

**IN THE MAGISTRATES' COURT
AT BA
CRIMINAL JURISDICTION**

Criminal Case No. 215/2022

BETWEEN: STATE

PROSECUTION

AND: VELA TAWAKE

ACCUSED

Counsel: WCPL 4897 Venu Singh for Police Prosecution
Ms. L. Naikawakawavesi for the Accused

Date of Trial: 11 December 2024
Date of Ruling: 12 February 2025

JUDGMENT

Introduction

1. Mr. Vela Tawake ("the Accused") was charged and produced in Court on 19 May 2022 for 1 count of Attempted Rape contrary to section 208, 1 count of Indecently Insulting or Annoying any Person contrary to section 213(1) and 2 counts of Indecent Assault contrary to section 212(1) of the Crimes Act 2009. The particulars of the offences are:

Count 1

Statement of Offence

Attempted Rape: Contrary to Section 208 of the Crimes Act 2009.

Particulars of Offence

Vela Tawake on the 25th day of January 2022 at Sorokoba, Ba in the Western Division attempted to commit rape to **Asena Rosa**.

Count 2

Statement of Offence

Indecently Insulting or Annoying any Person: Contrary to Section 213(1) of the Crimes Act 2009.

Particulars of Offence

Vela Tawake on the 31st day of January 2022 at Sorokoba, Ba in the Western Division with intent to insult the modesty of **Asena Rosa** by telling her to show her private part intending that such words be heard by the said **Asena Rosa**.

Count 3
Statement of Offence

Indecent Assault: Contrary to Section 212(1) of the Crimes Act 2009.

Particulars of Offence

Vela Tawake on the 3rd day of February 2022 at Sorokoba, Ba in the Western Division with unlawfully and indecently assaulted **Asena Rosa** by telling her to check his erected penis.

Count 4
Statement of Offence

Indecent Assault: Contrary to Section 212(1) of the Crimes Act 2009.

Particulars of Offence

Vela Tawake on the 15th day of March 2022 at Sorokoba, Ba in the Western Division with unlawfully and indecently assaulted **Asena Rosa** by showing his erected penis to her.

2. Given that the offence of Attempted Rape was an indictable offence triable summarily, on 19 May 2022, the Accused elected the Magistrates' Court to deal with the matter.
3. On 5 October 2022, the Accused in the presence of his counsel pleaded Not Guilty to Count 1 but entered Guilty pleas to Counts 2 to 4 before this Court's first predecessor. From the Court minutes from 5 October 2022, this Court's first predecessor determined that the Summary of Facts and Mitigation for Counts 2 to 4 would be dealt with after Count 1 was resolved after Trial.
4. After subsequent adjournments, this Court's second predecessor on 7 August 2023 set a Trial date for Count 1 but declined to give Prosecution further time for Summary of Facts for Counts 2 to 4 but rather proceeded to facts for Counts 2 to 4 as per charge. This Court's second predecessor also took mitigation for the Accused and heard submissions from the Accused's counsel regarding the Accused being found guilty for the lesser offence of Indecently Insulting or Annoying any Person for Counts 3 and 4 pursuant to section 160(2) of the Criminal Procedure Act 2009.
5. Considering the submissions of the Accused's counsel, this Court's second predecessor convicted the Accused for Count 2 and for both Counts 3 and 4 proceeded to convict the Accused for the lesser offence of Indecently Insulting or Annoying any Person. This Court's second predecessor then adjourned the matter for Trial for Count 1 and Sentencing for the 3 counts of Indecently Insulting or Annoying any Person.
6. On 11 December 2024, Trial proceeded before this Court. Prosecution called the Complainant to give evidence and thereafter closed its case. This Court found that a case was made out against the Accused to sufficiently require him to make a defence in respect of the charge. The procedure under section 179 of the Criminal Procedure Act was explained to the Accused. It was also explained to the Accused that he had a right to remain silent. The Accused chose to remain silent and not call any witnesses.
7. Thereafter, both parties filed closing submissions in the matter.

8. Having read the submissions and considered the evidence presented by Prosecution, I now pronounce my Judgment.

Burden of Proof

9. It is imperative to highlight that as a matter of law, the onus or burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no burden on an accused to prove his or her innocence as an accused is presumed to be innocent until proven guilty.
10. It is for the prosecution to prove the accused's guilt beyond a reasonable doubt. If there is doubt, so that the court is not sure of the accused's guilt, or if there be any hesitation in the court's mind on any of the ingredients or on the evidence led by prosecution, the accused must be found not guilty of the charges and accordingly acquitted.

Summary of Evidence

11. The Complainant testified that on 25 January 2022, she had been residing at the Accused home in Sorokoba. She explained that the Accused was her husband's uncle. The Complainant stated on the abovementioned date, she had been watching tv in the living room when the Accused returned from the shower and as he was passing, his towel fell off and he came closer to her and pushed her head down to his penis. The Complainant further testified that she pushed him away and then he went to the room to get dressed.

