IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. AAU0002/94S
(Lautoka High Court Criminal Case No. 14 of 1993)

BETWEEN:

THE STATE — Appellant

and

APOLOSA RAINIMA — Respondent

Ms N. Shameem for the State
Respondent in Person

Date and Place of Hearing: 12 August, 1994, Suva
Delivery of Judgment : 12 August, 1994

JUDGMENT OF THE COURT

This is an appeal by the State against the acquittal of the Respondent by the Lautoka High Court (Sadal J.) on a charge of Rape contrary to Section 149 of the Penal Code. All 3 Assessors had expressed the opinion that the Respondent was not guilty, the learned trial judge accepted their opinion and acquitted the Respondent.

The appeal is based on the following 2 grounds -

"(a) THAT THE opinions of the Assessors was perverse.

(b) THAT THE learned Judge erred in law by failing to direct the Assessors that on the accused's own admission in court that a case of attempted rape was made out."

In short, the State's contention is that the Respondent ought to have been convicted if not of rape than of the lesser offence of attempted rape.

By virtue of Section 21(2)(a) of the Court of Appeal Act (Amendment) Decree, 1990 the State is entitled to appeal "against the acquittal of any person on any ground of appeal which involves a question of law alone".

The particulars of offence in the Information laid against the Respondent alleged that `on the 24th day of September, 1992 at Lautoka in the Western Division had unlawful carnal knowledge of Miliana Cunacula without her consent.'

When arraigned before the High Court at Lautoka on 16 November, 1993 the Respondent pleaded guilty to the Information. However, when the charge was explained to him in detail he stated to the Court he did force the complainant but failed to have sexual intercourse. Thus a plea of not guilty was entered and the matter was adjourned for hearing on a later date.

On 1 February, 1994 the Respondent maintained his plea of guilty to attempted rape but Counsel for the State refused to accept that plea and the matter therefore proceeded to trial.

The State called four witnesses including the complainant, the medical officer and two police officers.

The complainant maintained that the Respondent tore her clothes and forcibly had sex with her twice and oral sex once. Unchallenged medical evidence pointed to recent intercourse. It revealed the presence of whitish discharge around the vagina and "discharge and slimy entry to vagina". Medical evidence also showed injuries on the complainant consistent with her evidence.

The Respondent's interview statement was tendered and admitted in evidence. In it he admitted that he threw the complainant down to the ground, tore her skirt and bra and tried to have intercourse with her. He, however, maintained that he was not successful.

Even in his sworn evidence the Respondent stated that he intended to have sexual intercourse with the complainant and also admitted "forcing" her. He said (p.52 of the Record) "I plead guilty that I wanted to rape her." In cross-examination he admitted as follows:

"I took advantage of her. I admit dragging her to Nacovu Park. I pressed her mouth to stop her from shouting. I wanted to have sexual intercourse with her. I forcibly took off her "T" shirt. I tore her skirt. She was resisting. I did not feel sorry for her."

Later he stated (p.53 Record):

"I got up because I could not have sex so I asked her to suck my penis. She was struggling. I was lying on top of her. I got up. I had erected penis at that time when I was lying on top of her. My penis did not enter her vagina. My penis was out. She was resisting."

In his address to the Court the Respondent said:

"I like to say a few words. I plead guilty to attempted rape. I wanted to have sex. I tried - forced her. Tore her clothes. I did not have sex. I forced her but do not admit having sex with the girl. Eldest child is attending school. That is all."

In his summing up the learned trial judge at no stage invited the Assessors to consider the possibility of expressing the opinion that the Respondent was guilty of Attempted Rape if they were not satisfied beyond reasonable doubt that the offence of rape had been established. The issue of attempted rape was never put to the Assessors nor were they directed as to the evidence capable of constituting attempt.

The State has not challenged the trial judge's direction on corrobcration. In fact it concedes that the complainant's evidence that she was raped twice was not corroborated. Although we have reservations about this concession we do not think we can

characterise the Assessors' opinions as perverse bearing in mind the learned judge's warning to them of the dangers of convicting on the uncorroborated evidence of the complainant. Similarly, we cannot criticize the Assessors for not returning an opinion that the Respondent was not guilty of rape but guilty of attempted rape. The simple fact is, as we have already noted, that the Assessors were not directed that as a matter of law it was possible to convict an accused of the lesser offence of attempt although not charged with attempting to commit the offence, provided there is evidence to support such a course. We note that all 3 Assessors were lay persons. We, therefore, feel that in the circumstances we cannot uphold the first ground of appeal that the Assessors' opinions were perverse.

