Criminal Case No. 4 of 1979

The Republic v. Taomia Iosia

13th August, 1979.

Attempted rape - voluntary desistence - legal effect depends on proximity of acts done before desistence to offence attempted.

Attempted rape - voluntary desistence - absence of mens rea to have sexual intercourse without consent.

Section 129 of the Criminal Procedure Code 1972 - whether indecent assault and assault occasioning actual bodily harm are minor and cognate with attempted rape.

The accused gave a lift on his motor cycle late at night to a young woman whose motor cycle had broken down. They were already slightly acquainted with one another. Instead of taking the young woman to her home as requested by her and promised by him, the accused drove along a different road and then off the road into the bushes. There he pulled her off the motor cycle, put her forcibly onto the ground, removed her trousers, unzipped his own trousers, got on top of her and tried to have sexual intercourse with her. She struggled with him and reasoned with him. In response he desisted and drove her to her home.

Held: (1) Voluntary desistence from an attempt to commit an offence does not absolve from criminal liability for the attempt, if the acts done before desisting are sufficiently proximate to the offence attempted to consititute an attempt to commit it,

(2) However, where the offence alleged to have been attempted is not the mere doing of an act but the doing of it in certain circumstances or with a certain intention, voluntary desistence may be evidence of an absence of mens rea, i.e. the intention to do the act in those circumstances or with that intention.

(3) Indecent assult and common assult are minor and cognate to attempted rape, but assult occasioning actual bodily harm is not.

Accused acquitted of attempted rape but convicted of indecent assault.

P.A. Thorpe for the Republic
R. Kaierua for the accused.

Thompson C.J.:

The accused, a young Tuvaluan man, is charged with attempting to rape a young Tuvaluan woman. Evidence of the incident allegedly constituting the attempted rape was given only by the woman, Meiema Latasi. All the other evidence given by prosecution witnesses was only circumstantial. The accused did not give evidence or make an unsworn statement and no witnesses were called for the defence.

The evidence of Meiema, a school teacher, was that, in the middle of the night, after her motor cycle had broken down, she accepted a lift on the motor cycle of the accused, who had chanced to pass by her and with whom she was slightly acquainted. She stated that, instead of taking her to the place to which he agreed to take her, he turned onto a different road and continued along that road in spite of her protests; that she tried to jump off the motor cycle but caused it to fall over; and that the accused then attacked her, dragging her off the road into some bushes, punching her about the face, putting her onto the ground, removing her trousers and underwear and then, after unzipping his trousers, getting on top of her and trying to insert his penis into her as she struggled to stop him doing so. She gave evidence that he desisted from the attempt when she asked him why he wanted to have sexual intercourse with her and why he was going about it in that manner; that, after he had told her that he had had his eye on her for a long time, since he was still at school, and she told him that she also loved him but did not consider the circumstances appropriate for sexual intercourse, he took her to her flat; that, as the young woman who shared the flat with her was obviously out, she left the accused to go inside while she waited outside; and that, when the other young woman came back in her car, she ran down to her crying and was taken by her to a hospital.

Evidence was adduced that, on arrival at the hospital, Meiema told a nursing sister that a boy had tried to rape her. A doctor gave evidence that, soon afterwards, he examined her and found that she had a black eye, a laceration under one eye requiring stitches, bruised swollen lips and a puffy cheek. A young woman who shared Meiema's flat gave evidence that, when she arrived, Meiema was sitting on the outside stairs leading up to her flat and was crying, and that Meiema ran to her car crying and unable to speak. She also gave evidence of seeing the accused drive away on his motor cycle as she was driving off in her car with Meiema.

Meiema gave her evidence in a straightforward manner. She impressed me as being a truthful witness. The accused was not a stranger to her; so, if she has told the truth, she cannot have been mistaken as to his identity. It was not suggested to her in cross-examination that she consented either to being taken in a direction away from the destination to which she said the accused had agreed to take her or to sexual intercourse. Her whole account of the incident amounted to a denial of consent or of any conduct which might have led the accused to believe that she was consenting.

Nevertheless, as the offence charged is attempted rape, corroboration of her evidence is required as a rule of practice. The evidence of her "recent complaint" to the nursing sister does not constitute corroboration; it merely shows that she has consistently made the allegation since very soon after the alleged incident (R. v Lillyman (1896) 2 Q.B. 167 and R. v Coulthread (1934) 24 Cr. App. R. 44). Furthermore, for evidence to be corroborative, it must not only be independent testimoney but it must also implicate the accused (R. v Baskerville (1916) 2 K.B. 658).

