THE STATE
versus
TASARA MUCHINERIPI

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 27 March 2024

**Criminal Review**

MAWADZE J: The proceedings in this matter are not only marred by procedural irregularities but also involve issues of substantive law.

This matter was referred to this court ostensibly for my views by the Gutu Resident Magistrate. This was after the accused was convicted of contravening section 189 as read with section 65 (1) of the Criminal Law (Codification and Reform) Act *[Chapter 9:23]*

which is attempted rape.

The accused had pleaded guilty to the charge and was duly convicted. However before sentence the Gutu Resident Magistrate, to her credit, had second thoughts on the propriety of the conviction and sought the views of this court for *"guidance"*

I in turn sought the views of the Prosecutor General. Specifically I solicited the views of Prosecutor General as to whether the facts alleged and admitted amount to the charge of attempted rape. I am indebted to the Prosecutor General's well researched opinion and agree to the same.

The facts of this matter are as follows;

The 43 year old accused was arraigned before the Gutu Resident Magistrate for Attempted Rape as defined in section 189 as read with section 165 (1) of the Criminal Law (Codification and Reform ) Act *[Chapter 9:23]*.

Both the accused and the 36 year old complainant reside in Muchineripi Village, Chief Chitsa, in Gutu. On 6 October 2023 at around 0900hrs the accused proceeded to the complainant's homestead. He found her cooking sadza. They exchanged greetings inside the kitchen hut and accused sat on a bench inside that kitchen hut as complainant. He held her continued cooking. The accused suddenly stood up and approached the complainant. He grabbed the complainant by the neck and covered her mouth with his hands to prevent her from crying out. The accused pronounced that he wanted *"to give her a child"* as he pushed her against the wall and closing the kitchen door. As fate would have it the complainant's mother arrived (Nyengterai Vengesai) and opened the kitchen door. The complaint's mother was not amused by the accused's conduct and proceeded to rescue the complainant by assaulting the accused with a sugar cane stick she was holding. The accused bolted out of the kitchen hut.

These are the facts upon which the charge of attempted rape is premised.

Before I deal with the question of whether these facts support the charge of attempted rape I would want to deal firstly with a procedural issue. This relates to how the plea of guilty was recorded, specifically the canvassing of the essential elements of the offence.

The Gutu Resident Magistrate either improperly uploaded the record of proceedings or simply acted in a perfunctory manner in handling this matter. The canvassing of essential elements of the offence are covered on pages 1 to 2 of the record and they make very sad reading. They are as follows;

*"Q Have you understood*
*A Yes*
*Q Charge, facts and essential elements*
*A Yes*
*V ------ Guilty as pleaded"*

The proceedings are ostensibly in terms of section 271 (2) (b) of the Criminal Procedure and Evidence Act *[Chapter 9:07]*. The Gutu Resident Magistrate who is ordinarily very astute and thorough in her work clearly acted out of character as it were unless the record of proceedings was erroneously uploaded (but still the relevant pages 1 and 2 are in a chronological order!)

It is clear that the canvassing of the essential element of the charge is improper. There is non-compliance with the provisions of section 271 (2) (b) of the Criminal Procedure and Evidence Act *[Chapter 9:07]*.

There is now a plethora of case law from the superior courts on how the essential elements of the offence should be properly put to an accused in compliance with section 271 (2) (b) of the Criminal Procedure and Evidence Act *[Chapter 9:07]*. I would sound like a broken record if I was to repeat the same and to even cite the relevant cases. Needless to say that the material or essential elements of the offence should all be put to the accused in a simple and straight forward language the accused understands. The need for sufficient clarity and detail is indispensable.

In *casu* this was clearly not done per pages 1 to 2 of the attached record of proceedings. Thus on this procedural irregularity alone I would be inclined to quash the proceedings and order a trial *de novo*. Indeed the Prosecutor General also picked this anomaly. There is clearly non-compliance with section 271 (2) (b) of the Criminal Procedure and Evidence Act *[Chapter 9:07]*. This renders the proceedings as not in accordance with real and substantial justice.

As already pointed out the second issue relates to the question of substantive law. Put differently do the facts alleged (and admitted) support the charge of attempted rape? I turn to this point.

