IN THE SUPREME COURT)
OF THE TERRITORY OF)
PAPUA AND NEW GUINEA)

CORAM : CLARKSON, J.
Friday
10th May, 1968.

REGINA v. KUIPA NAPAI

TRIAL

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The accused is indicted for the crime of attempted rape. The evidence disclosed that the complainant, a 16-year old Papuan girl, was gathering firewood on a hill near her village. She placed her axe on the ground while moving some firewood; the accused approached unobserved, took possession of the axe and hid behind a bush. On the girl's return the accused came from hiding and stood behind her. What happened then was described by the accused himself in a statement to the police as follows:-

" Q. What happened after that?

A. The girl turned around and saw me and started to run away, but she fell over a stone and fell to the ground. I ran up to her and sat down on my knees and held her. I put my right hand on her mouth and with my left hand I tried to pull her pants off.

Q. Did the girl try and fight you?

A. No, she screamed out. I told her that I wanted to have sexual intercourse with her. She told me that she did not want me to and she held her knees together hard. I tried to pull them apart with my left hand.

Q. Where was the axe when this was happening?

A. I had put it on the top of a stone near her head.

Q. What happened when she wouldn't open her legs?

A. I took my right hand off her mouth and got the axe and held the blade on her neck and told her that if she didn't let me have sexual intercourse with her I would cut her neck and if she didn't stop screaming I would cut her neck.

Q. What happened then?

A. Two men started to run up the hill towards me and were yelling out. I got up and took the axe and ran down the hill. "

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The Crown says that on those facts the accused is guilty of attempted rape. The defence contention is that what the accused did amounted to no more than acts of preparation, that too much remained to be done to complete the offence to permit the description of what was done as an attempt to rape.

I do not attempt to deal with the interesting and at times conflicting theories to which I was referred by counsel and which are discussed in the cases and texts to which I was directed. I restrict my observations to such as I think are necessary to dispose of the present case.

Where the charge is of an attempt to commit a specified crime it is necessary firstly to recognize the elements which constitute the complete crime. Here the crime is that of rape which is defined in section 347 of the Code as follows:-

> " Any person who has carnal knowledge of a woman, (or girl), not his wife, without her consent, or with her consent, if the consent is obtained by force, or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false and fraudulent representations as to the nature of the act, or, in the case of a married woman, by impersonating her husband, is guilty of a crime which is called rape. "

Secondly, it is necessary to recognize what constitutes an attempt. Section 4 of the Criminal Code provides 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. "

In some cases it may be useful to draw a distinction between an attempt and mere preparation or between equivocal or unequivocal acts or between proximate and remote acts, although I note that the Code itself does not refer in terms to any such distinctions in the relevant sections.

In my view the combined effect of sections 4, 347 and 349 is correctly stated by Frost J. in Regina v. Joseph-Kure (1), as follows:-

> ".....in order to establish an attempted rape the Crown must prove:-
>
> (1) The accused intended to have carnal knowledge of the complainant without her consent, or obtaining her consent by force or by means of threats or intimidation, or by fear of bodily harm, etc.
>
> (2) The accused had begun to put his intention into execution by means adapted to its fulfilment.
>
> (3) The accused had manifested his intention by some overt act. "

I should add that this construction was not disputed before me, the passage which I have read being adopted by the defence.

In my view also the construction of the relevant sections adopted by the Queensland Court of Criminal Appeal in Reg. v. Williams, Ex parte The Minister for Justice and Attorney-General (2) is correct. In particular I draw attention to the analysis of Wanstall J. at p.95. Rape is a compound crime which consists not merely in achieving penetration but in achieving it without consent or with consent obtained by force, fear or threat. Naturally enough in most if not all cases, the facts relevant to the issue of consent will occur before and not after penetration. When penetration is effected it will be on a victim who is not consenting, as for instance one physically resisting, or on a victim who has unwillingly consented, that is one whose consent has been obtained by force or by threat or by fear.

It remains to note as Wanstall J. pointed out in Reg. v. Williams (3) that in the definition of "attempt" in section 4 of the Code there is nothing to say that the act said to constitute the means of executing the intention should be directed towards the performance of one rather than another element of a compound offence. Further, I add my own observation that the expression "appears to put his intention into execution by means adapted to its fulfilment"

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(1) (1965-66) P. & N.G.L.R. 161 at p.166.

(2)& (1965) QD.R. 86.

where the offence attempted is a compound one points to the beginning of the execution of the crime not to the beginning of the final element of it.

If this analysis is correct then the result in the present case is clear.

The accused does not say at what point of time he formed his intention to rape but clearly it was not later than when he commenced to chase the girl. Consider what then happened. When the girl fell he ran to her and held her. He put his one hand on her mouth and with the other tried to pull her pants off. He told her he wanted to have intercourse with her, she refused and held her knees together and the accused tried to pull them apart.

Even at this stage I think it would be open to a jury to find that he was attempting to rape in the sense that he was attempting to have sexual intercourse with a woman who was not consenting, as evidenced by her refusal and resistance.

He could not readily overcome her resistance so he changed his tactics. He was asked: "What happened when she wouldn't open her legs?" and he replied, "I took my right hand off her mouth and got the axe and held the blade on her neck and told her that if she didn't let me have sexual intercourse with her I would cut her neck and if she didn't stop screaming I would cut her neck". At this stage having failed to achieve his object without her consent he tried to obtain her consent to his having sexual intercourse and tried to obtain that consent by threats and fear.

I return now to the three matters which the Crown must prove as set out in the judgment of Frost J, to which I have referred. I comment on them as follows:-

(1) On his own admission the accused intended to have carnal knowledge of the girl. At first his intention was to have it without her consent, she forcibly resisting. When he was unsuccessful his intention was to obtain her consent by threats and fear.

(2) The acts of chasing, catching and holding the girl, stifling her cries for help and attempting to part her legs - at least if taken all together - clearly constituted means by which the accused had begun to put into execution his intention to have intercourse without her consent and equally clearly were means adapted to the fulfilment of that intention.

(2) Cont. The same comments may be made of his threat with the axe in relation to his intention to obtain her unwilling submission.

(3) His intention can hardly have been more clearly manifested than by the totality of the acts to which I have referred in (2).

One further comment remains to be made. No doubt in some cases where the accused's intention is not expressly stated by him the enquiry to be made may be a much more difficult one. His intention may appear only as an inference to be drawn from the facts proved and it may then be difficult to determine whether certain actions of the accused justify an inference against him or whether those actions are innocent or perhaps directed to some other end.

Here it was not seriously contested that what the accused did he did as part of a course of conduct which was to culminate in penetration. The substance of the defence was that what he did did not satisfy the tests to which I have referred or perhaps to put it another way, that he was merely preparing to attempt and not attempting.

For the reasons I have given and following as I do Reg. v. Williams (4), and adopting the analysis of the relevant sections made in Regina v. Joseph-Kure (5) I reject the defence. Verdict on the first count, Guilty of attempted rape.

No verdict returned on second count.

Solicitor for the Crown : S.H. Johnson, Crown Solicitor
Solicitor for the Accused : W.A. Lalor, Public Solicitor