

SOUTH AFRICA / JUDGMENT

Masina v S (A23/2020) [2021] ZAMPMHC 34 (13 December 2021) [2021] ZAMPMHC 34

COURT

Middelburg High Court, Mpumalanga

BEFORE

Ratshibvumo, Mphahlele

CASE / FILE NUMBER

A23/2020

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THE

HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION, MIDDELBURG LOCAL SEAT

CASE

NO: A23 / 2020

NOT REPORTABLE

NOT OF INTEREST TO OTHER

JUDGES

REVISED

13 DECEMBER 2021

In

the matter between:

LIFA

LUCAS

MASINA APPELLANT

and

THE

STATE RESPONDENT

JUDGMENT**RATSHIBVUMO J:**

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 13 December 2021.

[1] Introduction.

The Appellant was convicted by the Ermelo Regional Court on two criminal charges to wit, count 1: kidnapping and count 2: contravening section 3 of Act 32 of 2007 (rape). On 21 November 2019, following the Appellant's conviction, the Regional Court took the two charges as one for purposes of sentence and sentenced him to life imprisonment. The appeal is lodged subject to the provisions of section 309(1)(a) of Act 51 of 1977 (the Criminal Procedure Act).[1] In terms of this provision, a person convicted and sentenced to life imprisonment by a Regional Court can lodge the appeal without

applying for leave to appeal.

[2] Background**facts**

Facts upon which the Appellant was convicted are largely undisputed. The Appellant and the complainant, Ms. PG were in a love relationship. Although the two were unmarried, Ms. Jabhile Makhanya, the second State witness who was also a close friend to the complainant referred to them as a husband and a wife. It was therefore common for them to visit each other and spend days at each other's place. They however did not stay together on permanent basis.

[3] Trouble between these lovers started on 21 July 2018 when the Appellant arrived at the complainant's place of residence "uninvited"

at around 20h00. What sparked the long-standing issues of mistrust between them was the people in her company. They were four in the room including the complainant, Ms. Makhanya and a man unknown to the Appellant. He however suspected that this man was in a love relationship with the complainant. His first words to her were, "I got you. I told you I will catch you." What happened thereafter was a noisy accusation in which he pointed Ms. Makhanya accusing her of supplying the complainant with a man. The complainant immediately suggested that they should rather go and spend the rest of the evening at Ms. Makhanya's place, hoping this would make the Appellant to cool and tone down.

[4] The Appellant followed the complainant and her companions to Ms. Makhanya's place. Once there, the Appellant went from being

noisy to being physically abusive towards the complainant. According to him, he hit her once with an open hand. The complainant however testified that he also hit her with a fist. She also gave evidence on how in defending herself, she hit him with a hot chimney, thereby burning him on his face. No medical evidence was however presented on injuries she inflicted on him, perhaps because it was the Appellant who was in the dock, not the complainant.

- [5] The Appellant left Ms. Makhanya's place together with the complainant. According to the complainant, they went to her place

first and thereafter proceeded to his place after he demanded that they should leave her place and go there. She testified that he held her by her throat when making this demand. The appellant testified that when they left Ms. Makhanya's home, they went straight to his place. It is however common cause that the Appellant's continued to level accusations of infidelity against the complainant even after their arrival at his residence. The complainant alleged that he again assaulted her with open hands. This was however disputed by the Appellant. She further alleged that at one stage he threatened to cut her with a grinder. A relative who was in the house had to come and take it away from his room.

- [6] After this skirmish, the Appellant proceeded to have sexual intercourse with her in his bed. When he finished, he remained on top of her where after he fell asleep in that state until the next day in the morning. The complainant asked to go home and the Appellant refused to let her go. She then decided to urinate on his bed in order to irritate him and it worked. He rose up immediately and demanded that she should get up and wash the blankets. As he was putting on his pants, she found an opportunity to flee out of the room, jumping over a fence to his neighbour and she ran past her own home as he was in pursuit. She proceeded to Ms. Makhanya and she hid herself under a heap of laundry. The Appellant arrived there and demanded that Ms. Makhanya should show where the complainant was hiding, threatening to assault her if she failed to do so. Ms. Makhanya did not comply. Instead, she called the police.
- [7] The Appellant was then arrested while the complainant was taken to be examined by a medical practitioner who completed a medical report (the so-called J88) which was handed in as evidence by agreement. The injuries she sustained were such that she was treated and released the same day without being admitted. The J88 reflects that the complainant had swollen lips and reddish (blue) eyes. She also complained of a sore throat.
- [8] The Appellant acknowledged that the complainant sustained those injuries as a result of him slapping her with an open hand. He denied having hit her with a fist. He also insisted that he did not kidnap the complainant as she walked with him to his place willingly and voluntarily. He further contended that he had a consensual sexual intercourse with her.

