The End of the Beginning and the Beginning of the End of Attempted Sexual Penetration: Revisiting *Silo v S* 2016 (2) SACR 259 (WCC)

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Abstract

The fine line marking the transition from the end of the beginning and the beginning of the end of a crime, or defining in precise terms what is meant by consummation, has been, and still is, a problem in criminal law. In precise terms, the determination of the specific moment that the consummation can be said to have commenced is fraught with controversy. The textbook illustration is where the wrongdoer has not commenced all that he or she set out to do, either because he or she was deterred from doing so or refrained from doing so. In such a case, the dilemma is how to draw a line between conduct constituting mere acts of preparation and conduct amounting to an actual attempt. In Silo v S *2016 (2) SACR 259 (WCC), the High Court clarified the principles and the law relating to the attempt to commit an act of sexual penetration without the consent of the complainant in violation of section 3 of the Sexual Offences and Related Matters Amendment Act 32 of 2007. This case note critically examines the decision in Silo and its broader implications in the context of severe gender-based violence and a sexual violence pandemic that continues to plague society.*

Keywords

attempted rape; commencement of consummation; common assault; gender-based violence; mere acts of preparation; minimum sentence; sexual penetration

1. Introduction

The fine line marking the transition from the end of the beginning and the beginning of the end of a crime, or defining in precise terms what is meant by consummation, has been, and still is, a problem in criminal law. More succinctly stated, the determination of the specific moment when the consummation can be said to have commenced is riddled with controversy.[1] The familiar problematic situation encountered is where the wrongdoer

1 See eg *R v Schoombie* 1945 AD 541 (*Schoombie*); *R v B* 1958 (1) SA 199 (A) (*R v B*); *S v Laurence* 1975 (4) SA 825 (A) (*Laurence*); *S v W* 1976 (1) SA 1 (A) (*S v W*); *S v Du Plessis* 1981 (3) SA 382 (A) (*Du Plessis*); *S v Agliotti* 2011 (2) SACR 437 (GSJ) (*Agliotti*). See also Arenson, K 'The Pitfalls in the Law of Attempt: A New Perspective' (2005) *Journal of Criminal Law* 146; Leader-Elliot, I 'Framing Preparatory Inchoate Offences in the Criminal Code: The Identity Crime Debacle' (2011) 35 *Criminal Law Journal* 80; Clarkson, C 'Attempt: The Conduct Requirement' (2009) 29 *Oxford Journal of Legal Studies* 25.

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has not commenced all that he or she set out to do, either because he or she was deterred from doing so or because he or she refrained from doing so. In such a case, the dilemma is how to draw a line between conduct constituting mere acts of preparation and conduct amounting to an actual attempt. *Silo v S*[2] provided an opportunity for the High Court to clarify the principles and the law relating to the attempt to commit an act of sexual penetration without the consent of the complainant in contravention of section 3 of the Sexual Offences and Related Matters Amendment Act.[3] This case note critically examines the decision in *Silo* and its broader implications in the context of the disheartening gender-based violence jurisprudence that has received notable attention in public and academic spheres in recent years.[4]

2. The factual background

In an environment of pervasive sexual and gender-based violence, the events leading to the appellant's arrest, conviction and subsequent sentence of six years imprisonment in the Regional Court on charges of contravening section 55 of SORMA and theft were not unusual.[5] Silo had attempted to sexually penetrate the complainant by pushing her into a room, pulling on her gown and panties, and telling her that he wanted to have sexual intercourse with her. He also told her that if she refused, he would fetch a knife and kill her. When he went to the kitchen to fetch a knife, the complainant escaped by jumping out of her bedroom window and onto the ground outside. The appellant was later apprehended in the flat in possession of a watch belonging to the complainant. Dissatisfied with both his conviction and sentence for attempted rape, the appellant's next port of call was the High Court. It should be noted that the appellant did not appeal the conviction for theft

3. The legal issues

Before the discussion turns to a consideration of the questions before the High Court, a clearer portrait of the pivotal provisions of the SORMA is appropriate. The provisions of section 55 of SORMA read as follows:

> Any person who–
>
> *(a)* attempts;
>
> *(b)* conspires with any other person; or

2 2016 (2) SACR 259 (WCC) (*Silo*).

