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THE QUEEN v. FRANK ETAMU

J U D G M E N T

Bignold J.
Feb 22.
SAMARAI.

As to the first count the evidence satisfies me beyond a reasonable doubt that the accused broke and entered the dwelling house on the date named in the count, and that he did so in the night time and, further, I am similarly satisfied from the evidence that when he did so it was with the intention of committing a crime, namely to rape or attempt to rape the complainant. I find the accused Guilty on the first count.

Mr. Cruickshank of Counsel for the Defence argued that upon the evidence the court should not make the above finding as the evidence did not exclude that the accused's intention might have been unlawfully and indecently to assault, that being in the Criminal Code designated a misdemeanour. I am constrained to add that it appears to me that consideration might well be given to substituting the words "an indictable offence" for the words " a crime" in the section so that both crimes and misdemeanours would fall within the ambit of the section.

Coming to the second count, consideration is required of the provisions of Section 4 of the Criminal Code which defines attempts. That section reads as follows:-

"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 said 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 same facts may constitute one offence and an attempt to commit another offence. "

The above definition appears clear and unambiguous, but the application of definitions of the kind to specific facts is notoriously difficult and this definition is no exception as regards its difficulty in application to the facts. Attempts seem always to involve an overt act or acts together with a mental element. The overt act or acts relied upon should be considered quite apart from the mental element, for whether the act or acts

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could in law constitute an attempt is a question of law and consideration of the mental element involved only arises if that question of law has first been determined by the court in favour of the prosecution, because the mental element is a question of fact.

Adopting a test suggested by Glanville Williams Criminal Law 1953 Edition, page 483, if it were possible to exhibit a cinematograph film depicting the scene described in the evidence, that is the accused full length on top of the complainant in the dark, she dressed in pyjama shorts and he in short trousers with his face masked and his hand over her mouth, with his body rising and falling over her, in my view, observers might reasonably conclude that they were witnessing the start of a rape, even garbed as they were. I agree with that conclusion.

In the view of this court the acts of the accused in law constituted an attempt to rape. I think these acts went beyond being merely preparatory ones and were sufficiently proximate. The accused was in the words of the text books "on the job". It is plain from the evidence that the accused was deterred from pursuing his purpose by the violent resistance of the complainant.

Turning now to the mental element, what the accused said in the lower court and what he told the police on interrogation (evidence that was given without objection), together with all his actions, leave no doubt in my mind that the accused was intending to have carnal knowledge of the complainant without her consent or in other words, to rape her or to attempt so to do.

Counsel for the Defence argued that so long as the accused remained with his pants on and the complainant with her pyjama pants on (and the evidence is that there was no attempt by the accused to remove either), the accused could not be said in the words of Section 4 to have begun to put his intention into execution by means adapted to its fulfilment. I do not agree with this but agree with the learned Crown Prosecutor, Mr. Clay, that it is immaterial that the accused had not done all that was necesaary on his part for completing the commission of the offence as is shown in the second paragraph of Section 4 of the Criminal Code.

In relation to the 1st count Counsel for the Defence also argued that before the accused could be convicted of attempted rape the court must be satisfied that when the prisoner laid hold of the prosecutrix he not only desired to gratify his passions upon her person but that he intended to do so at all events and that notwithstanding any resistance upon her part. He quoted Rex v. James Lloyd, English Reports, Volume 173 page 141 and The Queen v. Black Bob, N.S.W. Supreme Court Reports, Volume 7, at p.120. I do not agree that this is the law in this Territory. I think these cases put the burden of proof on the Crown higher than is required in this Territory by Section 347 of the Criminal Code which seems to me only to require

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the Crown to show that when the accused laid hands on the prosecutrix he intended to have carnal knowledge of her without her consent.

The Defence further put it to the court that the acts of the accused might have been in pursuance of an attempt unlawfully and indecently to assault the prosecutrix. Once the accused got on top of the sleeping complainant I think that he committed an unlawful and indecent assault and the section dealing with attempts shows that once he has fulfilled his intention it ceases to be an attempt. That definition also makes it plain that the same facts may constitute one offence and an attempt to commit another so that it does not matter in relation to the attempt to rape the complainant that he had also unlawfully and indecently assaulted her.

The prisoner is without merits and in the view of this court carried out his attack on the defenceless complainant with wicked premeditation. I find the accused Guilty on the second count. I was informed by the Crown Prosecutor that the 3rd count is laid in the alternative and I therefore find no verdict on that count. R. v.Grasso 1950 V.L.R.21.

It seems only right to add that I am sure that this case will shock greatly and disturb the native people of Milne Bay who are a civilized and law abiding people, and that I cannot recall any similar case anywhere in the Territory since 1928, the date when I came to it.

Accused Guilty on 1st Count
Guilty on 2nd Count
No finding on 3rd Count

Judgment was delivered on February 22nd at Samarai. At the conclusion of reading the written judgment the Crown Prosecutor, Mr. Clay, referred me to R. v. Grasso, 1950(Carter 315) Victorian Law Reports 21, and asked if I would refrain from making a finding on the 3rd count even though he had indicated that it was laid in the alternative. Mr. Cruickshank of Counsel for the Defence suggested that as the judgment had been read that it was not open to the court totake this course but in view of the fact that it had been read in English and not translated to the accused, the court decided to grant the Crown Prosecutor's application and no finding on the 3rd count was announced to the accused, but he was found Guilty on the 1st and 2nd counts and this was announced to him.

The accused is unmarried and about 19 years of age. He is illiterate and speaks no English. He was for a year at a Mission school. He was employed at Hagita plantation for a short time and has no previous convictions. Purely on account of his youth a sentence of 8 years' imprisonment with hard labour was imposed in respect of each of the convictions. Both sentences to be served concurrently. Upon being given allocutus, the accused had nothing to say.