[9] The court a quo rejected the Appellant's version and convicted him as charged in respect of all the charges. It also took a view that the injuries in the J88 constitute grievous bodily harm within the meaning of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Act) in that this would attract a prescribed sentence of life imprisonment. That means the Appellant was convicted of rape involving the infliction of grievous bodily harm. It was for this reason that the Appellant was sentenced to life imprisonment.

[10] The approach to be adopted by a court of appeal when dealing with the factual findings of a trial court is guided by the collective

principles laid down in *R v Dhlumayo*[2]. A court of appeal will not disturb the factual finding of a trial court unless the latter had committed misdirection. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct. The appeal court will only reverse it where it is convinced that it is wrong. In such a case, if the appeal court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.[3]

[11] Submissions.

The legal representatives for both the Appellant and the Respondent were asked to prepare supplementary heads of argument in which they address the question on whether the injuries inflicted on the complainant meet the minimum threshold to qualify as "the infliction of grievous bodily harm" within the meaning of section 51(1) of the Act. We are grateful for the submissions made.

[12] Counsel for the Appellant argued that the State failed to prove its case beyond a reasonable doubt and that the accused should have been given a benefit of doubt. It was further submitted in respect of the sentence that the finding that the complainant sustained grievous bodily harm was a misdirection on the part of the trial court. In case of a conviction, the trial court should have invoked the provisions of section 51(2) of the Act of which the prescribed minimum is 10 years' imprisonment.

[13] Counsel for the Respondent on the other hand submitted that there was no misdirection on the trial court in respect of both the conviction and the sentence. She submitted that the case for the State was proved beyond a reasonable doubt in respect of all the two charges. She further submitted that in view of the J88 being admitted without any dispute regarding the content, the trial court was right to hold a view that there the complainant sustained grievous bodily harm and that this warranted a prescribed sentence as provided in section 51(1) of the Act.

[14] I cannot find any misdirection on the part of the trial court in rejecting the Appellant's version. The Appellant admitted to assaulting the complainant on the night of the incident. The manner in which she left his place, after wetting his bed, jumping over the fence reflects that she was held against her will. Circumstances created by the Appellant were just not conducive for the complainant (or anyone for that matter) to have consented to sexual intercourse even if she would have agreed under normal circumstances. In assaulting and

forcing the complainant to go to his residence against her will, the Appellant missed an opportunity to have consensual sexual intercourse with the complainant as his partner in a love relationship.

[15] Being in a love relationship or even a marriage is not a permanent licence or consent to sexual intercourse that one enjoys without a need to hear if the other party is a willing participant. Section 56(1) of Act 32 of 2007 provides that whenever an accused person is charged with rape, “it is not a valid defence for that accused person to contend that a marital or other relationship exists or existed between him or her and the complainant”. It is, therefore, perfectly possible for a husband to rape his own wife.[4] The fact that one may have had consensual sexual encounters on several occasions in the past does not guarantee consent from the

same person in the future encounters. Consent to sexual intercourse has to be given each time the parties decide to indulge therein. The Appellant could not have seriously expected the complainant to have consented to sexual intercourse while in tears and with blue eye and swollen lips inflicted by him that very night. There is therefore no reason to interfere with the finding that the Appellant was guilty on both charges.

[16] The Sentence.

I now proceed to determine if the court a quo misdirected itself when it imposed the sentence of life imprisonment. Section 51(2) of the Act provides that the minimum sentence that should ordinarily be imposed upon conviction on a charge of rape is 10 years’ imprisonment for the first offenders. There are nine extra ordinary circumstances listed in the Act in which a conviction on rape would attract a sentence of life imprisonment.[5] These would be rape,

“(a) *when committed:-*

(i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;

(ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;

(iii) by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or

(iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;

(b) where the victim:-

(i) is a person under the age of 16 years;

(iA) is an older person as defined in section 1 of the Older Persons Act, 2006 (Act No. 13 of 2006);

(ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or

(iii) is a person who is mentally disabled as contemplated in Section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or

(c) involving the infliction of grievous bodily harm.

