THE PEOPLE v ACKIM MANDA AND MALIE SIMBEYE (1992) S.J. (H.C.)

HIGH COURT KABAMBA,
C.B.N.
22ND MAY AND 10TH JULY 1992
HP/24/92

Flynote

Aggravated robbery - Attempted murder - Degree of proof for both offences - Mens rea and actus reus

Headnote

The accused were charged with aggravated robbery and attempted murder. The case for the prosecution was that the accused were in a car with its owner who was driving. At some point the two ordered the owner of the car to stop driving and one of the accused shot the owner of the car and the other accused drove away in the car. The injured man later identified the second accused to the police as the one who had shot him.

Held:
(i) It is unsafe to uphold a conviction on a charge of armed aggravated robbery where there is no direct evidence of the use of firearms
(ii) For the offence of attempted murder to be proved, it must be shown that the accused had positive intention to cause death

Cases referred to:

1. Nkambwa v The people (1983) Z.R.103 at p. 104
2. Banda (n) v The people (1978) Z.R.300
3. Mugala v The people (1975) Z.R. 282
4. R. v Lovesay (1969) 2 ALL E.R. 1077
5. Regina vnuh & Dade (1957) 2 W.A.L.R. 348 (C.A GHANA)
6. Yanyongo v The People (1974) Z.R. 149
7. R. v Whybrow (1951) 35 CR. App. R.14, Archbold 43rd Ed, para 20-45a)
8. Chilomba v The people (1974) Z.R. 151 at p. 152
9. Benwa and Another v The people (1975) Z.R.1
10. Rex v Obi Bekum W.L.R 47 (igoria 1941)

For the State: E. Sewanyama - State Advocate
For the Accused: Capt. F.B. Nanguagambo, Assistant Senior Legal Aid Counsel

Judgment

The accused persons pleaded not guilty to the charges of aggravated robbery contrary to section 294 (2) Cap. 146 as amended by Act No. 29 of 1974; and attempted murder contrary to section 215 of the Penal Code Cap. 146. The particulars of the two counts are as set out in the information. However, for the second count the information does not state the section under which he accused are charged. The indictment and certificate for summary trial give sections 390 and 200 of the Penal Code. Section 390 of the Penal Code deals with offences where there are no sections which deal with attempts. But where a section for attempt is specifically provided the charge becomes defective in content.

Nevertheless in terms of section 137 of the court has used its discretion and inserted in the correct section.

The onus rests throughout upon the state to prove upon the evidence and beyond all reasonable doubt all the essential elements of the offences charged.

The prosecution case was to the effect that Nyambe Likomena (PW1) 15th June, 1992 at about 1630 hours he was approached by Ackim Manda (A1) who was with two friends. He, inquired if A1 had bought spares he had sent him to buy from Lusaka. A1 explains that he missed the people he wanted to buy the spares from. After that they arranged to meet at Sables Club in the evening. The two men who were with A1 were the same people from whom A1 was supposed to buy spares from in Lusaka and when A1 missed them they came to complainant and borrowed K5,000. So when they came with A1, he demanded that their vehicle should be used as a pledge until those people should bring spare parts. So together with them they went to Mundia's farm to keep the motor vehicle there but Mr. Mundia refused them to have it parked there. From there they went to Sables Club and whilst there A1 and his two friends went to park that vehicle at the house of a certain friend and came back. After drinking he gave them a lift and he wanted them to leave him at his house and take the vehicle so that A1 could bring it to him next morning.

When he was turning into hospital road A1 stopped him and asked him where they were going. He stopped the vehicle, then Vernon who was at the back jumped out and while he was explaining to A1 he just heard a gunshot. He became confused. Then Vernon went to his side, opened the door and pulled him out and A1 came and ordered him to surrender the key to him and A1 drove away. Then PW2 and the man who shot him took him to Kasanda Police Compound where he regained his consciousness and told Mrs. Mubiana that the man who was behind him was the one who shot him. Then Vernon ran away.

He was then taken to Kasanda Police Station where he found A2 and identified him to the police as one of those who had stolen his vehicle. From there he was taken to the hospital where he was operated on and pellets of the cartridge were removed from his body. He was issued with medical report form which he took back to the police when he was discharged. The motor vehicle was recovered by police and eventually released to him. He was in the hospital for three months. In cross-examination he said that he gave A1 K8, 000 to buy spares and K2, 000 for transport. He later conceded that he withdraw K100, 000 from the bank instead of K80, 000. That was on 14th June, 1991. That the first gun shot hit the windscreen but the second shot hit him when he was lying down. He went further to say that when they went to the farm of Mr. Mundia he talked to Mr. Mwendapole and it was Mr. Mwendapole who refused to keep the vehicle as it was for a stranger.

Dominic Mazuba (PW2) testified that when he knocked off duty, he found some people at the junction of Lusaka and hospital roads. The time was about 2100 hours. He saw these people (who were in the vehicle) at the distance of about 70 meters. He heard some noise from them followed by gunshot. He heard the voice "Bring the key". Soon after he saw one man running from the said vehicle towards Kasanda Police. When he stopped that man (A2) and asked him what had happened A2 told him that some bandits had shot one of A2's friends Mr. Nyambe and he was going to police station so that the police could take the injured to the hospital. PW2 then went to the scene alone.

On arrival at the scene he found PW1 being assisted by one whom he later learnt to have shot PW1. From there the two men took PW1 to Kasanda police camp-to his sister. And when PW1 talked to his sister that man ran away. From there they took PW1 to the police station where they found A2 at the Inquiries office and PW1 told the police to apprehend A2

because he was the one who knew the person who had shot him. After that he went home. In cross-examination he told the court that when he asked the man he found lifting PW1, he told him that his friend had been shot by the bandits who run away with the complainant's vehicle and he appeared concerned when assisting PW1. And that this man had nothing in his hands. He went on to say that in the presence of the man whom he found assisting PW1, the latter told him that they had been attacked by thieves who had run away and he did not know where they had gone. And when he informed PW1 that someone had already gone to report to the police, PW1, replied "oh, that is the boy we were with."

Constable Kwibisa (PW3) told the court that around 20:40 hours whilst on duty in the inquiries office he was approached by A2 who reported to him that a certain man who gave him a light together with his friends from Sable Club, had been shot by three criminals at the junction of Kabwe General Hospital road and Lusaka Road where he was told to drop them (the criminals). Whilst A2 was reporting the complainant came and immediately identified A2 as one of those who robbed him his vehicle and A2 could assist to trace his friends. He immediately apprehended A2. The complainant who was bleeding from his right arm was rushed to the hospital. He later handed A2 over to the CID section Detective Sergeant Kashela (PW4) told the court that on 15th June, 1991 he received a report of attempted murder and aggravated robbery in which PW1 was the victim. On 16th June, 1991 he interviewed A2 who was by them a suspect. During the interview A2 denied participating in the crime. But said that the complainant was shot by Vernon Fumpa while A1 drove the vehicle away. Later the vehicle was found in the ditch along Lusaka road but within Kabwe town. He notices that the right side of the windscreen was broken. Battery and right head-lump were missing. At about 1600 hours he apprehended A1 in Lukanga town- ship. When interviewed A1 told him that he (A1) had driven the vehicle to where it was found but did not participate in the shooting. A1 also admitted to have removed certain parts from the vehicle and hid them in the bush but when they went to the place he alleged he hid them they did not find them.

On 21st June, 1991 he jointly arrested A1 and A2 plus a person unknown for attempted murder and aggravated robbery. He produced medical report as part of his evidence. In cross-examination he said that A1 told him that he drove the vehicle for safe custody.

The case for the defence was a follows, Ackim Manda (A1) testified that on 14th June, 1991, he was sent to Lusaka by the complainant to take money (K10,000) to Vernon Fumpa in Lusaka. He found Fumpa at coach station as arranged by PW1 and Fumpa; and gave him the money. Since it was late Fumpa gave him K400 to book a taxi to Matero where he spent a night at Fumpa's house. The next morning he came back here and arrived between 1330 and 1400 hours. He went home and found A2 and Fumpa and joined them drinking beer. Later PW1 came and told him that he had come to collect him and go together to Nyama Farm. PW1 gave some money to Vernon for fuel to put in the vehicle that Vernon had driven from Lusaka. After filling in petrol they left for the farm. He drove PW1's vehicle and PW1 drove Fumpa's. On arrival Pw1 talked to the men they found there in Lozi. Then PW1 told one of those men they found, in English" Get away you stupid." He turned to them and said "let's go." Pw1 then told him "These people are refusing me to leave this vehicle here. Now where shall I leave it?" But PW1 did not tell him why he wanted to park that vehicle at the farm.

The next morning, PW1 told him that they were going to another farm to remove the engine, gearbox and diff from the vehicle he had bought from Vernon Fumpa. But they instead went to drink and after drinking at various places, around 2000 hours after being at Sables Club they wanted to park the vehicle PW1 was driving but the same developed defective suspension and they pushed it to a Mr. Sichone's house in Chowa. PW1 told his friends that

he wanted to go home as he was drunk.PW1 wanted to be dropped at his house. They all sat in front of the vehicle. PW1 drove the vehicle.

On the way PW1 and Fumpa started a business discussion where PW1 agreed to give Fumpa K50, 000.00 when they reached home. The passenger's door was jammed so all were using driver's door.

When they reached the T-junction of Lusaka and kabwe General Hospital roads they turned into hospital road and moved a short distance when he heard a gunshot, which broke the window on the driver's side. The vehicle stopped. They heard" Everybody come out." They became confused because of gunshot plus beer they had drunk. After that order PW1 came out, followed by Fumpa, himself and then A2. The attackers ordered them to lie down on the tarmac. He saw two people who ordered them to lie down and one who had a gun stood at a distance. Then one of them jumped behind and the other jumped into the driver's seat and they drove away. Before they drove away they asked "who is the driver? Bring the key" After that PW1 called him and told him that he had been shot in the arm.
From there they sent A2 to go and report to the police. He went to hire a cab from town. He booked one but when he went back to the scene he did not find Fumpa and PW1. When tax driver refused to take him to hospital, he went home (at Highridge). At home he found that his friend had taken the complainant's honder, he was keeping, at Lukanga so he was unable to go to hospital to check on PW1's condition. The next day whilst at Lukanga looking for Charles, his elder brother, Brighton approached him and told him that Jeff had been detained and the police were looking for him. He rang the police that he was at Lukanga. After that he and his brother decided to go to the police station. Near Mahatma-Gandhi Clinic they met the police. The police took him to Kasanda Police Station where he was interviewed and detained. He categorically denied to have ordered PW1 to surrender the key, that two shots were fired, that Vernon dragged PW1 out of the vehicle and shot him again. He denied also taking the arresting officer to the place he allegedly hid motor vehicle accessories mentioned.

In cross-examination he agreed that PW1, had sent him to buy the windscreen at other time. He denied to have driven PW1's vehicle from the scene That this was not the first time PW1 lied against him.

After A1 had finished giving evidence, A2 changed his mind and elected to remain silent. I remind myself again that since he does not ear the burden to prove his innocence, he was perfectly entitled to do so despite the seriousness of the two offences.

David Manda (DW1) the elder brother of A1 told the court that in the first instance A1 and PW1 were very close friends. He then went on to say that on 15th June, 1991 at 2100 hours he found A1 at his house. A1 told him that he was with PW1 and that the bandits shot at PW1; then snatched PW1's vehicle. A1 appeared drunk. A1 went to Charles to get the Honda so that he could go to the hospital but did not find him so A1 went sleep at his home. He also said that during the same night he was carrying lifts. He took some customers to mine township. On his way he passed at Kasanda Police to see A2 to get more information as to what happened. But on arrival the police detained him in cells saying until A1 was found and bought to police station.

He was detained for two days and during that time he was beaten badly, the police forcing him to confess that he was also involved. During the time he was in cells with the two accused they did not take the police out in the bush. He was released after two days. He concluded that whilst in cells, on 16th June, 1991 at about 0830 hours a certain person went to report to the police that there was a vehicle along Lusaka road which was in the ditch.

The same vehicle was brought to the police station. In cross-examination he said that he was driving the vehicle of his brother-in-law. That A1 did not ask him to give him a lift to go to the hospital to see his friend. In re-examination he said that when Brighton went to see him in cells, he told him to bring A1.

To constitute the offence of aggravated robbery the accused must be (1) armed with any offensive weapon or being together with one or more persons (2) steals anything and (3) at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property (4) with intent to obtain or retain the thing stolen, or prevent or overcome resistance to its being stolen or retained.

In Act 29 of 1974 if the facts reveals that firearm was used then the charge should be under s.294 920 and this calls in capital punishment upon conviction. Therefore under s. 294 (2) the prosecution must prove that firearm (s) was used in the commission of the alleged offence. In Nkumbula -v- The people (1983) ZR. 103 at p. 104 (1) it was held among other things that it is unsafe to uphold a conviction on a charge of armed aggravated robbery where there is no direct evidence of the use of firearms." and the appellant's conviction was substituted with aggravated robbery under subsection (1) of section 294 of the penal code cap. 146. However, in the present case it is common factor that firearm was used as is supported by medical evidence, PW1, PW2 and A1 inclusive. The only issues here are: who shot the complainant? and was he shot in furtherance of stealing?

In Banda (N) v The people (1978) ZR.300 (2) it was held again inter alia, in relation to the use of firearms, that "In terms of s. 294 (2) of the Penal Code where an aggravated robbery is committed by a number of persons one of whom is proved to have carried a firearm that one must be sentenced to death, and the others must also be sentenced to death unless they can bring themselves within sub-para (i) or (ii) of para. (a)"

Para. (a) (i) (ii) of subsection (2) of s. 294 states,

(a) where the offensive weapon or instrument is a firearm, unless the court is satisfied by the evidence in the case that the accused person was not armed with a firearm and

(i) that he was not aware that any of the other accused persons involved in committing the offence was so armed: or

(ii) that he dissociated himself from the offence immediately on becoming so aware."

The two sub-paras place a burden on the accused, of course on a balance of probability, to satisfy the court that he was either not aware that the other accused was armed or on becoming aware he immediately dissociated himself from the offence. The court in the latter case having these provisions in mind went further to hold that "The onus is on the appellant to satisfy the court as to the matters set out in s. 294 (2)"

In the instant case I have to determine if either of the two accused was covered by either or both sub-paras if it is proved that there was common intention for the two accused and Fumpa to steal from complainant by using violence. Again as regards the use of violence it is necessary for the prosecution to show that the violence was actually used in order to obtain or retain the thing stolen as provided by s.294 (1) of the Penal Code (see Mugala v The people (1975) ZR. 285) (3). In other words, there must be proof that theft was committed to sustain the charge of aggravated robbery under both subsections (1) and (2) of s. 294 of the Penal Code.

I have already alluded to the issue of common intention or purpose under s.22 of the Penal code. The common intention may be formed at the outset of a criminal expedition or it may arise spontaneously on the spur of the moment. This depends on the facts of each case. COLLINGWOOD J.J.B. on criminal law of East and Central Africa, at pages 59 and 60 expounds ad gives examples as to what is involved in having common intention and what appears to be common intention which is not in fact.

In R v. Lovesey (1969) 2 ALL E.R. 1077 (4) the appellants were charged with aggravated robbery and murder arising out of an incident in which a jeweler was found handcuffed to a railing in the basement of his shop suffering from severe head injuries from which he died; the issue of common design was considered at length and at p. 1079 WIDGERY, L.J. concluded by saying:

"Having reached this point we are unable to substitute verdicts of manslaughter, since, if a common design to inflict grievous bodily harm is excluded the jury might well have concluded that the killing was the unauthorised act of one individual for which the co-adventurers were not responsible at all." This is the law in Zambia under s. 294 (2) of the Penal Code. But indeed under our law the other co-accused can not escape the long hand of the law but be found guilty of lesser charge as we have seen above.

In Regina v. Menuh and Dade (1957) 2 W.A.L.R 348 (c.a. Ghana) (5) where 3rd appellant invited the other three appellants for the purpose of boating some C.P.P. people after election as revenge. In course of beatings 3rd appellant stole some money from three victims threatening them that if they could not, beatings would be repeated on them. The court stated its opinion thus:

"But the evidence is not clear whether the common design was to commit any offence other than one of assault and we are unable to find from the evidence as a whole that the concert was to commit the offence of robbery. We are, therefore, of the opinion that it is not possible to presume that the appellants conspired to rob but it is clear that they conspired to assault. It is hard to say that to rob a person must be deemed to be in furtherance of a common design to assault. As there is no evidence to connect the appellants with the ulterior motive of Yaw Bosompin (3rd appellant) whose apparent design was to 'exact' money from the victims, the appellants can not be responsible for Bosompim's acts perpetrated by him outside the assault and without the knowledge of the appellants."

Having considered the authorities, in relation to the first count I now turn to consider what is involved in the charge of attempted murder in second count.

In the case of attempted murder section 215 of the Penal Code, Cap. 146, states as follows:

"215, Any person who:

(a) Attempts 'unlawfully to cause death of another; or

(b) with intent unlawfully to cause death of another does any act, or omits to do any act which it is his duty to do, such act or omission being of such a nature as likely to endanger human life is guilty of a felony and is liable to imprisonment for life."

Both mens rea and actus rous are required to be strictly proved. The mens rea required for the offence is the intention to kill. This specific intention to kill has been often repeated in numerous-authorities. It has been held that it is not sufficient either, to prove that it would have been held that it is not sufficient either, to prove that it would have been a case of murder if death had ensued. It must be shown that the accused had positive intention to

cause death. In Yanyongo v. The People (1974) ZR. 149 (6) it was held by the Supreme Court thus:

"For a conviction of attempting to cause death it is necessary to prove an actual intention ti kill an intention to cause griovous harm is not sufficient" (See also R v. Whybrow (1951) 35 CR. APP. R. 14 Archbold 43rd Para. 20 - 456). (7)

Thus the men rea in this offence is much more limited than mens rea required for murder. In this offence is not sufficient to prove the intention to cuase griovous harm (Supra), although this is sufficient for murder if the victims dies. In Chilomba v. The People (1974) ZR. 151 at p. 512 98) it was held:

"As there was no unequivocal finding by the trial judge that there was actual intention to kill the conviction for attempting to cause death contrary to s.215 of the Penal Code can not stand."

In that case the Supreme Court rejected the proposition by the trial judge that under s.215 of the Penal Code that a charge may be proved by "showing (a) ..... or

(b) knowledge on the part of the accused that what he was doing was imminently dangerous that it must in all probability cause death or such bodily injury as was likely to cause death.

As regards Actus reus, if there is intention to kill, it may be attempted murder even though the means adopted to cause death are inadequate to cause death. Thus a person intending to kill puts poison in another person's beer is guilty of attempted murder even though the poison is insufficient to kill anybody. It seems clear that knowledge that death would be caused which implies malico aforethought is not an element to the charge of attempted murder. In Benwa and Another v. The People (1975) ZR. 1 (9) It was held among other things :

"In a case of attempted murder the charge is to attempt unlawfully to cause death of another. There is no question of constructive malico in that case; it is necessary to find the actual intent to kill."

Now having considered the law in this offence, the question is, that the prosecution satisfied the court to the built that actual intention to kill has been established? Was it in furtherance of robbery?

Before I discuss questions I have posed above in both counts, I must point out here that this case is novel because I have not come across, in Zambia, similar cases which involved people who are close friends to rob one of their close friends the way it is alleged here. This is compounded by the fact that the complainant had earlier on authorised A1 and his two friends to take the vehicle with them after leaving him at his house. If they wanted to steal it there was no necessity to sue violence to him to steal it. I have only found one West African case which is similar to the present case. And this is the case of Rex v. Obi Bekum 7 W.A.45 (Nigeria 1941) (10) where the victim 'an Ndo man' left his portmanteau containing money in the house of fourth accused. A man known as Boke Bissong was one of the attacker. When 'an Indo man' and his companions left the house of accused 4, Bissong and the four appellants followed them where they went to buy meat. And the fourth appellant fied his gun at 'the Ndo man' and afterwards reported that he had shot 'the Ndo man'.... Boke Bissong said that the object for attacking 'the Ndo man' and his companions was to steal the portmanteau left in the house of the fourth accused. The distinction

between the cited case and the present is that in that case although the fourth accused apparently know ' the Ndo man' and his companions the sole intent was to steal the brief case containing money left in the house of fourth accused and under the Nigerian penal Code they were convicted on robbery and they lost their appeals. Whereas in the present case it is manifestly clear that PW! was a close friend of A1 whom he was using in shady deals between him and Vernon Fumpa who was also a friend to PW1.

Now in answering the question of who shot PW1 there is very strong evidence that he was shot by Vernon Fumpa although PW2 did not find Fumpa with a gun in his hand. It might have been a pistol that Vernon might have put in his pocket at the time PW2 found him assisting the injured (PW1). The court dismisses the accused's suggestion that there were some bandits who attacked them. It was a more made up story. The only issue is whether Vernon shot PW1 to facilitate stealing his vehicle. And whether there was any common design as discussed above.

The fact is that these people, PW1 included, had been drinking for a long time in various places and they were drunk. It is evident PW1 suggested to others that he should be taken home because he was drunk and could not drink anymore. Furthermore PW1 said when A1 asked him where they were going manifesting his drunkenness, PW1 stopped and the two began discussing. But do not think it was only talking but an alteration - a quarrel or noisy argument. PW2 said that where those people stopped there was noise. This is quite in support of my proposition that there was an alteration that attracted the attention of Vernon the man at the back. This man's motive can be ascertained. It is hard to say whether he had any ulterior motive to shoot the complainant or he shot him inadvertently or recklessly. The later is more probable as they wee a drunken lot and there even was confusion. This situation was accepted by PW1 who said he was utterly confused. I would say that the other two in front with PW1 did not know what had happened. I would say that the other two in front with PW1 did not know what had happened. They were in a quandary. I would not hesitate to say that the two (A1) and (A2) really believed that they were attacked, by the bandits. I do not think that PW1 had removed the key from ignition slot. It is more apparent that he became too shocked and lapsed into unconsciousness and obviously when Fumpa violently opened the door PW1 dropped down. Thinking that his friend was shot dead, A1 in fright and in drunken mood thought of driving away the vehicle thinking he was rescuing it from the bandits and he drove it to undetermined destination and he went to land it into a ditch. A1 told the arresting officer (PW4) exactly that and it is no speculation.

Turning to Fumpa, if he had nay intention to killer to disable PW1 in order to steal his vehicle, it is most unusual in criminals for him to remain behind and begin assisting the injured to the police station to be assisted them with transport to take PW1 to the hospital. And on the way he still believed, mistakenly due to over drinking, that his friend was shot by bandits and not by himself - He did not realise that, he told PW2 so and confirmed that they sent A2 to go and report to the police for assistance. Pw1 said "oh, that boy he is with us". Furthermore said he only regained his consciousness on the way to the police station when realised that it was Vernon who shot him consequently. It was when PW1 informed his sister, a Mrs Mubiana that Vernon also realised that he was the one who was being accused of that offence, hence he took to his heels. I do not, in my humble judgment, think that the shooting was intended for the stealing of the complainant's vehicle. In this case I do not find that the prosecution have shown or proved to the satisfaction of the court that violence was used in order to obtained or retain the thing stolen namely the complainant's motor vehicle: s. 294 (1) Cap. 146.

And when we look at the conduct of A2, no reasonable person would suspect him or think that he and the two others had conspired to steal the complainant's vehicle as per the

evidence of PW2. A2 was consistent in his stating that the man who had given a lift to them had been shot by the bandits who were also given lift by the same PW1.This was what he told PW2 and PW3. The complainant, according to PW2 said that at the police station PW1 told the police to "apprehend A2 because A2 knew the one who shot him (PW1)". Of course the evidence before this court shows that PW1 know Vernon very well and had been dealing with him as I have indicated above. Assuming there was such conspiracy to steal PW1's vehicle which I do not believe, certainly A2 was not one of the conspirators. This is deduced from his conduct at the scene where he was soon by PW2 leasing the scene soon after the shooting and was seen running towards the police station when he was asked by PW2 he told him the same thing and the same was said to the police Although he elected to remain silent but there was enough evidence from other witnesses and his conduct to show his innocent conduct.

Reverting to the evidence of PW2, he said that when he arrived at the scene Vernon was very much concerned about his injured friend. The natural tendency of the guilty mind from any sane person was that when Vernon was approached by PW2, he was going to run away. That is the natural way or normal conduct of criminals in such situation. On the way to police station Fumpa told PW2 in criminals in such situation. On the way to police station Fumpa told PW2 in presence of PW1 that they had been attacked by bandits to which PW1 kept quite. Despite its novelty, Vis-a-Vis the charge of aggravated robbery, it is very clear that the charge has not been proved to the hilt because it is doubtful whether the shooting was intended to facilitate the stealing of the vehicle which the complainant had intimated to give to A1 and to go with it to his house with his two friends. And, further assuming that Fumpa had intention to steal, there is no evidence that the other two (A1 and A2) had conspired with him to steal; the moment adopted that idea on their realisation of Fumpa's intent to steal. In other words, I have not found any common design as I have discussed above. In respect of the second count of attempted murder, the cases I have referred to above, have shown that to sustain a charge of attempted murder it must be specifically proved by the prosecution the intent to kill. The above discussion in this regard is sufficient, but here I can repeat that it is abundantly clear that the shooting was done by the man who is at large. And to secure conviction for the two accused, the prosecution must again show common purpose or design that there was common intention between the two accused and Vernon Fumpa to kill the complainant. I have already intimated that the intention on part of Fumpa to kill PW1 was not proved. I have also resolved that intent to commit armed aggravated robbery has not been proved. In this charge the prosecution must prove that the two accused were aware that Fumpa was armed with firearm and that he was going to kill PW1 with it to facilitate the stealing of complainant's vehicle. But the prosecution has failed to prove this element. In conclusion, I find that the prosecution have not proved the two offences beyond reasonable doubt. Accordingly I find both accused not guilty on both counts and I acquit them forthwith.

Accused acquitted