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HARI PRASAD
BHAWAR SINGH

v.

REGINAM

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[COURT OF APPEAL—Marsack J.A., Henry J.A., Spring J.A.]

Criminal Jurisdiction

Date of Hearing: 26 March 1981
Date of Judgement: 2 April 1981

C *Criminal Law—Charge of Attempted Murder—alternative verdict of Causing Grievous Bodily Harm open on the facts—meaning of 'maliciously'—use of word 'think' not productive of error—direction as to inconsistencies.*

S. D. Sahu Khan for Appellants
S. Chandra for Respondent

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Appellants at Lautoka on 20 May 1980 were convicted of Unlawfully Causing Grievous Bodily Harm to Jan Ali. The appellants has been charged with Attempted Murder: but the assessors expressed the opinion that the proper verdict was guilty of unlawfully causing grievous bodily harm. This was accepted by the learned trial judge and convictions entered accordingly. The grounds of appeal which the court considered required consideration were summarised by it thus:—

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1. That the learned trial judge erred in law and in fact in directing the assessors that the only alternative verdict open for them to consider was grievous bodily harm under Section 258 of the Penal Code;

2. That the learned trial judge had misdirected the assessors on the issue of burden of proof in that his direction indicated that there was some burden on the appellants;

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3. That the learned trial judge did not sufficiently direct the assessors on the issue of inconsistent statements made by witnesses.

G A preliminary point was raised as to the competency of the trial court to substitute the verdict of Grievous Bodily Harm when the charge had been Attempted Murder. The argument was based on *Manuel (1960) 28 C.C.C. 383.* However, the court noted that by the provisions of S. 163(2) of the Criminal Procedure Code there was no necessity to prefer an alternative charge if the facts proved definitely established that some lesser offence had been committed; the offence of which accused was convicted in fact being minor offence the ingredients of which had been

H fulfilled by the evidence.

S. 258 of the Penal Code read:—

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"Any person who unlawfully and maliciously does grievous bodily harm to another is guilty of felony, and is liable to imprisonment for 7 years..............".

The court noted that the trial judge gave no direction as to the significance of "maliciously" in the definition of grievous bodily harm. In *R. v. Cunningham (1957)* 2 All E.R. 412 the meaning to be applied to the word "malicious" was considered. The definition in Kenny's Outline of Criminal Law 16th Edition was approved. It reads:— B

"......in any statutory definition of a crime 'malice' must be taken not in the old vague sense of 'wickedness' in general, but as requiring either (i) an actual intention to do the particular kind of harm that in fact was done, or (ii) recklessness as to whether such harm should occur or not (i.e. the accused has foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it). It is neither limited to, nor does it indeed require, any ill-will towards the person injured." C

The Court also stated that "maliciously" postulated foresight of consequence. Further the definition of "malice" approved in *Allen v. Flood (1898)* A.C. 1. namely:— D

"Malice, in its legal sense, means a wrongful act done intentionally without just cause or excuse."

was relevant to take into consideration.

The court was satisfied that the direction to the assessors that the attack in order to sustain a finding of guilty of grievous bodily harm must have been "deliberate and unlawful" and the injuries could be said to be grievous. In the opinion of the court the deliberate use of knives in the circumstances:— E

"......undoubtedly proved malice as above defined; and the assessors could have been left in no doubt as to what had to be established by the evidence to substantiate such a finding." F

The learned trial judge directed the assessors that the attack must be "deliberate and unlawful" i.e. done intentional without just cause or excuse. Applying the definition of malice (supra) the direction was sufficient to establish it; and although the word "malicious" was not used by the trial judge the court was satisfied that the summing up was adequate.

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Further it was not necessary that the trial judge should give the assessors the option of considering other minor offences.

A ground of appeal critical of the directions of the learned trial judge upon the subject of onus of proof was, assisted by passages from the summing up, dismissed. The court referred to *R. v. Taylor (1968)* N.Z.L.R. 981. H

A further objection to the summing up was as to use of the word 'think' in posing questions to the assessors e.g.:—

A "Do you think that the evidence of Jan Ali and Taleem was covered by suspicion."