3 32 of 2007 ('SORMA').

4 The latest shocking incident of gender-based violence is the femicide of Noosicelo Mtebeni on 17 August 2021. See also Stevens, P 'Recent Developments in Sexual Offences against Children – A Constitutional Perspective' (2016) 19 *Potchefstroom Electronic Law Journal* 1; Goldblatt, B 'Violence against Women in South Africa – Constitutional Responses and Opportunities' in Dixon, R and Roux, T (eds) *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Influence* (CUP, 2017).

5 See *Commission Report: Toward a Safer Khayelitsha*; *Gender-Based Violence (GBV) in South Africa: A Brief Review* April (2016). See generally Koraan, R and Geduld, A 'Corrective Rape of Lesbians in the Era of Transformative Constitutionalism in South Africa' (2015) 18 *Potchefstroom Electronic Law Journal* 70; Kitharidis, S 'Rape as a Weapon of War: Combating Sexual Violence and Impunity in the Democratic Republic of the Congo, and the Way Forward' (2015) 15 *African Human Rights Law Journal* 449.

> *(c)* aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person,
>
> to commit a sexual offence in terms of this Act, is guilty of an offence and may be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

Two questions were before the High Court: firstly, whether the Regional Magistrate was correct in convicting the appellant of contravening section 55*(a)* of the Act; and secondly, whether the custodial sentence of six years was disproportionate. The appellant did not really dispute whether the court below was correct in accepting the complainant's evidence that he assaulted her. Rather, the nub of the appellant's challenge to his conviction was that in the light of material facts, the evidence tendered did not indicate that he had breached section 55. Differently put, the evidence was not sufficient to warrant a conviction of attempted sexual penetration in terms of the applicable provisions of the statute. This was because the complainant did not testify that he forced himself on her, or that he took off his clothes, or that he opened her legs in an attempt to rape her. The appellant further pointed out the lack of DNA evidence matching his and the lack of bruising on the thighs of the complainant, indicating attempted rape.[6] In essence, the appellant contended that his acts could be interpreted as 'mere acts of preparation', and the court *a quo* erred in not convicting the appellant of common assault.

4. The decision

The determination of the first ground of appeal relied upon whether the conduct of the appellant, coupled with the requisite intention, constituted an attempt to commit an offence as contemplated in section 3 of SORMA. In disposing of the first ground of appeal, the High Court agreed with the Regional Magistrate's premise that the actions of the appellant, together with his requisite intention, constituted an interrupted or incomplete attempt. The court restated the law relating to an attempt to commit an offence, enunciated in *Schoombie* and endorsed in subsequent cases,[7] ie that the conduct should not be mere acts of preparation to commit the offence, but should at least have reached the commencement stage of the execution of the intended crime, also described as the 'the commencement of consummation'.[8] A pragmatic and common-sense approach is called for in determining the crucial issue as to when the precise moment of consummation can be said to have commenced. In *Schoombie,* Watermeyer CJ illuminatingly said:

> Consequently, if a wrongdoer has finally made up his mind to commit a crime and has taken steps to carry out his resolution the exact moment he is interrupted and prevented from fulfilling his intention should not be the sole determining factor in deciding whether or not his morally wrongful act should be regarded as crime. Provided always that his acts have reached a stage that it

6 *Silo* para 21.
7 *R v B* (n 1); *Laurence* (n 1); *S v W* (n 1); *Du Plessis* (n 1); *Agliotti* (n 1).
8 *Silo* para 16. See also *Agliotti* para 16.