However, we now turn to the second ground of appeal.

Section 380 of the Penal Code (Cap.17) defines attempt as follows:

> *"380. When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.*
>
> *It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.*
>
> *It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence."*

The Director of Public Prosecutions has, in her written submission, made, inter alia, the following submissions:

`English authorities before the passing of the Criminal Attempts Act 1981 are useful. These authorities say that an attempt must be an act that is not merely preparatory - the act done must be immediately connected with the commission of the offence. Parke B in R v Eagleton (1855) Dears 515 asked whether there was any further act on the defendant's part remaining to be done before the completion of the crime.

In Stonehouse (1977) 2 All ER 909 H.L, Lord Diplock said "The constituent elements of the inchoate crime of an attempt are a physical act by the offender sufficiently proximate to the complete offence and an intention on the part of the offender to commit the complete offence.

Acts that are merely preparatory to the commission of the offence ... are not sufficiently proximate to constitute an attempt. They do not indicate a fixed irrevocable intention to go on to commit the complete offence unless involuntarily prevented from doing so."

This I submit is the test of whether an act is an overt act within the meaning of section 380 of the Penal Code.

The Respondent said (at page 52):

> *"I took advantage of her. I admit dragging her to Nacovu Park. I pressed her mouth to stop her from shouting. I wanted to have sexual intercourse with her. I had the urge to have sex with her. I forcibly took off her T-shirt. I tore her skirt. ' She was resisting ... She was resisting. She left."*

At page 53:

> *"I got up because I could not have sex so I asked her to suck my penis."*

The only reason why the Respondent did not have sexual intercourse with the complainant was, according to his own sworn evidence, that he was not able to because of circumstances beyond his control.

Section 380 also provides that it is immaterial if the "complete fulfilment of his intention is prevented by circumstances independent of his will ...."

In his closing address the Respondent said: "I plead guilty to attempted rape" and the learned trial Judge still failed to put the issue of attempted rape to the assessors.'

We agree with the State's submissions. We also note the following further provisions of our written laws.

Section 170 of the Criminal Procedure Code, Cap. 21 lays down that -

> *"When a person is charged with an offence, he may be convicted of having attempted to commit that offence although he was not charged with the offence".*

And Section 151 of the Penal Code, Cap. 8 states -

> *"Any person who attempts to commit rape is guilty of a felony, and is liable to imprisonment for seven years, with or without corporal punishment."*

We have no hesitation in holding that in the light of the unequivocal evidence before the Court, the learned trial judge erred in law in not directing the Assessors that there was ample evidence before them based on the Respondent's own admission to constitute the offence of attempted rape even though the Respondent was not charged with attempt. His failure to put the issue of attempt to the Assessors has, in our view, resulted in a miscarriage of justice. Had he done so we have no doubts in our mind that the Assessors would have advised him that the Respondent was guilty of attempted rape.

In an assessor system such as ours the trial judge is the final arbiter of the innocence or guilt of the accused. He is

not bound to accept the opinions of the Assessors willy nilly although where guilt or innocence is dependent purely on credibility and on questions of fact he would rarely reject their opinion. Where he does so he would be expected to give cogent reasons for differing from the Assessors.

We, therefore, allow the appeal, set aside the order of acquittal and direct a judgment and verdict of conviction of the Respondent of attempt to commit rape contrary to Section 151 of the Penal Code to be entered, as authorised by Section 170 of the Criminal Procedure Code and Section 23(2)(b) of the Court of Appeal Act (Amendment) Decree, 1990.

We remit the case to the trial judge to pass sentence on the Respondent according to law after taking evidence of his antecedents and after affording him an opportunity to make submissions in mitigation.

The Respondent is admitted to bail in the sum of $500.00 in his own recognizance to appear before the High Court at Lautoka on a date to be notified.

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Sir Moti Tikaram
President, Fiji Court of Appeal

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Mr Justice Ian R. Thompson
Judge of Appeal

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Mr Justice Peter Hillyer
Judge of Appeal

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