[17] When suspects are convicted of rape, whether ordinary rape that attracts the prescribed minimum sentence of 10 years' imprisonment, or the extra ordinary rape that attracts the prescribed sentence of life imprisonment, courts can only deviate from the prescribed sentence and impose a lesser sentence if there are "substantial and compelling circumstances" that justify the imposition of a lesser sentence. Courts are to approach the question on whether such circumstances exist conscious of the fact that the Legislature has ordained prescribed sentences as the proper sentences to be imposed and that they should not to be departed from lightly and for flimsy reasons.[6]

[18] In the words of Nugent JA, "what is striking about [the sentencing] regime is the absence of any gradation between ten years'

imprisonment and life imprisonment. The minimum sentence of ten years' imprisonment progresses immediately to the maximum sentence

that our law allows once any of the aggravating features is present, irrespective of how many of those features are present, irrespective

of the degree in which the feature is present, and irrespective of whether the convicted person is a first or repeat offender. On the face of it a first-offending 18-year-old boy who rapes his 15-year-old girlfriend on one occasion must receive the same sentence as a recidivist serial rapist who repeatedly gang-rapes and beats senseless a disabled victim whom he consciously infects with HIV. The 18-year-old boy who rapes his 15-year-old girlfriend must also receive the same sentence as the adult recidivist who rapes an infant. The offender who imprisons and rapes his victim repeatedly every day for a week is considered to be no more culpable than one who rapes his victim twice within ten minutes."[7]

[19] It is clear from the above that the Legislature intended that harsh sentences should be reserved for extra ordinary rapes such as where the rape involves the infliction of grievous bodily harm. In casu, the doctor was not called to give evidence. The conclusion as to the extent of injuries inflicted on the complainant could only be gleaned from the J88 and the complainant's own evidence. She testified that she was hit with open hands and a fist at Ms. Makhanya's place. This was a punishment on her by the Appellant for being "caught" with another man. After she was taken to the Appellant's place, she was threatened with a grinder and was again hit with open hands before being raped. No details were given as to where she was assaulted on her body. One cannot tell as to how she sustained the blue eye and/or the swollen lips or which blows caused that. It is however apparent that the Appellant saw that she had blue eyes before they parted ways.

[20] The court a quo did not interrogate the extent of injuries or give reasons as to why it concluded that the rape involved the infliction of grievous bodily harm. It also made no reference to any authority in this regard. The infliction of grievous bodily harm should be associated with the commission of the crime of rape, be committed in the process of rape or intended to subdue the victim to being raped, for it to invoke the prescribed sentence of life imprisonment.[8] If the infliction of grievous bodily harm precedes the commission of rape in circumstances that a suspect at a later stage forms a new intention to rape totally detached from the assault, or where the assault takes place after the rape, this would constitute an independent charge of assault. In *S v Moloi*, [9] Patel J said,

“I am of the considered view that the magistrate did not make any finding whatsoever that the rape was committed in the circumstances

involving infliction of grievous bodily harm. The assault that was perpetrated on the victim preceded the rape both in time and place. Further for the court to determine whether the rape was committed involving grievous bodily harm, then there must be evidence of (a) the nature of the weapon or instrument used, if any and if such a weapon or instrument was used, then in what manner it was used; (b) the degree of force used and how such force was used; (c) the part of the body the force was aimed at; and (d) the nature of the injury, if any, which the victim sustained. I am of the view that rape involving the infliction of grievous bodily harm can be when the rapist is engaged in having sexual intercourse with the victim, he holds a firearm to her head or strikes her with his fist. In such circumstances the rape involves the infliction of grievous bodily harm.”

[21] When a victim is assaulted to punish her for perceived infidelity in a particular house, that assault would be detached from rape that takes place several hours later at a different house. As a result, it is not necessary to express a view on the correctness of the position adopted in *Moloi* where it was held that it is only the injuries inflicted in the process of rape that may be considered if it caused grievous bodily

harm for it to attract the prescribed sentence of life imprisonment.

[22] The approach of the trial court in determining if grievous bodily harm was inflicted finds guidance from *R v Jacobs* [10] where the Appellate Division 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.”

[23] The facts of this case mirror to a large extent those in *S v Nofemele*.^[11] In that case, the appellant stood trial on a charge of rape involving the infliction of grievous bodily harm. The complainant was assaulted with open hands and fist blows by the suspect so as to subdue her resistance to being raped. The J88 handed in by agreement reflected “a few scratches on neck. +/- 4 small scratches, bruising and swelling of upper and lower lip. No other signs of trauma.” Besides the medical report, the undisputed evidence by the complainant was that she sustained a blue mark on her face and that she was strangulated by the appellant. The trial court had found that the injuries in the J88 triggered the application of section 51(1) of the Act, and imposed the sentence of life imprisonment. On appeal, the High Court applied the principles adopted in *S v Jacobs*^[12] in finding that section 51(2) of the Act was applicable, as opposed to section 51(1). The sentence was as such set aside and replaced with the one of 10 years’ imprisonment.

