In the Court of Appeal Swaziland

Crim. Appeal No.1/91

In the matter between:

Thornton Henwood

Vs

The King

CORAM : Kotze, J.P.

Browde, J.A.

Hull, CJ.

Judgment (Hull, C.J., dissenting) (8/4/94)

The appellant was convicted in the High Court on two counts of attempted murder. On each count, he was sentenced to two years imprisonment, the terms being ordered to run concurrently.

The charges related to an incident in which he confronted and shot two young men, in each case in the abdomen, with a revolver. The learned trial judge found that he did not intend to kill either of them. However, he also found that the appellant fired recklessly, appreciating that there was in each case a real possibility that he might cause death, but not caring whether or not he did so.

The judge found further that in shooting the men, he was acting unlawfully. As far as those conclusions are concerned, they are clearly justified on the evidence, but there is in my opinion a question for consideration as to what offences the appellant thereby committed.

Under the law as it applies in South Africa, there is no doubt that, on the facts, the judge convicted correctly him of attempted murder. There, a person is guilty of attempted

murder either if he actually intends to kill, or if it is proved that he has the necessary legal intention for the offence of murder: see R. v. Huebsch 1953 2 SA 561.

At common law in. England, it is otherwise. To sustain a charge of attempted murder, it is necessary for the prosecution to show that the accused person had a specific intention to kill : see R. v. Whybrow (1951) 35 Cr. Appeal R. 141.

Decisions of the Appellate Division of the Supreme Court of South Africa are of course of very high persuasive authority in Swaziland. But they are not binding in this country and, with great respect, I am of the view that Huebsch should not be followed here. I have difficulty in reconciling the meaning of the concept of an attempt to do something with that of constructive intention. Where a person intentionally injures another in circumstances in which, although he does not mean to kill him, he knows that there is a real risk that he will do so, and nevertheless proceeds recklessly to inflict the injury, I do not think that it is apposite or necessary that the assailant should be guilty of the crime of attempted murder.

In ordinary language, to "attempt" to do a thing means to try, intentionally, to cause it to happen. In the present case, what is it that the accused "attempted" to do? The trial judge

found as a fact that he did not intend to kill; i.e. that he was not attempting specifically to kill either of the men. Mr. Kilukumi submitted that he was attempting to incapacitate them but, with respect, I do not consider that that really answers the question. On the facts, he did incapacitate them. He did not "try" to do so. He succeeded. (Alternatively, if on a strict view of the judge's decision it cannot properly be said that he held that the appellant incapacitated them, then there was never any basis for a verdict that this was what he was trying to do.

He did not "try", either, to act recklessly. He did act recklessly.

In South Africa and in England, the law recognises that for the crime of murder itself, a constructive intention to kill - as opposed to a specific intention to do so - will suffice. The definition of constructive intention differs in each place. In South Africa, as here in Swaziland, it is an intention to do an act that the offender himself knows will give rise to a real possibility that someone will be killed, that intention being acted upon recklessly by the offender, not caring whether or not death results.

The doctrine of constructive intention (in South Africa and in Swaziland, and also in England) was developed by the courts over the years for reasons of policy. It reflects the gravity of the act of unlawfully killing a human being.

In some circumstances, where recklessness as distinct from a specific intention is a sufficient ingredient in a criminal offence, a person who acts recklessly may be liable for attempting to commit the offence. Thus, in England at common law, a person who attempted to have sexual intercourse with a woman, not caring whether or not she consented, was guilty of attempted rape : see R.v. Pigg (1982) 2 All E.R. 591. But in such a situation it can be said that the offender is trying intentionally to do something which is an ingredient of the offence, namely to have sexual intercourse, and, as well, it can also be said that he has the necessary degree of mens rea, namely recklessness. Thus it is possible to say, meaningfully in such a case, that although he did not commit the completed offence, he nevertheless tried - attempted - to do so.

The present case, involving as it does allegations of attempted murder based on a constructive legal intention instead of a specific intention to kill, is in my opinion

clearly distinguishable. It cannot be said, in ordinary-language, that the appellant attempted in other words tried but failed - to do anything that was an ingredient of the complete offence. He did succeed in causing injury. He did act recklessly. It cannot be said, properly, that he tried - but failed - to do any act that he knew gave rise to a real risk of death. I do not believe that it is necessary, even if it may be permissible, to apply a process of reasoning whereby, on grounds of judicial policy, the fact that he actually did certain things should be treated as including a fortiori an attempt to do them.

Although at first sight, it may seem to be consistent and perhaps desirable that, for every completed criminal offence, there should also be a complementary offence of attempting to do the prohibited act, I do not think that that is necessarily a logical conclusion in every case. Where, as in the present instance, a conviction for the completed offence would depend on proof of a constructive intention, I do not think that it does follow logically that there has to be a corresponding offence of attempting to commit that offence, based on the imputing of such an intention to the person accused. On the contrary, I think that there is a very real logical difficulty in reconciling the notion of an attempt with the act on which each charge is based.

It has been said that that the law is, eventually, based on experience rather than logic, which no doubt means amongst other things that it rests ultimately on practical considerations rather than on any intellectual exercise. The definition of a criminal offence is nevertheless a matter

of importance.

As a general rule, I think that is desirable that the definition of an offence should describe, as far as possible and in plain language, the actual conduct that the law proscribes; and I also think that it is undesirable to rely unnecessarily on any concept of constructive intent.

In theory, there is. a difference between the case where a person, in trying to harm another, does foresee a real possibility that he may kill him and the one in which he does not foresee that.

It follows - in theory - that the offender commits a more serious act in the first case. Speaking for myself, however, I think that it is a refined distinction, rather than a practical one, where death does not ensue. I do not consider that it is a sufficient justification for altering the ordinary meaning of the expression "to attempt", artificially on grounds of judicial policy, to make a person who does not actually intend to kill someone else guilty of the crime of attempted murder. The law of assault is sufficient in its existing gradations, in my view, to deal with such situations.

In the present case, for these reasons, the appellant in my view should properly have been convicted on each count not of attempted murder but of the offence of assault with intent to cause grievous bodily harm. Although the appeal has not been pursued on that basis, I would for myself vary the judgment of the learned trial judge accordingly.

The sentences imposed by him for the offences committed by the appellant, clearly, were not excessive. I would concur in dismissing the appeal against sentence.

DAVID HULL

CHIEF JUSTICE