LI MENG HENG
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MAVANGIRA JJ
HARARE, 3 September 2013 & 20 August 2014

Criminal Appeal

P Takaendesa, for the appellant
R Chikosha, for the respondent

HUNGWE J: The appellant, a Chinese national, was convicted on one count of attempted murder as defined in s 189 as read with s 47 of the Criminal Law (Codification & Reform)Act, [*Cap 9:23*] ("Criminal Code"). She was also convicted of assault as defined in s 89 of the Criminal Code after a protracted trial. She was sentenced to four years imprisonment of which one year was suspended for five years on appropriate conditions. The trial court treated both counts as one for sentence. She appeals against the conviction for attempted murder as well as the sentence in that respect. Although the notice of appeal sets out four grounds of appeal, a reading of these grounds shows that in fact only one ground of appeal against conviction is raised. This ground is set out in the first paragraph. The subsequent paragraphs amount to an amplification of the same ground. The sole ground of appeal against conviction raised on behalf of the appellant is that the court a quo erred in finding that the evidence led at trial by the State supported a charge of attempted murder when it did not. As against sentence, the usual ground is raised; that the sentence imposed is so excessive as to induce a sense of shock.

The appellant was convicted for attempted murder on the following general facts which are not disputed. She was employed as a Human Resources Manager at the same place where the complainant was also employed. In August 2012 complainant submitted his papers from the Ministry of Labour. As a result of the contents of these papers, a misunderstanding arose between the two. The appellant poked the complainant. He felt under attack as the appellant picked up a stone and hurled it at him. He attempted to leave the premises but was prevented from doing so at the appellant's behest. She chased him around the premises. He

outpaced her and made good his escape. She decided to pursue him with a company motor vehicle. She took two other people and drove out in search of complainant. When complainant realised that appellant's anger had not subsided, he again took to his heels. A cat and mouse chase followed. It was witnessed by several people. Some of them gave evidence in court during trial.

The thrust of appellant's argument is that had she intended to kill the complainant, she had no less than three instances where she could have run him over but did not. She approached the complainant from behind on those three occasions and could therefore have run him down if she wished to. As such she had no intention to kill whether in the form of actual or legal intention. All she intended to do was to apprehend the complainant and bring him back into the company premises so that they iron out their differences. This version of events was rejected by the trial court. It reasoned as follows:

> "When I analyse carefully the above evidence, I have no doubt in my mind that the complainant's life was in real danger because of the manner in which the accused was driving. I say so because:
>
> 1. The accused was so upset and pursued him in that state of emotion. She explained that all she wanted was to get hold of the complainant but one then wonders how does a motor vehicle get hold of a moving human being. All we know is that a motor vehicle does not hold but runs over.
> 2. Mitchel said that he was so terrified and I am sure he was referring to the extreme danger complainant's life was exposed to. I cannot say he wanted to protect his job but all I can say is that he helped the court to understand that complainant's life was put in extreme danger because of the manner in which the accused was driving.
> 3. The manner she stopped she only stopped because the motor vehicle could not pursue the complainant on the pavement, it could not drive there. According to all the witnesses, the accused crossed the road to the right side in the middle of the road and cut right in front of the complainant. This is consistent with someone who was upset and angry.
> 4. An analysis of the reasons was accused was pursuing the complainant in the manner she was doing also helped us to conclude that the accused had an evil intent." (sic)

This is the reasoning through which the court *a quo* found that in fact the appellant had the necessary intention required for a conviction of an attempt. Attempt is a common law concept. As such both *mens rea* and *actus reus* are required before an accused can be found guilty of an attempt. That *mens rea* consists in intention to commit the crime which the accused is charged for attempting. In our law legal intention is sufficient to found guilt. In *R* v *Huebsch* 1953 SA 561 (AD) SCHREINER JA at p567 expressed the law as follows:

> "in order to support a conviction for attempted murder there need not be a purpose to kill proved as an actual fact…….It is sufficient to show an appreciation that there is some risk to life involved in the action contemplated, coupled with recklessness as to whether or not the risk is fulfilled in death."

The approach regarding the test to apply was discussed in the cases of *S* v *Bhaiwa* 1988 (1) ZLR 412 (SC) and *S* v *Dube* 1992 (2) ZLR 338 (SC). In *S* v *Dube (supra*) the following passage is quoted:

> "The common law concept of intent in English criminal law was overtaken by s8 of the Criminal Justice Act, 1967, which reads:
>
> 'A court or jury, in determining whether a person has committed an offence:-
>
> (a) Shall not be bound in law to infer that he intended or foresaw the results of his actions by reason only of this being a natural and probable consequence of those acts, but
> (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.'"

