THE STATE

Versus

YEKELANI TSHUMA

HIGH COURT OF ZIMBABWE
MUTEVEDZI AND NDLOVU JJ
BULAWAYO, 6 JUNE 2025

Criminal review judgment

MUTEVEDZI J*:* These proceedings were placed before me on automatic review in terms of Section 57 of the Magistrates Court Act [Chapter 7:10] ("the MCA").

[1] The offender appeared before the court of a regional magistrate facing a count of attempted rape as defined in terms of section 189 as read with section 65 (1) (a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] ("the CODE") and another of aggravated indecent assault as defined in section 66 (1) (a) of the same CODE. He pleaded not guilty to both the charges but was convicted after a full trial. He was sentenced, on each count to 20 years imprisonment. The trial court ordered the two sentences to run consecutively which means he will serve an effective forty (40) years imprisonment.

[2] The facts and evidence before the trial court established that on the material date, the complainant, a female juvenile of eleven years, went to a nearby shopping centre. She was looking for her elder sisters. The offender then saw her, took advantage of her desperation and lied that he knew where the girl's sisters were. He led the complainant to the banks of a nearby river. There, he suddenly grabbed her, pulled up her skirts and removed her pants. He then inserted his finger into her vagina in the process of attempting to rape her. The complainant vigorously resisted the offender's efforts resulting in her foiling the mooted rape. It was from those facts that the two charges of aggravated indecent assault and attempted rape arose. The aggravated indecent assault charge was framed in the following terms: Aggravated indecent assault as defined in section 66 (1)(a)(i) as read with section 64(1) of The Criminal Law

Codification and Reform) Act Chapter 9:23. The attempted rape charge was correctly framed and there is no need to recite it.

[3] From the above, two issues are apparent namely: -

i. The propriety of citing or reading section 66 (1)(a)(i) of the CODE, which creates the offence of aggravated indecent assault, together with section 64

ii. The unnecessarily splitting of the two charges.

The law on citing offence creating provisions

[4] Section 64 of the CODE provides that:

> **64 Competent charges in cases of unlawful sexual conduct involving young or mentally incompetent persons**
> (1) A person accused of engaging in sexual intercourse, anal sexual intercourse or other sexual conduct with a young person of or under the age of twelve years shall be charged with rape, aggravated indecent assault or indecent assault, as the case may be, and not with sexual intercourse or performing an indecent act with a young person, or sodomy.
> (2) A person accused of engaging in sexual intercourse, anal sexual intercourse or other sexual conduct with a young person above the age of twelve years but of or below the age of fourteen years shall be charged with rape, aggravated indecent assault or indecent assault, as the case may be, and not with sexual intercourse or performing an indecent act with a young person or sodomy, unless there is evidence that the young person—
> (a) was capable of giving consent to the sexual intercourse, anal sexual intercourse or other sexual conduct; and
> (b) gave his or her consent thereto.
> (3) A person who engages in sexual intercourse, anal sexual intercourse or other sexual conduct with a mentally incompetent adult person shall be charged with rape, aggravated indecent assault or indecent assault, as the case may be, unless there is evidence that the mentally incompetent person—
> (a) was capable of giving consent to the sexual intercourse, anal sexual intercourse or other sexual conduct, and
> (b) gave his or her consent thereto.
> (4) If, in the case of a male person who engages in anal sexual intercourse or other sexual conduct with a young male person of or below the age of fourteen years, or with a mentally incompetent adult male person, there is evidence that the young or mentally incompetent person—
> (a) was capable of giving consent to the anal sexual intercourse or other sexual conduct, and
> (b) gave his consent thereto;
> the first-mentioned male person alone shall be charged with sodomy.

[5] My reading of the provision is that it does not create any offence. It merely serves to provide guidelines on what charges are competent in cases of unlawful sexual conduct involving young persons of the stated ages or mentally incompetent persons. The consent of such persons to sexual acts is not recognized. As such the provision spells out the most appropriate charges as being rape, aggravated indecent assault or indecent assault depending on the facts of the matter.

There is therefore no feasible reason for citing section 64 in a charge of rape, aggravated indecent assault or indecent assault resulting from any of the circumstances mentioned in section 64. Doing so, is not very dissimilar to what happens with the crime of assault which is charged under section 89 of the CODE. Yet what an assault is, is defined under section 88 of the CODE. Despite that, prosecutors never frame the charge of assault as contravening section 89 as read with section 88 of the CODE. They do not do so because it is of no consequence because section 88 is just a definition section and only serves to guide the court on what constitutes an assault.

[6] As such, it is equally unnecessary in a charge to specify that section 66 is read with section 64 where the allegations arise from circumstances mentioned in section 64. An accused who commits the transgressions stated in section 64 ought to be simply charged with contravening any of sections 65, 66 or 67 whichever is appropriate. Admittedly however, in this instance, that superfluous addition of section 64 to the charge of aggravated indecent assault did not detract from what it was. It also could not have caused any prejudice to the accused person. As such, I will not interfere with the charge and the conviction on that basis alone.