> can properly be inferred that his mind was finally made up to carry through his evil purpose he deserves to be punished because, from a moral point of view, the evil character of his acts and from a social point view the potentiality of harm in them are the same, whether such interruption takes place soon thereafter or later.[9]

The following question arises: Were the features of the stage of commencement of execution, also called the stage of consummation, present in *Silo*? According to the High Court, the answer was in the affirmative. Distinctive acts pointing to commencement of execution of the intended crime were: (a) he entered the flat of the complainant without her consent and knowledge; (b) thereafter, as she was about to leave, he pushed her back into the flat and closed the door behind him; (c) he then pushed her onto the bed in her bedroom, despite her trying to stand up; (d) he assaulted her, by smacking her in the face; (e) when she asked him what he wanted, he made his intentions clear, by saying that he wanted to have sexual intercourse with her; (f) he ordered her to take off her gown and panties, which she did, but while doing this the complainant screamed, and he continued to assault her to overcome her resistance; when she saw that he was serious, she further resisted by kicking him; (g) he continued with his assault by throttling her, and when he had difficulty in restraining and overpowering the complainant, he went to the kitchen to get a knife.[10] In view of the facts, there could be no conclusion other than that the rationale behind the appellant's conduct was the attempted commission of an offence envisaged in section 3 of SORMA, in that he unlawfully and intentionally attempted to commit an act of sexual penetration without the consent of the complainant.

What about the appellant's objection that the evidence of the complainant that she was pushed into the flat, smacked and throttled was not enough to sustain a conviction of attempted sexual penetration? At the core of the appellant's argument was that his conduct was tantamount to mere acts of preparation. It will be recalled that the following salient features were brought to the fore: the complainant never testified that the appellant forced himself on her, or that he took off his clothes, or that he opened her legs in an attempt to rape her. Also, there was no DNA evidence matching his, nor were the thighs of the complainant bruised, indicating attempted rape. One might ask if there was scope for characterising the appellant's conduct as constituting mere acts of preparation. Henney J gave short shrift to the appellant's submission, stating that

> it is not necessary for the State to prove that a perpetrator must have forced himself on a rape victim by lying on top of her; that he had to take off his clothes, opened her legs, that there had to be evidence of DNA which matches that of the appellant; and that there were bruises visible on the upper legs of the complainant to indicate that there was an attempted rape.[11]

9 *Schoombie* 547.

10 *Silo* para 20.

11 *Silo* para 22. See also Rumney, P 'False Allegations of Rape' (2006) 65 *Cambridge Law Journal* 125-158 and 'When Rape Isn't Rape: Court of Appeal Sentencing Practice in Cases of Marital and Relationship Rape' (1999) 19 *Oxford Journal of Legal Studies* 243.

Furthermore, the proposition that the assault of the complainant constitutes attempted rape, especially where the perpetrator was determined to have intercourse with the victim, is supported by an eminent authority. In *R v B* Schreiner JA held that 'if it were established that, when a man threw a woman to the ground in order to have intercourse with her against her will, he had not yet developed an erection, but only expected to do so at a later stage, this would not prevent his assault from constituting an attempt to rape'.[12] Relying on *R v B*, the court in *S v W* concluded that where an assault takes place with the sole purpose of raping a victim, such an assault would constitute an attempted rape.[13] There can be no quarrel with the court's stance that there were undoubtedly clear acts in the commencement of the crime of rape:

An assault, therefore, on a victim before a rape takes place is considered an act of consummation and would constitute attempted rape, if it is clear that the perpetrator inflicted such assault with the intention to rape in order to restrain or overcome the resistance of a victim. Much more than happened in this case. The pushing of the complainant onto the bed, the assault by slapping the complainant in the face, the instruction to her to take off her gown and panties, as well as the attempts to fetch a knife to further threaten and restrain her …[14]

An alternative contention made by the appellant attempted to frame his conduct as either common assault or sexual assault, as envisaged by section 5(2) of SORMA, in order to attract a less severe punishment. That subsection states: 'A person ("A") who unlawfully and intentionally inspires the belief in a complainant ("B") that B will be sexually violated, is guilty of the offence of sexual assault.' Insofar as the scope of the relevant provision is concerned, the court aligned itself with the views of Snyman.[15] Snyman[16] describes such a 'legislative provision as equivalent to the common law assault, when it is committed with the intent to sexually violate or assault a victim'.[17] In addressing the appellant's submission that the evidence or facts warranted a conviction on a lesser offence, the court held that there were no grounds to alter the conviction either to common assault or sexual assault within the ambit of section 5 of SORMA. The crux of the court's reasoning was as follows:

> Even though the essential elements of the crime as contemplated in section 5(2) of SORMA are included in the crime of attempted rape, and may be present in this case, this is clearly a lesser offence which may be a competent verdict in terms of section 161(3) of the Criminal Procedure Act 51 of 1977 ('CPA') on a charge of rape in terms of section 3 or 4 and attempted rape in terms of section 55 of SORMA.[18]

In short, the findings of the court below were confirmed.

