

THE STATE
versus
KELVIN MAKONI

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 11 December 2017

Criminal Review

MUSAKWA J: The accused was convicted of contravening s 67 (1) (a) (i) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to 15 months' imprisonment of which 3 months' imprisonment was suspended for 5 years on condition of good behavior. The remaining 12 months' imprisonment was suspended on condition of performance of 420 hours of community service.

It is the propriety of the charge that was preferred against the accused that I have reservations with. The charge alleged that:

“In that on the 1st day of September 2017 at K2715 Katanga Norton Kelvin Makoni being a male person unlawfully committed upon a female person, Lainah Botsa an act involving physical contact that would be regarded by a reasonable person to be an indecent act. Kelvin Makoni intentionally kissed Linah Botsa on her neck, caressing her whole body and at the same time trying to remove her dress without her consent.”

The facts show that the accused and the complainant reside at the same dwelling in Norton. The complainant was aged fourteen years and attending school at Norton 2 Primary School. The accused went into the complainant's spare bedroom and locked the door from inside. The accused pushed the complainant onto some blankets which were on the floor and went on top of her. He then started kissing the complainant on the neck whilst touching her all over the body and also trying to remove her dress.

Having been so charged, the accused's defence was that the complainant entered his room and sat on his lap. The complainant asked for money with which to buy some freezits. Having told her that he had money in the form of rands the complainant invited the accused to her room. There the complainant commenced to search the accused's pockets. The complainant's young sister knocked on the door and the accused went to sit in the lounge. The complainant approached and commenced to search the accused's pockets again and tried to sit

on his lap. The accused grabbed her by the waist and they ended up pushing and touching each other. The complainant fell down and the accused went out of the room.

According to the complainant's testimony, on the Friday afternoon the accused returned home and she opened the gate for him. Elizabeth, also known as Bridget Manyika took a juice bottle from the accused. It seems the accused and Elizabeth are related but the nature of the relationship was not established.

After the complainant went to her quarters, the accused approached her and asked for her mother. She went into the spare bedroom and the accused followed. The accused then closed the door. That door had no handles and a pair of scissors was used to open it. The accused threw the pair of scissors on top of the wardrobe. Meanwhile Elizabeth started to play music loudly. When the complainant asked the accused why he had closed the door he pushed her onto the blankets and tried to lift her dress. As the complainant held onto her dress she also tried to bite the accused's hand. Some people came to the window and the accused went on top of the wardrobe. Elizabeth prevented people from entering the room. The accused later jumped from the wardrobe and ran out. As to the nature of indecent contact, the complainant stated that the accused kissed her on the left side of the neck.

The complainant's nine year old sister, Lavender confirmed that the accused visited their quarters and that Elizabeth played the radio loudly. The complainant banged on the door. When Lavender tried to open the door Elizabeth told her to go away. When she went to the back she saw the accused on top of the complainant. She then called their mother.

In his testimony the accused admitted entering the complainant's room. Although admitting that he indecently touched the complainant his explanation was that the complainant consented. Unfortunately the State did not seek clarification from the accused person on the aspect of consent by the complainant. This is because the accused stated that the complainant consented to the touching because she wanted money. Therefore, according to the accused; "we touched each other." This required further probing, considering it was not part of the accused's defence. He also admitted that he went on top of the complainant as testified by Lavender. The accused further admitted to indecently touching the complainant and stated that it was a 'mistake'. Following such an admission, mistake was an inappropriate word. It is clear that the accused was admitting that he erred. Therefore, this was clearly wrong interpretation of what the accused stated in the vernacular.

Elizabeth testified for the defence. She confirmed that the accused held the complainant by the hand. She clearly sought to distance herself from aiding or abetting the accused as she

denied playing the radio. However, during cross-examination she stated that when the accused grabbed the complainant she went outside.

The trial court was correct to conclude that the accused equivocated in his defence. However, was the correct charge preferred in the first place? Whilst the accused indecently touched the complainant, was that the substantive act that he committed? Or, to put it differently, what was the accused's intention? In my respectful view this is an attempted rape that was interrupted by third parties.