The unnecessary splitting of charges

[7] As already stated, in attempting to rape the complainant, the offender inserted his finger into the complainant's vagina. The dominant intent was to insert his penis into the girl's vagina. In the case of *R v Peterson and Ors* 1970 (1) RLR 49 the court explained the rationale against splitting of charges as being " to protect the accused person from the unnecessary duplication of convictions in a trial where the whole criminal conduct imputed on the accused constitutes in substance only one offence which could have been properly embodied in one all embracing charge where such duplication results in prejudice to the accused." Simply put, the law recognizes that in committing one offence, an accused may in that process commit several other crimes which viewed with a strict legal lens would constitute stand-alone criminal acts. Needless to state, such may easily be prejudicial to the accused person if he ends up being sentenced in the manner that befell the offender in this case. To avoid duplication of charges the courts developed two tests whose application would indicate whether or not there is an

unnecessary spitting of charges. The tests have come to be known as the single intent test and the similar evidence test.

The single intent test

[8] In the case of *The State vs Amos Zhakata* HH-153-22, this court in dealing with a mater involving splitting of charges stated the following reading the single intent test:

> "Put simply the single intent test entails that where the accused commits several criminal acts each of which standing alone constitutes a crime in instances where the acts are inevitably and intrinsically linked with a single intention, it is unacceptable to charge him with each of those criminal acts. As said earlier the rationale is to restrict prejudice to the accused where a duplication of convictions would ensue. This means that where the double or multiple convictions pose no detriment to the convicted individual, the multiplicity of convictions becomes inconsequential."

[9] As such where an accused is shown to have one dominant intention, it is that crime which must be preferred ahead of the others that may result from his conduct. In this case, the offender could have been charged with assault, with indecent assault and with attempted rape. But what is clear is that in attempting to have sexual intercourse with the complainant, the offender touched the complainant's privates. He may have even touched her breasts and assaulted her when he tripped her, but it does not take away the fact that he had the single intention to rape her. As such on that test alone, it is apparent that prosecution unnecessarily split the charges. It ended up prejudicing the offender as he was sentenced twice on the same transaction.

The similar evidence test

[10] Like the name suggests, the test is applicable where in multiple charges, the evidence needed to prove one charge is the same evidence needed to prove the other(s). In such a case, it is desirable to charge the accused with the severest of the charges emanating from the same transaction. It is impermissible under this test, to use the same evidence necessary for one offence to secure conviction of the same accused on another charge.

Application of the law to the facts

[11] As highlighted the offender was convicted of aggravated indecent assault and attempted rape. He was sentenced to 20 years imprisonment on each of the count with the sentences ordered to run consecutively. Applying the single intent test, the intention of the offender was to rape the victim. To achieve that he had to force her to lie down on her stomach and then

inserted his finger into vagina possibly in a bid to make it easier for him to penetrate her. In as much as the insertion of the finger was criminal conduct it was done with the intention to rape the complainant. The actions were antecedent to the main intent of raping the victim. The evidence which was relied upon to secure a conviction on the charge of attempted rape is the same that was used on the charge of aggravated indecent assault. As such the application of both tests to the facts of this matter results in the inevitable conclusion that the charges were unnecessarily split.

[12] I have already said the rule against splitting of charges is not to say the accused did not commit the crimes in question. He certainly would have. Rather, its objective is to prevent prejudice of double or multiple punishments on an accused for essentially the same transaction. In casu, the offender was sentenced to a total of 40 years imprisonment on both counts. The prejudice is apparent. Had the trial court ordered the sentences to run concurrently, it could have mitigated that prejudice. The sentences of 20 years imprisonment are irreproachable given that the offence was committed in aggravating circumstances.

[13] The most appropriate way in the circumstances would have been to charge the offender with attempted rape. That he inserted a finger into the complainant's vagina is something that ought to have simply aggravated the crime for purposes of sentencing.

[14] All said and done, I have no apprehension that both the crimes of aggravated indecent assault and attempted rape were committed. I can, therefore, do very little if anything about those convictions. What must be done is to mitigate the prejudice suffered by the offender by the imposition of a double punishment.

[15] Where a magistrate has proceeded to convict an accused on two offences seemingly borne out of the same transaction, there are various ways in which the prejudice regarding punishment may be attenuated. A sentencing court may choose to treat both or all of the crimes as one for sentence particularly in instances where the crimes are kindred such as in this case. Alternatively, the court may sentence the offender on each of the crimes but then order that the shorter sentences run concurrently with the longest. The same would happen where the sentences are of equal length.

[16] In this case, I have no doubt that the cumulative sentence of 40 years imprisonment is severe and is on the outer limits of the those imposed for similar transgressions resulting from

a single transaction. To mitigate that severity, I have no choice but to slightly interfere with the trial magistrate's sentence.

[17] In the end, the convictions of the offender on charges of aggravated indecent assault and attempted rape are, apart from the issues discussed above, in accordance with real and substantial justice. I confirm them. The sentences imposed are equally in accordance with real and substantial justice and I also confirm them. What is not is the order that the sentences must run consecutively. I therefore order as follows:

a. The trial magistrate's order that the sentences in the two counts shall run consecutively be and is hereby set aside. It is substituted with the following:

> **"That the sentence in count one shall run concurrently with the sentence in count two. The offender shall serve an effective twenty (20) years imprisonment."**

b. The trial magistrate or in her absence another magistrate of equal jurisdiction shall recall the offender and inform him of the new way in which he shall serve his sentences.

MUTEVEDZI J……

NDLOVU J ……agrees