

## **CHILOMBA v THE PEOPLE (1974) ZR 151 (SC)**

SUPREME COURT <sup>20</sup>

DOYLE CJ, BARON DCJ AND HUGHES JS

9th JULY 1974

SCZ Judgement No. 26 of 1974.

### **Flynote**

**Criminal Law - Attempting to cause death contrary to s. 215 of the Penal Code <sup>25</sup> - No unequivocal finding of actual intention to kill - Whether conviction possible.**

**Criminal Procedure - Minor offence - Section 181 of the Criminal Procedure Code - Whether s. 224 of the Penal Code minor offence in relation to s. 215 of the Penal Code. <sup>30</sup>**

### **Headnote**

The appellant was convicted of attempting to cause death contrary to s. 215 of the Penal Code. The learned judge held that following some kind of difference the appellant had armed himself with three spears and attacked the complainant. The only question that arose for decision in this appeal was whether the appellant was correctly convicted of <sup>35</sup> attempting to cause the death of the complainant or whether he should have been convicted of a lesser offence, namely an offence under s. 224 of the Penal Code.

1974 ZR p152

DOYLE CJ

*Held:*

- (i) As there was no unequivocal finding by the trial judge that there was an actual intention to kill the conviction for attempting to cause death contrary to s. 215 of the Penal Code cannot stand.
- (ii) Although <sup>5</sup> s. 224 of the Penal Code is to some extent a less serious offence than an offence under s. 215 of the Penal Code, it is not a minor offence within the meaning of s. 181 of the Criminal Procedure Code because offences under the two sections are both felonies and carry the same maximum sentence.

Cases cited: <sup>10</sup>

- (1) *Yanyongo v The People* 1974 ZR 149.
- (2) *Charles Phiri v The People* 1973 ZR 168.

Legislation referred to:

Penal Code, Cap. 146, ss. 215, 224 and 229.

Criminal <sup>15</sup> Procedure Code, Cap. 160, s. 181.

*M S Kapumpa, Legal Aid Counsel*, for the appellant.

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

### **Judgment**

**Baron DCJ:** delivered the judgement of the court. The appellant was convicted of attempting to cause death contrary to section 215 of <sup>20</sup> the Penal Code. It is unnecessary to deal in any detail with the facts. The learned judge held, and on the evidence before him he was fully entitled to do so, that the appellant was not speaking the truth when he alleged that it was the complainant who had attacked him, the appellant, with three spears. He held that following some kind of difference the <sup>25</sup> appellant had armed himself with three spears and attacked the complainant. The only question in this case is whether the appellant was correctly convicted of attempting to cause the death of the complainant or whether he should have been convicted of a lesser offence, namely an offence under Section 224 of the Penal Code.

The <sup>30</sup> learned judge having reviewed the evidence and having also considered the law on the subject said:

"A charge of attempted murder under paragraph (a) of section 215 of the Penal Code may be proved by showing either:

- (a) an intention to kill; or 35
- (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."

We have been unable to find any foundation for the second part of this 40 dictum; it is not taken from section 215 of the Penal Code, nor can we find it in any of the cases to which the learned Judge himself referred in the course of his judgement. The law is in fact correctly set out in those cases and has been followed in a recent judgement of this court, *Yanyongo*

1974 ZR p153

BARON DCJ

*v The People* [1]. In that case we reaffirmed that on a charge of attempting unlawfully to cause the death of another there can be no question of constructive malice; it is necessary that there be an actual intention to kill. We are bound to hold therefore that the learned judge misdirected himself in stating the law as he did. 5

Where he came to make his findings of fact the learned judge said this:

"In the circumstances of the case, the only inference reasonably possible is that the accused's intention was to kill Robinson Shichimbwele, or alternatively, that there was knowledge on his 10 part that what he was doing was so imminently dangerous that it must, in all probability, cause death, or such bodily injury as was likely to cause death."

Putting the matter in the alternative in this way leaves us in the position that we cannot hold that the learned judge has found an intention to kill. 15 For this reason the conviction for attempting to cause death contrary to section 215 cannot stand. However, the evidence is overwhelming that the appellant was guilty of an offence under section 224 which reads:

"224 Any person who, with intent to maim, disfigure or disable any person 20

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

...  
is guilty of a felony . . . "

We are quite satisfied that the appellant intended to do grievous harm to 25 the complainant and in fact did such harm. The conviction under section 215 will be set aside and there will be substituted a conviction for an offence contrary to section 224 of the Penal Code.

On the question of sentence, it can hardly be said that the offence of which the appellant has now been convicted is very much less serious than 30 the offence with which he was originally charged. The facts of the case certainly disclose a serious offence. However, an offence under section 224 must be regarded to some extent as a less serious offence, and in all the circumstances the sentence of six years' imprisonment with hard labour will be set aside and a sentence of five years' imprisonment with hard labour substituted; that sentence equally will take effect from the January, 35 1973.

*Postea*

Immediately after we rose this morning we realised that the maximum sentences under section 215 and 224 are the same. Although therefore, as 40 we said in the judgement we delivered this morning, to some extent an offence under section 224 is a less serious offence, it is not a minor offence within the meaning of section 181 of the Criminal Procedure Code, because offences under the two sections are both felonies and both carry the same maximum sentence. We must therefore hold that the case of *Yanyongo* [1] 45

1974 ZR p154

BARON DCJ

to which we referred this morning was wrongly decided on this point, and for this reason we have hastened to correct the judgement given today, in which we again inadvertently overlooked that the maximum penalty under section 224 was the same as under section 215. Generally, on the 5 question of a conviction for a minor offence under section 181 of the Criminal Procedure Code we refer to *Charles Phiri v The people* [2].

The order of the court will be that the conviction of attempting to cause death contrary to section 215 of the Penal Code will be set aside and a conviction under section 229 of the Penal Code of unlawfully doing 10 grievous harm will be substituted. This offence is a felony and the maximum sentence is imprisonment for seven years and is therefore a minor

offence for the purposes of section 181 of the Criminal Procedure Code. We set aside also the sentence and we substitute a sentence of three years' imprisonment with hard labour. This sentence will take effect from 15<sup>th</sup> January, 1973.

*Conviction of attempting to cause death and sentence set aside. Conviction under section 229 of the Penal Code and sentence of three years' imprisonment with hard labour substituted.*

1974 ZR p154