

THE STATE
versus
TAKUDZWA MURONDA

HIGH COURT OF ZIMBABWE
MUSAKWA & MUZOFA JJ
HARARE, 30 October 2020

Criminal Review

MUZOFA J: On 12 March 2020 the complainant, a married woman retired to bed around 23:00 hours. Her husband was away. So she was alone. The accused who is related to the complainant was aware of the absence of the complainant's husband stealthily entered the room. He was naked. He crept into bed, and slept on top of the complainant. The complainant who was fast asleep by then, was startled and to realize that someone was on top of her. The complainant pushed the accused who resisted. During the struggle the appellant forced his hand into the complainant's skirt and grabbed her panty. The complainant fought harder until she set herself free and rushed to the door. The accused tried to sweet talk her to calm down so that he could have sexual intercourse with her. He tried to grab her again, she fought him off and ran outside.

The complainant immediately reported to her brother in-law who was sleeping in the tobacco barn.

The accused was subsequently charged with indecent assault in contravention of s 67 (1) (a) of the (Criminal Law Codification and Reform Act) [*Chapter 9:23*] 'the Code'. He pleaded guilty. A sentence of 12 months imprisonment was imposed of which 4 months' imprisonment was suspended on condition the accused did not within that period commit an offence involving indecent assault. The remaining 8 months' imprisonment was suspended on condition of community service.

The learned Regional Magistrate who scrutinized the matter, raised issue on the propriety of the charge. In a detailed letter citing relevant case law, which I will revert to later in this judgement, he requested the trial magistrate to comment whether in the circumstances of this case a charge of attempted rape would not have been appropriate.

The trial magistrate stood his ground and referred to case law that, in his perception justified the charge. A reading of the case law does not support the learned Magistrate's view on this issue.

Having reached a stalemate, the Regional Magistrate referred the matter on review and guidance.

The engagement between the two magistrates demonstrates the fine line between some acts of indecent assault and attempted rape. However reverting to the provisions that create the offences and decided cases should be able to settle the issue.

The issue for determination is whether the accused's conduct constitutes attempted rape or indecent assault.

All attempts derive from s 189 of the Code which creates this type of offences and provides

“189 Attempt

.....

Two requisites have to be met the *mens rea* to commit the offence and the attempt to commit the offence. The accused must have reached at least the commencement of the execution of the intended crime”¹

The difficulty lies in the determination of when “the commencement of execution” begins. This has been subject of debate as far back as 1921² where the court said the act charged as an attempt must

“...reach far enough towards the accomplishment of the desired result as to amount to a commencement of the consummation.”

Consummation is what is referred in the Code as “commencement of the execution” which the court in *Rex v Sharpe*³ describes as the beginning of the final series of acts which complete the crime. The beginning of the acts of the final series depends on the circumstances of each case. It also involves a value judgment by the court. This principle has been applied in numerous judgments in our jurisdiction. A case in point that I believe the Regional Magistrate relied on is *S v Dube*⁴ where the Supreme Court emphasized value judgment of a practical nature based on proximity and remoteness to the commission of the offence. In other words, it is an

¹ Section 159 (1) (b) of the Code

² .Rex v Nhovo 1921 AD 485

³ 1903 TS 868

⁴ 1996 (1) ZLR 77 SC

exercise of common sense. In the *Dube* case (supra) the court dismissed an appeal against conviction on a charge of attempted rape. The appellant had made sexual overtures to the complainant, had seized her, thrown her on the ground and tried to remove her panty, but then got up and refrained from further attacking her because he discovered that she was menstruating. The court held that the appellant's conduct had gone beyond the preparatory stage to commit the offence when some external factor caused him to change his mind.

In *S v Kuwizha*⁵ the accused was charged with indecent assault. The accused met the complainant along a road. He blocked her way and expressed his intention to have sexual intercourse with her. He grabbed her arm and dragged her to a nearby bush where he pushed her to the ground. The complainant fell on her back and her dress moved up to her thighs. The accused sat on her legs. The complainant bit the accused's thumb and he let her go. The review judge declined to confirm the proceedings to be in accordance with real and substantial justice. The court relied on the Attorney General's opinion that it sought, which referred to the *dicta* in *R v B*⁶ where the court noted,

“In my view, which I believe accords with the general practice, the stage of attempted rape is reached as soon as the assault takes place and before any direct effort is made to effect penetration. Of course, if what the man did was through an assault, equivocal, it may not be possible to affirm beyond reasonable doubt that his purpose was to effect penetration. In such a case, the proper verdict may be one of indecent assault or common assault. But once the acts prove that the purpose was to achieve forcible intercourse, they constitute in my view an attempt to rape'...”

The court held that attempted rape occurs when the assault takes place aimed at having sexual relations with a woman without her consent and his conduct had gone beyond mere preparation.

In *S v Mkandla*⁷ the appeal court dismissed an appeal against conviction on a charge of attempted rape where the appellant threatened the complainant with a knife, dragged her to a nearby bush, fell her to the ground, removed her skirt, got on top of her and muffled her mouth.

The above cases demonstrate the approach the courts take. Indeed, there is no one size fits all or mathematical formula to determine whether the acts by the accused have advanced beyond the preparatory stage to be classified as substantial steps towards the commission of the offence.

⁵ 1992 (1) ZLR 156 (HC)

⁶ R v B 1958 91) SA 199 (A)

⁷ HB 143/04

In this case it is not only about the attempt but whether indecent assault was the appropriate charge. It means if the accused's conduct was anything short of attempted rape it then becomes indecent assault. Invariably some, if not all attempted rape matters involve some indecent assault.

Indecent assault by a male person involves physical contact on a female person that would be regarded as an indecent act by a reasonable person.⁸ A case in point is *S v Makaya*⁹. In a review judgment, the reviewing Judge declined to confirm a conviction on a charge of attempted rape. The accused and complainant were at their workplace. The accused approached the complainant in the kitchen carrying a pack of condoms. He expressed his intention to be sexually intimate with the complainant. The complainant refused. The accused held her by the hands, but she pushed him away. He staggered backwards. The complainant ran into another room. The accused followed her. This time armed with a kitchen knife demanding to have sex with her. She texted her employer but the phone fell. The accused threatened to kill her for not submitting to his demands. For some reason he then left her.

The review judge set aside the conviction of attempted rape in that there was intention as expressed by his word of mouth. However, there were no acts towards the commission of the Act. The charge was set aside and substituted with threatening the complainant under s 186 (1) (b) of the Code.

In my view the judge in the *Makaya* case (*supra*) found that the acts by the accused were merely preparatory. The accused did not touch or access any private part of the complainant's body. His conduct could not be classified as substantial steps towards the commission of the offence.

In the present case the intention was expressed. The accused took substantial steps towards the commission of the offence. He entered the room already naked. He took steps to undress the complainant, not only of the skirt but her panty. Obviously his hands had contact with her private parts. Had the complainant not overpowered him, he could have raped her.

In my opinion the appropriate charge should be attempted rape.

⁸ S 67 of the code

⁹ HH 525/15

For the above reasons, the proceedings are not in accordance with real and substantial justice. I accordingly withhold my certificate.

MUSAKWA J AGREES:.....