

THE STATE  
versus  
LEONARD JAMBAYA

HIGH COURT OF ZIMBABWE  
TSANGA & MWAYERA JJ  
HARARE, 18 December 2015

### **Criminal review**

TSANGA J: The accused who initially faced charges of rape and robbery was ultimately convicted of robbery and acquitted on the charge of rape. He received a sentence of 40 months imprisonment for the robbery charge of which twenty months was suspended for five years on the usual conditions. The complainant for both crimes was a 63 year old woman. The accused was 19 years old. In light of the facts below, it is the reasoning in the handling and dismissal of the rape charge without finding an alternative permissible verdict of attempted rape that raises the concern.

The accused was alleged to have ambushed the complainant along a river as she was relieving herself and then proceeded to rape her and to rob her of money that she had in her possession amounting to \$30.00. The accused was said to have approached the complainant and told her to remove her clothes. He had also told her not to scream. Further, he had threatened her with stabbing. He had ordered her to lie on her back, which she did, and then proceeded to mount her. However, he had failed to penetrate her despite his efforts at doing so. In the absence of penetrative intercourse the magistrate's reasoning was that there was no rape and that no charge, even to a lesser count, could stand. His reasoning, in dismissing the rape charge, as the excerpts from the record reveal, was largely based on the absence of penetrative intercourse.

“Accused then took a look at her vagina and asked her why his penis was failing to penetrate it. Thereafter accused took all her money, \$30 in all and told her he would kill her if she reported to the police.....Accused's penis had failed to penetrate her vagina hence accused had ended up using his hands to try and prize(*sic*) her legs apart so that he would see her vagina. Her evidence on the aspect confirmed that she had lifted her legs up while maintaining them together without parting them. As earlier stated, it would be impossible for sexual intercourse to be had with her in these circumstances. Yet she said she felt pain on her vagina as accused was trying to insert her penis into it.

Considering complainant's age, that is 63 years, and the findings of the doctor as per medical report, complainant would not be expected to fail to realise it if accused's penis had penetrated her vagina, even if only slightly, she was emphatic that he had only tried to insert his penis into her vagina....

Regarding the rape charge the court was left unconvinced that sexual intercourse could be had by people in the position complainant was talking about. Even so according to the complainant herself, accused failed to penetrate her vagina. There can be no rape in the absence of penetration per vagina..... The evidence relating to the alleged robbery was far more convincing, in fact to reaching the standard of proof beyond reasonable doubt.... Accordingly while acquitting accused on the rape charge the court returns a verdict of guilty as charged on the robbery charge. ”

Section 189 of the Criminal Code deals with “attempt” as a category of offences. It is couched 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:”

From the above provision it is clear that two requisites must be fulfilled for the crime to fall within the category of attempt to be committed. Firstly, there must be the intention to commit the crime. Secondly, there must an attempt commit the act in question. There is no doubt from reading the facts of this matter and indeed the magistrate's own summary of the factual circumstances that the accused intended to commit the crime of rape. Secondly, there is no doubt that he had reached the commencement of the execution of the intended crime. The fact that he failed to penetrate her vagina does not absolve him of the crime of attempted rape. From the accused's own evidence he queried why complainant's female organ could not be penetrated. This, together with complainant's own evidence of the pain she felt on her vagina , clearly show that the accused had gone past the preparatory stage and thus attempted to rape the complainant.

Section 273 of Chapter XV of the Criminal Code also deals with permissible verdicts where a person charged with a crime may be found guilty of “attempting to commit that crime” if the full elements of the main charge are not satisfied. Schedule four of the Criminal Code clearly lists attempted rape as an alternative verdict to a main charge of rape where the core elements of rape are not satisfied. From the above facts in this case there is no reason

why the alternative verdict could not have been found. The magistrate was clearly misguided in the failure to regard the factual circumstances as amounting to attempted rape in terms of s189 as read with s 65 of the Criminal Code. Whilst the conviction and sentence on robbery stands, the proceedings cannot be said to amount to real and substantial justice in so far as count on rape stands. It would be improper in the face of overwhelming evidence and a competent verdict of attempted rape to acquit the accused of a sexual offence. Accordingly, I withhold my certificate.

TSANGA J .....

MWAYERA J agrees .....