[24] In *S v Rabako*^[13], Musi J (as he then was) describes the nature of a grievous bodily harm required for rape to attract the prescribed sentence of life in the following words,

“[I]n essence then if the injury inflicted by the accused on the body of the rape survivor is serious then it involves the infliction of grievous bodily harm. A serious injury at one extreme may mean an injury so serious as to endanger life, necessitate hospitalisation or to result in permanent loss of bodily or mental faculty at the other; it may include a wound that heals rapidly. It should not be a trivial or insignificant injury. A serious injury therefore need not necessarily be an injury that is permanent, life threatening,

dangerous or disabling. Whether the injuries were life-threatening, necessitated hospitalisation or immediate medical attention will generally be relevant to determine the degree of seriousness but not necessarily the seriousness itself. Whether an injury is serious will depend on the facts and circumstances of every case... It seems to me that in order to determine whether the injuries in a particular case are serious one has to have regard to the actual injuries sustained, the instrument or object used, the number of the wounds – if any – inflicted, their nature, their position on the body, their seriousness and the results which flowed from their infliction. It must be remembered that an injury can be serious without there, necessarily, being an open wound. In order to determine this, the judicial officer will be guided by medical evidence. It is therefore advisable that in all such cases – where a finding in relation to infliction of grievous bodily harm is considered – medical evidence should be presented.”

[25] When one looks at the seriousness of injuries as noted in the J88 (lips swelling and reddish eye), the manner in which they were inflicted (open hands and a fist) and the purpose for which they were inflicted I cannot find any basis for concluding that this was a rape involving the infliction of grievous bodily harm. The injuries sustained by the complainant fall short of being serious enough to attract the provisions of section 51(1) of the Act, or that they were inflicted in the commission of a rape. The finding of the court a quo was therefore a misdirection entitling us to interfere. The prescribed sentence applicable would therefore be the one in section 51(2) of the Act which is 10 years’ imprisonment.

[26] Before making a pronouncement on the sentence, it would be appropriate to make remarks over the decision by the court a quo to impose a globular sentence (taking two or more charges as one for purpose of sentence). A globular sentence imposed in this case creates a conundrum when a misdirection is found in respect of the sentencing regime applied in just one of the charges as we found in this case. This would also apply in determining if the accused should apply for leave to appeal or whether he/she enjoys an automatic right to appeal. The automatic right to appeal lies to a charge in which a sentence of life imprisonment was imposed.[14] In respect of any other charge for which a different sentence is imposed, the accused would have to apply for leave to appeal from the trial court. In this case, the Appellant was given a sentence of life imprisonment for the charge of kidnapping and for the charge of rape as they were treated as one for purposes of sentence. Interference in the sentence imposed for rape forces our hand even in the sentence for kidnapping as these crimes are different and the level of their seriousness is not the same.

[27] While the imposition of globular sentences is within the trial court's discretion, this discretion should be exercised only in exceptional circumstances. Generally, each criminal charge is supposed to have its own sentence even if the court may order the sentences to run concurrently. In *S v Immelman*[15] the SCA held,

"The practice of taking more than one count together for the purpose of sentence (ie the imposition of what I shall, for convenience, term a "globular sentence") was recently commented upon by this Court in the case of S v Young[16] *where TROLLIP JA stated at (610E - H): "That procedure is neither sanctioned nor prohibited by the Criminal Procedure Act 56 of 1955. Where multiple counts are closely connected or similar in point of time, nature, seriousness, or otherwise, it is sometimes a useful, practical way of ensuring that the punishment imposed is not unnecessarily duplicated or its cumulative effect is not too harsh on the accused. But according to several decisions by the Provincial Divisions (see, eg, S v Nkosi*[17] *where the authorities are collected) the practice is undesirable and should only be adopted by lower courts in exceptional circumstances. The main reason for frowning upon the practice mentioned in these cases is the difficulty it might create on appeal or review especially if the convictions on some but not all of the offences were set aside."*

[28] In considering the sentence afresh, we take into consideration and balance, what the well-known case of *S v Zinn*[18] described as a 'triad consisting of the crime, the offender and the interests of society. As of the date of the sentence, the Appellant was 31 years old, single but was in a relationship with the complainant, until the date of his arrest in this case. He is a father of two children aged 12 and one-year-old respectively. All these children resided with their mothers who are their primary care givers. He studied and passed Grade 10 before dropping out. He was out on bail in this case pending the trial. He worked as an assistant mechanic earning R1000.00 per fortnight. He has a previous conviction of stock theft in contravention of section 2 of Act 57 of 1959, of which he was convicted on 24 April 2018 and sentenced to 18 months' imprisonment, wholly suspended on certain conditions.

[29] The crimes the Appellant was convicted of are of serious nature. The exact impact these crimes had on the complainant would not be known in the absence of a victim impact report. It is however common knowledge that the complainant suffered humiliating gender based violence and violation at the hands of a man who should have protected her. Rape is an appalling and utterly outrageous crime,

gaining nothing of any worth for the perpetrator and inflicting terrible and horrific suffering and outrage on the victim and her

family. A woman's body is sacrosanct and anyone who violates it does so at his peril and our Legislature, and the community at large, correctly expect our courts to punish rapists very severely.[19]

[30] In *S v Chapman*[20] the SCA dismissed an appeal against the conviction on three charges of rape and the cumulative sentence of 14 years' imprisonment.

Mohamed CJ who wrote the judgment went on to say,

"Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy, the dignity of every person are basic to the ethos of the Constitution and to any defensible civilization. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives."

[31] Consequently, the following order is made:

[28.1] Appeal against the convictions is dismissed.

[29.2] The conviction on both charges is hereby confirmed.

[29.3] Appeal against the sentence is upheld.

[29.4] The sentence imposed by the court a quo is set aside and replaced with the following:

[29.5.1] Count 1: The accused is sentenced to 5 (five) years imprisonment.

[29.5.2] Count 2: The accused is sentenced to 10 (ten) years imprisonment.

Cumulative sentence: 15 (fifteen) years imprisonment.

[29.5.2] No order is made in terms of section 103 of Act 60 of 2000 (the accused automatically declared unfit to possess a firearm.

[29.6] The sentence above is antedated to 21 November 2019.

TV RATSHIBVUMO

JUDGE OF THE HIGH COURT

I agree and it is so ordered.

SS MPHAHLELE

DEPUTY JUDGE PRESIDENT

FOR THE APPELLANT: MR. MUTHIVHITHIVHI

INSTRUCTED BY: LEGAL

AID – MIDDELBURG

FOR THE RESPONDENT: ADV MAOKE

INSTRUCTED BY: OFFICE

OF THE DPP - MIDDELBURG

DATES HEARD: 10

SEP & 15 NOV 2021

JUDGMENT

DELIVERED: 13 DECEMBER 2021

[1] 309. Appeal from lower court by person convicted 1(a) Subject to section 84 of the Child Justice Act, 2008 (Act No. 75 of 2008), any person convicted of any offence by any lower court (including a person

discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that if that person was sentenced to imprisonment for life by a regional court under section 51(1) of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302(1)(b) shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section 302(1)(a).

[1] 309. Appeal from lower court by person convicted

1(a) Subject to section 84 of the Child Justice Act, 2008 (Act No. 75 of 2008), any person convicted of any offence by any lower court (including a person

discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that if that person was sentenced to imprisonment for life by a regional court under section 51(1) of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302(1)(b) shall apply in respect of a

person who duly notes an appeal against a conviction, sentence or order as contemplated in section 302(1)(a).

[2] 1948

(2) SA 677 (A)

[3] See also DPP v S 2000 (2) SA 711 (T); S v Leve 2011 (1) SACR 87 (ECG); and Minister of Safety and Security and Others v Graig and Another NNO 2011 (1) SACR 469 (SCA)

[4] CR Snyman, "Criminal Law" 6th edition, 355

[5] See section 51(1) and Part I of Schedule 2 of the Act.

[6] S v Malgas 2001 (1) SACR 469 (SCA) at 482A.

[7] S v Vilakazi 2009 (1) SACR 552 (SCA) para 13.

[8] See S v Moloi [2007] JOL 19094 (LCD)

[9] Supra at para19.

[10] 1961

(1) SA 475 (A) at 478A. See DPP, Gauteng Division, Pretoria v Moabi 2017

(2) SACR (SCA) para 15, where this approach was referred to by Molemela AJA (as she then was) with approval.

[11] (CA&R 169/18) [2019] ZAECGHC 46 (12 March 2019).

[12] Supra.

[13] S v Rabako 2010 (1) SACR 310 (O) para 7 & 10.

[14] See footnote 1 above.

[15] 1978

(3) SA 726 (A) at 728E-H

[16] 1977

(1) SA 602 (A).

[17] 1965

(2) SA 414 (C).

[18] 1969

(2) SA 537 (A), at 540G-H.

[19] S v Ncheche

[2005] ZAGPHC 21; 2005 (2) SACR 386 (W), at paragraph 35.

[20]

[1997] ZASCA 45; 1997

(2) SACR 3 (SCA) at 5A-C.

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