The failure of the accused to give evidence or to make an unsworn statement contradicting the evidence of Meiema does not constitute corroboration of her evidence. But her flatmate's evidence of her distressed condition and her injuries and of

seeing the accused drive away from the place on his motor cycle is capable of doing so and, I am satisfied, in the circumstances of this case, does constitute corroboration. Accordingly I am satisfied beyond all reasonable doubt that Meiema has told the truth and that the accused did do all the things of which she gave evidence, as recounted above.

There is no doubt that Meiema did not consent to the accused having, or trying to have, sexual intercourse with her. He has not raised in any way the issue of belief in consent; I am absolutely satisfied that he had no such belief. However, it remains to be decided whether he had the necessary mens rea to be guilty of the offence charged and whether the actus reus was sufficiently proximate to the substantive offence to constitute an attempt to commit it.

Accepting Meiema's evidence as I have, I find as fact that, before she asked the accused the questions about his reasons for what he was doing, he had removed her trousers and underwear, was lying on top of her, had forced her legs apart, had his hands on her shoulders and was pressing his penis against her and trying to put it into her.

His acts were immediately, not remotely, connected with the commission of the substantive offence. Undoubtedly they constitute the actus reus of an attempt to commit it.

The mens rea of the substantive offence of rape is an intention to have sexual intercourse with a woman or girl without her consent. The mens rea of an attempt to rape is an intention to try to commit the substantive offence, that is to say an intention not only to try, without the consent of the woman or girl, to have sexual intercourse with her but to intend, if the attempt is successful, to have sexual intercourse with her without her consent. The fact that a person who is attempting to commit an offence voluntarily desists from his attempt before the substantive offence is in fact committed does not exculpate him if, when he did the actus reus of the attempt, he had the

intention to commit the substantive offence (see, for instance, R. v Page (1933) V.L.R. 351). But, if he desisted from completing the substantive offence because he had never had the intention to commit it, that is to say he lacked the mens rea of the substantive offence, he is not guilty of attempting to commit it.

The onus of proving all the elements of the offence charged rests on the prosecution. If there is any reasonable doubt as to the accused's mens rea, he is entitled to the benefit of it. In the present case, the fact that the accused desisted voluntarily, in the circumstances in which he did so, from his attempt to have sexual intercourse with Meiema may cast some doubt on whether it was ever his intention actually to have such intercourse without her consent, that is to say, he may possibly have been hoping that she would eventually consent. Certainly she did not consent to his trying to have sexual intercourse with her and he knew that; but, in view of the circumstances in which he desisted from his attempt, even though I think it considerably more likely that he did intend to have sexual intercourse without her consent, I consider that there is a reasonable doubt in the matter. Accordingly the accused will be acquitted of the offence of attempting to rape Meiema.

However, the acts of the accused which I have found proved constitute the offence of unlawfully and indecently assaulting a woman, contrary to section 350 of the Criminal Code Act, 1899, of Queensland in its application to Nauru, and also the offence of unlawfully assaulting another and thereby causing her bodily harm, contrary to section 339 of that Code. Under the provisions of section 135 of the Criminal Procedure Act 1972 a person who is charged with rape may be convicted of an offence against section 350 of the Code if the Court is of the opinion that he is not guilty of rape but is guilty of an offence against section 350. In the present case the accused is charged not with rape but with attempting to rape; so section 135 is not applicable. However, section 129 (2) of the Act provides that -

> "where a person is charged with an offence and facts are proved which reduce it to a minor and cognate offence, he may be convicted of the minor offence although he is not charged with it."

Section 129 (3) defines a minor offence as one for which, upon conviction, a lesser maximum sentence is provided by law. There is no definition of a cognate offence but, however narrowly that expression may be defined, an offence against section 350 of the Code is undoubtedly cognate with an offence of attempting to rape. It may also be observed that the headnote to section 135 of the Act is "Conviction of a Cognate Offence on Charge of Rape". The maximum sentence which can be imposed for attempted rape is 14 years' imprisonment. The maximum sentence which can be imposed for an offence against section 350 of the Code is two years' imprisonment. So the latter offence is a minor and cognate offence of which the accused can, and will, be found guilty and convicted.

Attempted rape is a trespass to the person and usually includes an assault, so that conviction of common assault may possibly be open under the provisions of section 129 (1) or (2) of the Act. The element of occasioning actual bodily harm which is part of an offence against section 339 of the Code is not a part of the offence of rape and attempting to rape. Clearly section 129 (1) of the Act is inapplicable; and, in my opinion, because of that element of occasioning actual bodily harm the offences are not cognate with one another. Accordingly the accused cannot be convicted of an offence against section 339 of the Code.

I find the accused not guilty of attempting to rape Meiema but guilty of indecent assault on her.