Winsen AJA held:

“As a general rule it is desirable practice to charge an accused in such a way that he is apprised of the fact that the State will ask for his conviction on an offence coupled, where this is permitted by law, with a finding that it was committed under aggravating circumstances.”

In the ultimate analysis as to the presence of aggravating circumstances, and more specifically the infliction of grievous bodily harm, each case will have to be assessed based on its own unique facts and merits. The case under discussion is of importance as it paves the way for a more inclusive and comprehensive interpretation of the term “grievous bodily harm” also encompassing the consequences emanating from such conduct.

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