Section 189 as read with section 65 (1) of the Criminal Law [Codification and Reform] Act *[Chapter 9:23]* does not in explicit terms provide the requirements of what constitutes attempted rape. The trial court would thus be enjoined to exercise a value judgement as is reflected in the facts of a particular case. Be that as it may they are certain essential common requirements to be met like in any crime. There should be both the *actus reus* (the physical element) and *mens rea* (the mental element of the offence).

There are also certain guiding general principles discussed in a number of decided cases in our jurisdiction on what constitutes the crime of attempted rape or any attempt to commit any offence or crime. The position is that the accused should have at least reached commencement of the execution of the intended crime.

What may be vexing is what actually constitutes the commencement of the execution of a crime at law.

The common thread which runs through the decided cases is that *mens rea* on its own may not be sufficient but should be accompanied with an act or acts towards the actual committing of the offence. In other words the accused should have reached a certain degree of proximity which is very close to the *actus reus* of the offence.

Admittedly each case would have to be assessed on its particular facts. The test nonetheless is whether the accused would have gone far enough towards the accomplishment of the desired result as to amount to a commencement of the consummation of the alleged offence.

An example of a few decided cases will help to clarify this point.

In *State v Mkadla* HB 413/04 the court was satisfied that the accused had committed the offence of attempted rape as he had used violence to remove the complainant's skirt, an act deemed to be substantial enough towards the act of rape.

In *State v Nyoni* HB 34/08 the accused was fortunate to be charged of indecent assault when in fact he should have been charged of attempted rape. This was so because he had violently tried to remove the complainant's skirt and had touched the complainant's genitalia as complainant tenaciously fought back screaming for help and by grabbing he accused's private parts causing accused to fail to rape her.

In *State v Makaya* HH 525/15 the accused escaped a conviction on a charge of attempted rape simply because the *mens rea* was only expressed by word of mouth and not accompanied with any other physical acts towards the commission of the offence.

See also *State v Muronda* HH 679/20.

In my respectful view, for the charge of attempted to be proper or satisfied an accused should have gone beyond the preparatory stage.

In *casu* the physical acts of violence perpetrated by the accused are as follows;

(i) the accused stood up and grabbed the complainant by the neck

(ii) the accused covered the complainant's mouth with his hands (to prevent her from screaming out)

(iii) the accused pushed the complainant towards the wall and

(iv) the accused closed the kitchen door

In relation to the *mens rea* the accused verbally told the complainant that he wanted *"to give her a child"*. Clearly he was saying he wanted to have sexual intercourse with her and this explains the conduct he embarked upon.

It is common cause that the accused was thwarted or interrupted by the complainant's mother who fortuitously arrived and attacked him.

In my view the physical acts admitted or alleged are not substantial acts towards the commission of the offence of rape. The accused had not removed or attempted to remove any of the complainant's attire. He had not managed to touch the complainant's genitalia which act could even be deemed as indecent assault. Granted, his overall objective was to forcefully engage in sexual intercourse with the complainant. However legally one cannot say those acts amounted to the offence of attempted rape.

The correct legal position is that the accused's conduct in the circumstances squarely falls within the ambit of section 186 (1) of the Criminal Law (Codification and Reform) Act *[Chapter 9:23]*. The threats envisaged in *casu* were by word of mouth and his conduct. It is clear that the accused's conduct both physically and verbally inspired into the complainant the real fear and or believe that he was going to rape her. Thus the agreed or alleged facts do not constitute the charge of attempted rape.

The next issue to consider is what then the appropriate remedy is in this case.

Since contravening section 186 (1) of the of the Criminal Law (Codification and Reform) Act *[Chapter 9:23]* is not a permissible verdict to the charge of attempted rape these proceedings cannot be allowed to stand. The proper course of action would be to quash the proceedings and order a trial *de novo* before a different magistrate of competent jurisdiction.

It is on account of both the procedural irregularities and the question of substantive law that I have to quash these proceedings and order the trial *de novo*.

Accordingly, it is ordered that the proceedings be and are hereby quashed. A trial *de novo* is ordered before a different magistrate of competent jurisdiction.

ZISENGWE J agrees……