

THE STATE  
versus  
TRYMORE KAMUDZANDU

HIGH COURT OF ZIMBABWE  
MUREMBA J  
HARARE, 8 February 2017

### **Criminal Review Judgment**

MUREMBA J: On 10 December 2016 at around 5 pm in Kazangarare area in Karoi near Kazangarare Primary School two women were walking, coming from Kazangarare Grain Marketing Board. The accused who is a 29 year old man followed them. When he got closer, he advanced towards the complainant, a 32 year old woman, tripped her to the ground, grabbed her by the throat, pulled her skirt to waist level and pulled her pant aside. He unzipped his trousers, withdrew his penis and tried to insert it into her vagina. Unfortunately for him, as he was trying to insert his penis, he discovered that the complainant had a cotton cloth inside her pant and it stopped him from penetrating her. At that very moment in time, he saw the woman who had been in the company of the complainant coming to the scene in the company of another person. The accused grabbed a 2 litre bottle of cooking oil belonging to the complainant and fled from the scene. He left the complainant injured on the hands, shoulder and throat.

A report of the case was made at Kazangarare Police Base on the very day and investigations were carried out leading to the arrest of the accused and the recovery of the bottle of cooking oil. The accused was charged with and convicted of attempted rape and robbery for attempting to rape the complainant and for robbing her of her bottle of cooking oil. The accused was convicted on his own pleas of guilty to the 2 charges. He was duly convicted. I hereby confirm the convictions.

For attempted rape which is a contravention of s 189 (1) (b) as read with s 65 of the Criminal Law (Codification and Reform) Act [ *Chapter 9:23*], ( the Criminal Law Code), the accused was sentenced to 3 years imprisonment of which 1 year imprisonment was suspended on condition of future good behaviour. For robbery which is a contravention of s

126 (1) of the same Act, he was sentenced to 6 months imprisonment of which 3 months imprisonment was suspended on condition of future good behaviour.

I have no issues with the sentence for the robbery conviction. It is hereby confirmed. It is the sentence in the attempted rape conviction which causes disquiet. The sentence is manifestly lenient and induces a sense of shock.

### Jurisdiction

I do not believe that the trial magistrate who is a senior magistrate ought to have presided over this matter because of his sentencing jurisdiction in criminal matters. In terms of s 50 (2) (a) of the Magistrates Court Act [*Chapter 7:10*], the jurisdiction of a senior magistrate in respect of punishment for any offence is imprisonment for a period not exceeding 4 years. It reads:

“50 (2) Subject to this Act and any other enactment, the jurisdiction of a court of a senior magistrate in respect of punishment for any offence, whether on summary trial or on remittal by the Attorney-General, shall be—  
(a) imprisonment for a period not exceeding four years;”

To begin with, it is regional magistrates only who have the jurisdiction to deal with rape matters. All other magistrates can only do so upon authorisation by the Attorney-General in exceptional circumstances. Section 49 (2) of the Magistrates Court Act [*Chapter 7:10*] is pertinent. It reads:

“49(2) The jurisdiction of the court, other than the court of a regional magistrate, over the offence of rape shall be exercised only—  
(a) on remittal by the Attorney-General of a case for trial or sentence in such court; or  
(b) on summary trial where the person charged has not attained the age of eighteen years and the Attorney-General has in writing authorized the trial”

In terms of s 65 (1) of the Criminal Law Code rape attracts a penalty of life imprisonment or any shorter period. In terms of s 50 (4) (a) of the Magistrates Court Act, the jurisdiction of a regional magistrate in respect of punishment for any offence is imprisonment for a period not exceeding 10 years. However, in sexual offences, they have special jurisdiction to impose up to a maximum of 20 years imprisonment – see s 51 (4) (a) (i) of the Magistrates Court Act. The provision reads:

“51(4) Notwithstanding section *fifty*, the jurisdiction of—  
(a) a regional magistrate in respect of punishment for a sexual offence, whether on summary trial or remittal of the case for trial or sentence by the Attorney-General, shall be—  
(i) imprisonment for a period not exceeding twenty years;

In subsection 5 the provision goes on to define the meaning of sexual offence. It says,

“(5) For the purposes of paragraph (a) of subsection (4)—  
“sexual offence” means—  
(a) a contravention of section 65 (“Rape”), 66 (“Aggravated indecent assault”), 67 (“Indecent assault”), 70 (“Sexual intercourse or performing indecent acts with a young person”), 73 (“Sodomy”), 74 (“Bestiality”), 75 (“Sexual intercourse within a prohibited degree of relationship”) or 76 (“Complicity in sexual crimes”) of the Criminal Law Code; or  
(b) an attempt to commit an offence referred to in paragraph (a).”

