

THE STATE
versus
WHITE MAKAYA

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 10 June 2015

Review Judgement

DUBE J: On 16 May 2015 the accused person appeared before a Harare magistrate facing charges of attempted rape as defined in s 189(1) as read with s 65(1) of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*]. He was convicted on his own plea of guilty and sentenced as follows:

“15 months imprisonment of which 5 months imprisonment was suspended for 5 years on condition within that period accused does not commit any offence of a sexual nature and for which accused will be sentenced to imprisonment without the option of a fine. Effective 10 months imprisonment”

The allegations preferred by the state are as follows. The accused and complainant are gardener and maid respectively at their work place. On 14 May 2015 the accused arrived at his workplace and found the complainant already present at the workplace. He told the complainant that he has had good relationships with previous housemaids that he worked with. Thereafter he asked for food to eat which the maid gave him and the complainant left. He then followed her into the house. The salient facts surrounding the encounter complained against is summarised in para(s) 4 and 5 of the state outline as follows:

“4. The accused used the laundry door to gain entry into the kitchen where he is not allowed to enter by the employers. While inside he produced a purple packet of condoms and demanded to have sex with complainant but she refused. Accused grabbed complainant’s hands but was pushed away and staggered backwards as he had no balance and she ran out of the kitchen.

5. Accused ran towards complainant who was cleaning the laundry entrance and pushed her but she quickly took a kitchen knife and threatened to stab him if he tried to rape her and accused retreated. The accused then followed complainant in the kitchen and grabbed her by the neck holding a kitchen knife demanding to have sex but complainant resisted and text her employer to phone her back and the employer who heard the screaming of the complainant unfortunately, her phone fell and accused picked it and switched it off and threatened to kill her if she failed to submit to have sex with him. The accused then left the house.”

The following excerpt from the record of proceedings captures the exchange that took place between the trial court and the accused when the essential elements of the offense were being put to the accused.

- “Q - So is it correct that on 14 May 2015 at 1838 Area D, Westgate, Harare you attempted to have sexual intercourse by force and without her consent.
A. - Yes
Q. - You know this was unlawful.
A. - Yes
Q. - Any defence
A. - No”

Section 189 of the Code which creates this genre of offences reads as follows

“189 Attempt

- (1) Subject to subsection (1), any person who
(a) Intending to commit a crime, whether in terms of this Code or any other enactment; or
(b) Realising that there is a real risk or possibility that a crime, whether in terms of this Code or any other Enactment may be committed;
Does or omits to do anything that has reached at least the commencement of the execution of the intended crime,
Shall be guilty of attempting to commit the crime concerned.”

There are two requisites to this offence. The first is the intention to commit the requisite offence and secondly, the attempt to commit the overt act. Section 189 (1) (b) requires a person so charged to have ‘reached at least the commencement of the execution of the intended crime’

Looking at the circumstances surrounding the commission of this offence, I was baffled at how the accused was convicted of the offence of attempted rape. What the facts disclose is that the accused approached the complainant with an intention to have sexual intercourse with her. That state of mind is evidenced by the words uttered by the accused and his conduct towards the complainant. What is of concern to the court is proof of the the *actus reus*. It is a requirement of our law that for the act complained against in an attempt to constitute an offence, it must go beyond mere stages of preparation for the offence. This is clearly what the legislature intended to

address when it introduced s 189(1) (b). I am not convinced that the accused had reached the commencement of the execution of the intended crime. I do not consider that without any evidence showing any attempt to remove the complainant's pant or clothes to expose her private parts, the allegations suffice to support a conviction of attempted rape. There is also no evidence to show that the accused tried to have sexual intercourse with her or penetrate her private parts or even went as far as touching her private parts. The allegations fall far short of the offence charged.

During the putting of essential elements, the trial magistrate suggested to the accused that he had tried to have sexual intercourse or rape the accused. The trial court does not suggest how this attempt to rape occurred. It ought to have been suggested to the accused how he attempted to have sexual intercourse with the complainant and how he did that. I am not satisfied the plea of guilty is an unequivocal plea of guilty.

The facts disclose two possible offences, the common law crime of assault with intent to rape or a threat to commit a crime. It does not appear that assaults with intent to rape are covered under the Code. Threats are provided for in s 186 which reads as follows:

“186 Threats

(1) Any person who by words, writing or conduct threatens to commit a crime referred to in subsection (3) against another person, thereby inspiring in the person to whom he or she communicates the threat a reasonable fear or belief that he or she will commit the crime, shall be guilty of threatening to commit the crime concerned if□

(a) he or she intended to commit the crime concerned or to inspire in the person to whom he or she communicated the threat a reasonable fear or belief that he or she would commit the crime concerned;

or

(b) he or she realised that there was a real risk or possibility of inspiring in the person to whom he or she communicated the threat a reasonable fear or belief that he or she would commit the crime concerned; and be liable to a fine not exceeding level five or imprisonment for a period not exceeding six months or both”.

Evidence is clear that the accused threatened to have sexual intercourse with the complainant. As a result he inspired fear and despondency in the complainant. Believing that he was going to rape her, she threatened to stab him with a knife. She screamed and ran away. She believed that the accused would rape her.

This conviction cannot stand. The offence of threatening to commit under s 186(1) (b) is a permissible verdict to that of attempted rape. In the result, the conviction for attempted rape is set aside and in its place is substituted that of contravening s186 of the code. Resultantly the sentence imposed is also set aside and substituted with the following,
The accused is sentenced to 6 months imprisonment.

MATANDA-MOYO J: agrees.....