Analysis of Evidence

12. For a proper analysis of the evidence, it is imperative for the Court to turn its mind to the elements for the offence, which are:
- i. the accused
 - ii. attempted to commit rape of the Complainant.
13. It is important to note that once this Court found that there was a case made out against the Accused sufficiently requiring him to make a defence, the Accused chose to remain silent and not call any witnesses, this Court is mindful that no adverse inference can be made against the Accused in this regard.
14. The Court will need to evaluate the evidence by Prosecution. The evidence presented will be evaluated to determine the testimonial trustworthiness of the evidence which will be done by evaluating the credibility – the correctness or veracity of the evidence and the reliability of evidence – the accuracy of the evidence - vide ***State v Prasad*** Criminal Case No. HAC 72 of 2021 (20 June 2024). In doing this, the Court should consider the promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions, interestedness/disinterestedness/bias, the demeanour and deportment in Court and the evidence of corroboration where it is relevant. (vide ***State v Moroci*** Criminal Case No. HAC 161 of 2023 (26 April 2024)).
15. The Court is mindful of section 44 of the Crimes Act 2009 which provides for the physical and fault elements of attempt to commit an offence. The section states:

Attempt

44(1) A person who attempts to commit an offence is guilty of the offence of attempting to commit the offence and is punishable as if the offence attempted has been committed.

(2) For the person to be guilty, the person's conduct must be more than merely preparatory to the commission of the offence, and the question whether conduct is more than merely preparatory to the commission of the offence is one of fact.

(3) Subject to section (7), for the offence of attempting to commit an offence, intention and knowledge are fault elements in relation to each physical element of the offence attempted.

(4) A person may be found guilty even if

- (a) committing the offence attempted is impossible; or
- (b) the person who actually committed the offence attempted is found not guilty.

(5) A person who is found guilty of attempting to commit an offence cannot be subsequently charged with the completed offence.

(6) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of attempting to commit that offence.

(7) Any special liability provisions that apply to an offence apply also to the offence of attempting to commit that offence.

(8) It is not an offence to attempt to commit an offence against section 45 (complicity and common intention), section 49 (conspiracy to commit an offence) or the offence of conspiracy to defraud.

16. In **Ram v State**; Criminal Appeal No: AAU0089 of 2013 (14 September 2017) the Court of Appeal stated at paragraph 12:

"Attempt requires proof of two essential elements. Firstly, it must be proved that the accused intended to commit the alleged offence and secondly, that, with that intention, the accused did something which was more than mere preparation for committing the alleged offence (DPP v Stonehouse [1978] AC 55; [1977] 2 ALL ER 909; 65 Cr App R 192 (HL) at 68; 917; 208, per Lord Diplock). The Court of Appeal adopted the principle in Stonehouse in State v Rainima unreported Cr App No AAU0002/94S; 12 August 1994 (Tikaram P, Thompson JA and Hillyer JA)."

17. Considering **Ram** [supra] it is for Prosecution to prove beyond a reasonable doubt that the Accused intended to commit the alleged offence and with that intention he did something which was more than mere preparation for committing the alleged offence.

18. As stated by His Lordship Justice Sharma in **State v Ratu**; Criminal Case No.: HAC 60 of 2020 (12 January 2024) '[i]ntention is not something that can be easily proved it is something that has to be judged by the acts or words of a person or of the circumstances that surrounds what he or she does. The law says a person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary cause of events. This court will have to decide intention by considering what the accused did, by looking at his actions before, at the time of, and after the act."

19. The Court will thus need to look at the conduct of the Complainant and the Accused at the time and the surrounding circumstances to decide this issue
20. The Complainant stated in evidence that on 22 January 2022, she had been living at the Accused's home in Sorokoba as she had been going through a difficult time with her partner as he had chased her out. On 22 January 2022, the Complainant stated that she was watching tv in the living room when the Accused had returned from the shower. The Complainant had been sitting on the settee when the Accused came out of the shower. It was at this point that the Complainant testified that the Accused's towel fell off and that he came closer to her and gave a little push on her head to push her down to his penis.
21. The Complainant then stated that she pushed the Accused away and he then went to his room and got dressed. The Complainant stated in her evidence that the Accused did not hold her head still when pushing it down.
22. From the evidence it is apparent that the Accused and the Complainant are acquainted with each other. The Accused has not raised the issue that the Complainant was mistaken in identifying the alleged perpetrator - the dispute centres on whether this alleged incident involving the Accused occurred.
23. From the Complainant's evidence regarding the Accused pushing her head down to his penis, her evidence was that he had merely pushed it and that he did not hold it still when he pushed it down. Further, the Complainant had stated that when she had pushed the Accused away, he then went to the room to get dressed. Nothing from this evidence suggests that the Accused had the intention to commit the offence of attempted rape.
24. Further, Prosecution failed to elicit any other evidence from the Complainant as to whether the Accused had said anything to the Complainant when he had come out of the shower, or before he came close to her or even at the time of pushing her head towards his penis.
25. Additionally, Prosecution did not elicit any evidence from the Complainant what had happened after the Complainant pushed the Accused away. No clarification was sought by Prosecution whether the Accused had done anything else or said anything to the Complainant after she pushed him and before he went to the room to get dressed. No other evidence was led by Prosecution as to whether anything had occurred between the Complainant and the Accused after he had got dressed after the alleged incident.
26. Prosecution's failure to elicit such evidence does not allow the Court to ascertain what the Accused's intention was when this alleged incident took place and whether the Accused's actions were intended to be more than mere preparation when committing the alleged incident.
27. Having considered the reasons above, the Court finds that Prosecution has failed to satisfy beyond a reasonable doubt that the Accused had attempted to commit the rape of the Complainant on 25 January 2022.

Determination

28. I find that Prosecution has not discharged its burden in proving all the elements for Attempted Rape beyond reasonable doubt.

29. I, therefore, find the Accused, Vela Tawake, not guilty as charged for Attempted Rape and hereby acquit him forthwith.

30. Any party aggrieved with the Court's decision has 28 days to appeal to the High Court.



N. Mishra
Resident Magistrate