It goes without saying that rape is a very serious offence by its very nature hence the severe penalty provision and the special jurisdiction that has been granted to regional magistrates. It is interesting to note that in terms of s 192 of the Criminal Law Code for attempting to commit any offence, the punishment is the same as the one that is imposed to an accused who has committed the offence concerned. This penalty came about as a result of the codification of the criminal law in 2004. The section states,

“Subject to this Code and any other enactment, a person who is convicted of incitement, conspiracy or attempting to commit a crime shall be liable to the same punishment to which he or she would have been liable had he or she actually committed the crime concerned.”

Put differently, a conviction of attempted rape attracts the same penalty as a conviction of rape. This means that it is possible for an accused to be sentenced to 20 years imprisonment for a conviction of attempted rape. It all depends on the badness of the case. What is considered are the circumstances surrounding the commission of the offence, the mitigatory factors and the aggravatory factors all put together. The challenge that is there now is that when the sentencing jurisdiction of regional magistrates in sexual offences was increased in 2004, the sentencing jurisdiction of all other magistrates in such cases was not increased. So all other magistrates have no special jurisdiction in sexual offences, yet in terms of the Magistrates Court Act they are not prohibited from dealing with cases of attempted rape. In fact, it has always been the practice that provincial magistrates are the ones who deal with attempted rape matters mostly. Senior magistrates do so here and there.

Now in view of the fact that provincial magistrates and senior magistrates have an ordinary jurisdiction of 5 years and 4 years imprisonment respectively, and have no special jurisdiction in sexual offences, what it means is that even if they deal with attempted rape matters, they cannot impose any sentences that are beyond their ordinary sentencing jurisdiction in terms of s 52 and s 53 of the Magistrates Court Act. I believe that the legislature made an oversight. It ought to have increased the jurisdiction of these magistrates

in sexual offences too seeing that for attempted rape a sentence of 20 years imprisonment can now be imposed and all other magistrates, other than regional magistrates, have jurisdiction to try such matters. Their jurisdiction to try such matters has not been taken away by any law. However, if we are to give effect to s 192 of the Criminal Law Code what it means is that as the law stands right now, cases of attempted rape should largely be dealt with by regional magistrates since they are the only ones who have jurisdiction to impose penalties of up to 20 years imprisonment.

Until other magistrates are given special jurisdiction in sexual offences, I do not believe that they should try bad cases of attempted rape which, upon a consideration of the facts, are likely to attract sentences of more than 4 or 5 years imprisonment. They should try those cases of attempted rape wherein sentences of 4 or 5 years and below are appropriate, for instance, cases involving juveniles and very youthful accused persons, maybe up to the age of 21 years. Even then, such cases must not be bad ones. Factors that may be taken into account in deciding whether or not an attempted rape matter should be heard by a magistrate who is not a regional magistrate are as follows. The age of the accused; the age of the complainant; the degree of force or violence used in the attempt to rape; the extent of physical and psychological injury inflicted upon the complainant; the number of persons who took part in the attempted rape; whether or not any weapon was used in the commission of the offence; whether the accused is related to the complainant and the degree of relationship. These factors are not exhaustive. These factors are indicative of the sentence the accused is likely to get.

The case at hand is quite a bad case of attempted rape. The accused is a very daring and dangerous rapist. The way he committed this offence shows without doubt that if a third person had not been called to the scene he would have raped the complainant. He is daring because he followed 2 adult women and attempted to rape one of them in the presence of the other. This shows that he is very dangerous. He falls in the category of those rapists who can even kill if push comes to shove. Despite facing resistance from the complainant, he struggled with her and caused her injuries on the hands, shoulder and throat. After tripping her to the ground he managed to undress her and to withdraw his penis from his pants. Such determination during broad daylight is frightening. The cloth that the complainant had in her pant and the third person who was called to the scene by the complainant's companion saved the day, otherwise the accused would have accomplished his mission. After failing to achieve

his mission, he remembered to grab a 2 litre bottle of cooking oil that had fallen to the ground during the struggle with the complainant as he fled from the scene.

This is a case which warranted the imposition of a stiffer penalty which is well beyond the jurisdiction of even a provincial magistrate. Therefore this is not a case which should have been dealt with by a senior magistrate or by a provincial magistrate, but by a regional magistrate. In the circumstances of this case a sentence in the region of 8 to 10 years imprisonment with 3 to 4 years thereof suspended on condition of future good behaviour would have met the justice of the case.

In view of the foregoing I am unable to certify the sentence for attempted rape as being in accordance with real and substantial justice. I thus withhold my certificate.