Section 189 of the Criminal Law (Codification and Reform) Act provides that:

“(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:

(2) A person shall not be guilty of attempting to commit a crime if, before the commencement of the execution of the intended crime, he or she changes his or her mind and voluntarily desists from proceeding further with the crime.”

In Burchell and Hunt, *South African Criminal Law and Procedure*, Vol 1, the conduct constituting attempt is said to be of two kinds, completed and uncompleted attempt. Thus in a completed attempt the accused does everything which he sets out to do but fails, either through lack of skill or foresight or because of some unexpected obstacle. In uncompleted attempt the accused fails to do what he set out to do because he is thwarted by the intervention of some external agency or by changing his mind and desisting.

The question of when commencement of execution starts has always vexed the courts and no attempt has been made to lay a test as everything should depend on the facts of a particular case. The case of *R v Schoombie* 1945 A.D. 541 helps to elucidate the issue at hand. In that case the accused was charged with attempted arson. He had gone to a shop with a tin of petrol. Having placed the tin of petrol against the door he proceeded to pour petrol, some of which flowed under the door. He was then interrupted by a Police officer whilst in the process of pouring the petrol. Having been convicted he noted appeal. The argument advanced on his behalf was that his conduct amounted to mere preparation as he had neither a box of matches in his hand nor had he lit a matchstick.

In dismissing the appeal, WATARMEYER CJ acknowledged the difficulty posed in determining when preparation ends and when perpetration commences. He also made reference to the two types of attempt discussed by Burchell and Hunt. Having observed that the case before them concerned an interrupted attempt at 547 he made the following remarks:

“It seems, therefore, that in the case of interrupted crimes an attempt to commit such crime is proved when the Court is satisfied from all the circumstances of the case that the wrongdoer, at the time he was interrupted, intended to complete the crime and that he had at least carried his purpose through to the stage at which he was “commencing consummation”.

Further commenting on when the precise moment at which consummation can be said to commence and the attendant difficulties, WATARMEYER CJ continued at 547 and stated the following:

“Consequently, if a wrongdoer has finally made up his mind to commit a crime and has taken steps to carry out his resolution, the exact moment at which he is interrupted and prevented from fulfilling his intention should not be the sole determining factor in deciding whether or not his morally wrongful act should be regarded as a crime. Provided always that his acts have reached a stage that it can properly be inferred that his mind was finally made up to carry through his evil purpose he deserves to be punished because, from a moral point of view, the evil character of his acts and from a social point of view, the evil character of his acts and from a moral point of view, the evil character of his acts and from a social point of view the potentiality of harm in them are the same, whether such interruption takes place soon thereafter or later. Consequently the court should lean towards giving a wide interpretation to the phrase ‘commencement of the consummation’ by including in such consummation all the last series of acts which would constitute a continuous operation, unbroken by intervals of time which might give an opportunity for reconsideration. In our law this inclination towards a wide interpretation is all the more justified because, as was pointed out in *Nlhovo*’s case (supra), the Roman-Dutch authorities took a much wider view of the criminality of acts which in English and American law would be regarded as mere preparation.”

That the accused person accosted the complainant, closed the door, threw the pair of scissors that was used as a makeshift key/handle on top of the wardrobe and threw the complainant onto some blankets that were on the floor is suggestive of something more sinister than someone who was bent on gratifying himself by ‘touching the genitals or other erotically significant parts of the complainant’s body.’¹ The accused person also got on top of the complainant. He only desisted on account of the intervention of third parties. The commencement of the execution of the intended crime of rape was in motion when he was interrupted.

The prosecution erred in preferring the wrong charge and the trial court erred in proceeding with the trial on the wrong charge. Accordingly, I cannot certify that the proceedings are in accordance with real and substantial justice.

¹ *S v Svovai* 1999 (1) ZLR 183 (H)