12 *R v B* 205A.
13 *S v W* 3F-G.
14 *Silo* para 25.
15 Snyman, CR *Criminal Law* 6th ed (LexisNexis, 2014) 279.
16 Snyman, CR *Criminal Law* 6th ed (LexisNexis, 2014) 367.
17 *Silo* para 26.
18 Ibid.

The second ground of appeal was directed at the sentence imposed. Here, the appellant contended that 'on a plain reading and interpretation of Part I-Part IV of Schedule 2 of the Criminal Law (Sentencing) Amendment Act,[19] no provision is made for the imposition of a prescribed sentence in contravention of section 55 of SORMA'.[20] This raises the following question: did the Regional Magistrate misdirect herself in applying and considering the provisions of the Minimum Sentencing Act? In answering this question, the court emphasised that an appreciation of the provisions of section 55 relating to the sentence is imperative. The point is that section 55 'seeks to give power to a court to impose the same punishment on a person convicted of attempting to commit any of the offences as mentioned in SORMA as would be imposed on a person convicted of actually committing that offence'.[21] What is relevant is that the punishment imposed upon the appellant is similar to the one that a perpetrator would be liable to undergo in terms of either the court's sentencing power or section 276 of the CPA.[22] It follows that the Regional Magistrate was correct in applying the Minimum Sentencing Act.

It has been said that 'the prosecution revealed in the charge sheet that it would be relying on the provisions of the Minimum Sentencing Act, and in particular the provisions of Part II of Schedule 2, which prescribes a sentence of 10 years' imprisonment unless of course the court finds that there are substantial and compelling circumstances to deviate from such a prescribed sentence'.[23] This invites a consideration of the question whether the sentence of six years' imprisonment in respect of both charges, after they had been taken together for the purpose of sentence, was disturbingly inappropriate. The appellant was a 27-year-old university dropout without a criminal record. He had worked at a call centre at some stage and planned to resume his studies. In imposing a sentence of six years' imprisonment, the court below considered all the aforementioned factors, including the triad and the aims of punishment.[24] Indeed, the Regional Magistrate had to give due regard to the enormity of the crime committed by the appellant. The remarks of the Supreme Court Appeal in *S v Chapman*[25] struck a chord:

> Rape is a very serious offence constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim.
>
> The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation.
>
> Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to

19 105 of 1997 ('Minimum Sentencing Act').
20 *Silo* para 27.
21 *Silo* para 28.
22 Section 276(1) provides that '[s]ubject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence …'. See also *DPP, WC v Prins* 2012 (2) SACR 183 (SCA).
23 *Silo* para 30.
24 *S v Malgas* [2001] 3 All SA 220 (A) para 25.
25 *S v Chapman* 1997 (3) SA 341 (SCA) (*Chapman*).

> enjoy their shopping and their entertainment, to go and come from work and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.[26]

Therefore, the court below could not be faulted in imposing a term of imprisonment of six years. The stark facts revealed that the appellant 'attacked a defenceless woman in the sanctity of her house and wanted to rape her. As a result of his attempt to rape her, she jumped out of a window from the first floor of her flat and sustained severe injuries'.[27] The crime was premeditated, the complainant was attacked, and the appellant showed no remorse. Given the severity of the crime, the sentence handed down by the lower court was an appropriate one.[28]

5. Commentary

The judgment of Henney J is a good example of the application of the principles and the law relating to attempt, resulting in a decision that shows that SORMA is yielding results. That the law of attempt has always engendered uncertainty and controversy is beyond doubt.[29] The question is still how one determines the clear-cut moment at which the consummation can be said to have commenced. A further problem that arises is that there is no clear line between the 'end of the beginning and the beginning of the crime or of outlining in precise terms what constitutes its consummation'. Reading *Silo* and its venerable antecedents suggests that the vexed issue surrounding the law of attempt to commit an act of sexual penetration without the consent of the complainant has been judicially resolved.