In Zimbabwe the Criminal Law (Codification and Reform) Act, [*Cap 9:23*] ("the Code") provides the various tests applicable to the mental element of a particular crime. The test for intention is subjective. Section 15 of the Code provides as follows:

> "15 *Realisation of real risk or possibility*
>
> (1) Where realisation of a real risk or possibility is an element of any crime, the test is subjective and consists of the following two components:
> (a) A component of awareness, that is whether or not the person whose conduct is in issue realised that there was a risk or possibility, other than a remote risk or possibility, that-
> (i) his or her conduct might give rise to the relevant consequence; or
> (ii) the relevant fact or circumstance existed when he or she engaged in the conduct; and
> (b) a component of recklessness, that is, whether, despite realising the risk or possibility referred to in paragraph (a), the person whose conduct is in issue continued to engage in that conduct.
> (2) ……
> (3) Where, in a prosecution of a crime of which the realisation of a real risk or possibility is an element, the component of awareness is proved, the component of recklessness shall be inferred from the fact that-
> (a) the relevant consequences actually ensued from the conduct of the accused; or

(b) the relevant fact or circumstance actually existed when the accused engaged in the conduct;

as the case may be.

(4) For the avoidance of doubt it is declared that the test for realisation of a real risk or possibility supersedes the common law test for constructive or legal intention and its components of foresight of a possibility and recklessness wherever that test was formerly applicable."

Section 189 of the Code proscribes actions taken in the commencement of execution of the intended crime. In the final result therefore the question is whether the appellant's conduct amounts to an attempt to commit the crime of murder. The evidence established that the appellant was annoyed by the complainant. She poked him and tried to assault him. Complainant took to his heels and outpaced the appellant. Incensed by this display of spitefulness on the complainant's part, appellant resorted to the use of a motor vehicle to vent her frustrations with the complainant. A cat and mouse chase thereafter followed. She pursued him from one street to the next and drove across traffic. On no less than three occasions, onlookers feared that complainant's life was in danger as appellant almost run him over. Those inside her motor vehicle expressed fear for their own safety. She must have been driving in a dangerous manner. The complainant felt that his life was in danger as he had to resort to several tactics to avoid appellant's motor vehicle hitting him.

It was argued on behalf of the appellant that notwithstanding complainant's fears, she did not intent to kill. She had pursued him with such care that he was not in any danger of being run over. This may well be so but the court *a quo* cannot be faulted in the manner in which it assessed the evidence. What was of critical importance was whether, viewed objectively, it could be said that from appellant's actions, it can be inferred that she realised that there was a real risk or possibility that her conduct was likely to cause the complainant death or grievous bodily harm but she persisted with her conduct. The learned trial magistrate answered this question in the affirmative and found that in fact the appellant was aware of the real risk or possibility that her conduct may cause death or serious injury on the complainant but that she had persisted in that conduct. By her own admission, she had directed a motor vehicle which was in motion towards the complainant and on three occasions avoided running him down. There is no doubt that had the motor vehicle, for any reason, suffered brake failure when she was so engaged, she would have run over the complainant with serious consequences for the complainant. In my respectful view, this approach to the

evidence cannot be faulted. The learned trial magistrate correctly rejected her plea that she lacked the intention to kill. In the result therefore, the appeal against conviction fails.

As for sentence, the appellant contends that her sentence ought to be reduced in recognition of her status as a female first offender. She also pointed to the fact that our courts are reluctant to send first offenders to prison unless there are compelling reasons for such a sentence. It is trite that before an appeal court can interfere with the sentencing discretion of the trial court, it ought to be demonstrated that the court *a quo* applied a wrong principle in assessing sentence, or that it failed to take into account factors which it was enjoined to take into account, or that the severity of the sentence is so gross as to induce a sense of shock. If this is not demonstrated, the appeal court may not interfere with sentence merely because it would have imposed a different sentence, or that it would have preferred a shorter term of imprisonment.

Dangers posed by road rage is widely reported in the media. The court takes judicial notice of these dangers and the frequency with which such reports appear in the media. This case does not however qualify, strictly speaking, to be categorised as falling in that category since the genesis of the rage was confined to industrial relations within private property. Complainant however escalated her dispute with complainant into the public and using a motor vehicle in public roads. The complainant's only crime, so it appears from the facts, was to assert his rights as a worker. Why an employer, or his agent, would react so viciously escapes logic. Having said that however, I find that the court *a quo* did not give sufficient weight to the fact that appellant was a female first offender and acted out of impulse. This was not a planned reaction to the labour matter between the parties. As such there was need to suspend a greater portion of an otherwise deserved sentence so that the sting in the sentence is not lost. In my view this could have been achieved by suspending 2 years instead of one year. To that extent the appeal against sentence succeeds. The sentence imposed in the court *a quo* is altered by suspending two years on the same conditions.

MAVANGIRA J agrees _____

Mtetwa & Nyambirai, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners