

## **YANYONGO v THE PEOPLE (1974) ZR 149 (SC)**

SUPREME COURT

DOYLE CJ, BARON DCJ AND HUGHES JS 10

9th APRIL 1974

(Appeal No. 109 of 1973)

### **Flynote**

**Criminal law - Attempting to cause death - Mens rea - Whether intention to cause grievous harm sufficient. 15**

### **Headnote**

The appellant was convicted of attempting to cause death contrary to s. 215 (a) of the Penal Code. The trial judge did not find an intention to kill, but found an intention to do grievous harm and relied on the definition of "malice aforethought" in s. 204 of the Penal Code in holding that this was sufficient for a conviction for the offence charged. 20

*Held:*

For a conviction of attempting to cause death it is necessary to prove an actual intention to kill; an intention to cause grievous harm is not sufficient.

Legislation referred to: 25

Penal Code, Cap. 146, ss. 204, 215, 224.

*Appellant in person.*

*P Lisulo, State Advocate, for the respondent.*

### **Judgment**

**Doyle CJ:** delivered the judgment of the court.

The appellant was charged with the offence of attempted murder, contrary to section 215 (a) of the Penal Code, and was convicted as 30 charged.

The facts of the matter are that two constables, Constable Nyirenda and Constable Mubita, were on their respective beats in Kitwe, and as they were patrolling Independence Avenue they saw a man who they thought was behaving in a suspicious manner. They chased this man who disappeared, and the two police officers split up, looking for him. 35 Constable Nyirenda then continued looking and he found the appellant sitting with a gun in his hand. Nyirenda told him (the appellant) that he

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was a police officer, grasped him by the wrist and a struggle then ensued in the course of which a shot was fired. The other police officer, Constable Mubita, heard the shot and shortly afterwards heard Constable Nyirenda shouting for help. He ran towards the scene and found Nyirenda 5 and the appellant struggling. When he reached within about five yards he was struck by a bullet which went through the left eye. The evidence shows that in the course of that struggle the shot was fired which caused the injury.

The appellant's defence is that he did not fire the shots at all. If 10 he did he was only firing with intent either to frighten or to get away.

The learned trial judge considered the evidence and accepted that the appellant had fired these shots deliberately at the police officers. He also found that the appellant had an intent to do grievous bodily harm by reason of the fact that he must have intended to cause the natural and 15 probable consequence of his act, and that firing a rifle at a man would probably have the consequence of doing grievous bodily harm.

The learned trial judge, however, fell into error. Having found that the appellant intended to do grievous bodily harm, he then relied upon the definition of "malice aforethought" in section 204 of the Penal Code. 20 That section refers to the case where a person has actually killed, and defines malice aforethought as not merely an intent to kill but an intent to do grievous bodily harm. However, in the case of attempted murder the case is not the same. The charge is to attempt unlawfully to cause the death of another. There is no question of constructive malice in that case; 25 it is necessary to find the actual intent to kill. The learned State Advocate accepts that this is the law, but he submits that in this case there was a clear intent to kill evinced. In the first place the learned judge has not so found. In any event

we cannot, looking at the record, come to that conclusion without any reasonable doubt. It is plain there was a struggle, 30 it is plain that the appellant was resisting arrest, and it is plain that he fired the shots at or in the direction of both the policemen. It is plain that he very nearly killed one of them in his attempt to escape. But it is not shown that he had the intention to kill. There is no doubt whatever the conviction for attempted murder cannot stand. We must quash it 35 together with the sentence passed.

But it is equally clear that the appellant was guilty of an offence under section 224 of the Penal Code, which provides:

"224. Any person who, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person or to resist 40 or prevent the lawful arrest or detention of any person -

- (a) unlawfully wounds or does any grievous harm to any person by any means whatever;

...

is guilty of a felony and is liable to imprisonment for life." ,

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On the evidence it is probable that the learned judge was right and that the appellant intended to do grievous harm, but it is not necessary so to find. He was certainly resisting arrest, and he certainly unlawfully wounded Nyirenda for that purpose. The appellant was guilty beyond all doubt of an offence against section 224. We allow the appeal against 5 conviction, quash the conviction for attempted murder and substitute a conviction for causing grievous harm with intent to prevent arrest, contrary to section 224 (a) of the Penal Code.

That section is punishable, as is attempted murder, with imprisonment for life. Here a firearm was used; it is true there was no express 10 intent at the time, but on the other hand the appellant was clearly carrying the weapon around and must have been prepared to use it. The sentence of twelve years' imprisonment with hard labour comes to us with a sense of shock. It is inadequate and the remarks that we have already in a previous case made as regards offences in which lethal weapons are used apply equally here. The very least sentence that should be imposed in this case is fifteen years' imprisonment with hard labour. That is the sentence we impose.

*Appeal allowed to extent that conviction under s. 224 (a) substituted*

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