The ease with the law of attempt, as stated in *Silo* belies the complexities that exist in its practical application. In particular, the complexity centres on exactly what is meant by the commencement of execution. As already stated, the commencement of execution is established where the perpetrator has engaged in conduct that is not merely preparatory.

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26 *Chapman* 344J-345B. Pillay JA described the consequences of rape on the victim in *S v Nkunkuma* 2014 (2) SACR 168 (SCA) para 17 as follows:

'Rape must rank as the worst invasive and dehumanising violation of human rights. It is an intrusion of the most private rights of a human being, in particular a woman, and any such breach is a violation of a person's dignity which is one of the pillars of our Constitution. There does not seem to be any significant decline in the incidence of rape since the publication of the statistics referred to above. The same can be said of robbery. No matter how they are viewed, society has called, on more than one occasion, for the courts to deal with offenders of such crimes sternly and decisively.'

See also *Levenstein v Estate of the Late Sydney Frankel* 2018 (2) SACR 283 (CC).

27 *Silo* para 35.

28 Spies, A 'Substantive Equality, Restorative Justice and the Sentencing of Rape Offenders' (2016) 29 *South African Journal of Criminal Justice* 271.

29 Stark, F and Bock, S *Preparatory Offences* (1 October 2018) *University of Cambridge Faculty of Law Research Paper No. 64/2018* <https://ssrn.com/abstract=3276568> accessed 19 June 2020; Duff, A 'The Circumstances of an Attempt' (1997) 50 *Cambridge Law Journal* 100; Child, J 'Exploring the *Mens Rea* Requirement of the Serious Crime Act 2007: Assisting and Encouraging Offences' (2012) 76 *Journal of Criminal Law* 220-231; Pelser, C 'Preparations to Commit a Crime: The Dutch Approach to Inchoate Offences' (2008) 4 *Utrecht Law Review* 57; Dawkins, K and Briggs, M 'The Mental Element in Attempt' [2007] 1 *New Zealand Law Review* 161.

In other words, he or she has done everything which he or she intended to do, but his intention has been thwarted through lack of skill or has been made impossible by some unexpected impediment. Where the perpetrator voluntarily desists from committing an offence, attempt will suffice if his or her conduct has reached a stage of commencement of execution. Once this stage is reached, the conduct constitutes an interrupted or incomplete attempt at a crime. *Silo* is a good illustration that the wrongdoer has crossed the proverbial Rubicon through his or her actions. The assault on the complainant in order to overcome resistance was more than adequate to sustain a conviction of attempted sexual penetration.

Of greater significance from a jurisprudential point of view is that the judgment of Henney J promotes the spirit and purport of the Constitution in no small way. The point must be made that gender-based violence remains unacceptably pervasive. The *Silo* judgment affirmed the fundamental rights of women to be free from continuing and systematic violation.[30] In interpreting the pertinent provisions of SORMA, the approach of the court is in consonance with seminal Constitutional Court precedents.[31]

6. Conclusion

The judgment of Henney J constitutes a good example of the application of the law relating to attempt, resulting in an outcome that shows that SORMA is yielding results. Suppose the prosecution can prove the crime of attempted sexual penetration under section 55. In that case, there is no scope for altering the conviction to either common assault or sexual assault in terms of section 5 of the Act. In short, the High Court cannot be faulted for confirming the conviction and sentence imposed by the Regional Magistrate.

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30 Di Silvio, L 'Correcting Corrective Rape: *Carmichele* and Developing South Africa's Affirmative Obligations to Prevent Violence Against Women' (2011) 99 *Georgetown Law Journal* 1469.

31 See *Carmichele v Minister of Safety & Security* 2001 (4) SA 938 (CC); *K v Minister of Safety & Security* 2005 (6) SA 419 (CC).