The court considered that there was nothing in the summing up which in any way watered down his specific and correct directions as to onus.

B The summing up of the learned trial judge sufficiently referred to inconsistencies in the evidence. A contention that the defence of alibi had not been properly considered or the subject of appropriate direction as to onus rejected. See *R. v. Taylor* (Supra).

Held: There had been no failure so to direct as not to take account of the defence of alibi.

C The direction that the assessors should consider only one alternative verdict namely 'Grievous Bodily Harm' (S. 258) disclosed no error.

There has been no misdirections of the assessors on the onus of proof or on inconsistent statements.

Cases referred to:

D *Manuel* (1960) 28 C.C.C. 383

Kabarazi v. R. 20 EACA 156

R. v. Cunningham (1957) 2 All E.R. 412

Allen v. Flood (1898) A.C. 1

E *R. v. Johnson* (1961) 1 W L.R. 1478

R.v. Taylor (1968) N.Z.L.R. 981

Bullard v. R. (1957) A.C. 635

MARSACK, Judge of Appeal:

F Judgment

These are appeals against convictions for the offence of grievous bodily harm entered in the Supreme Court at Lautoka on the 20th May 1980, and also against the sentence of three years' imprisonment imposed in each case. Appellants were charged with attempted murder; but the assessors expressed the opinion that the G proper verdict was guilty of the offence of unlawfully causing grievous bodily harm. This was accepted by the learned trial Judge and convictions entered accordingly. In the Supreme Court one trial was held for both the accused persons, and in this Court the appeals of both appellants were heard together.

The original grounds of appeal filed were prepared by the appellants in person, and were identical in each case. At the hearing of the appeal counsel for the H appellants submitted amended grounds and it was on those amended grounds that

the hearing took place. We do not find it necesary to state these grounds out in full; those requiring consideration by this Court may be briefly summarised as under: A

1. That the learned trial Judge erred in law and in fact in directing the assessors that the only alternative verdict open for them to consider was grievous bodily harm under Section 258 of the Penal Code;

2. That the learned trial Judge had misdirected the assessors on the issue of burden of proof in that his direction indicated that there was some burden on the appellants; B

3. That the learned trial Judge did not sufficiently direct the assessors on the issue of inconsistent statements made by witnesses.

A preliminary point was raised as to whether it was competent for the Court below to substitute a verdict of grievous bodily harm when the charge had been attempted murder. This argument was based on the judgment in *Manuel* (1960) 28 C.C.C. 383 cited in Adams Crim. Law in N.Z. 2nd Ed. para. 1325, where it was held that an attempted murder does not necessarily include physical injury, and conviction for any offence necessarily involving physical injury could be entered only if the crime charged in the indictment had this basis. Counsel for the respondent contended that *Manuel* did not apply to Fiji because of the provisions of Section 163(2) of the Criminal Procedure Code which reads: C D

"When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

In our opinion this argument is sound. Section 163(2) makes it clear that there is no necessity to file an alternative charge alleging some factor which does not apply to the original charge if the facts proved definitely establish that some lesser offence has been committed. The condition that the offence of which the accused was convicted must be a minor offence is certainly applicable here; the maximum penalty under Section 258 being seven years' imprisonment whereas the maximum penalty on conviction for attempted murder under Section 245 is imprisonment for life. E

A somewhat similar position arose in the East African case of *Kabarazi v. R.* 20 EACA 156, where the accused was charged with attempted murder but was convicted of unlawfully doing grievous bodily harm. This conviction was upheld by the East African Court of Appeal. Though the report does not cite the relevant statutory provisions, it would appear from the judgment that the applicable legislation corresponded substantially with our Section 163(2). F

The facts alleged in the prosecution case may be shortly set out: G

Jan Ali was a cane farmer at Itatoko, Ba. On the night of 16 October, 1979 he found that his cane was on fire and he and some others went over to put the fire out. Jan Ali was then attacked with cane knives by the two appellants. First appellant struck Jan Ali on the head and on the face with a cane knife and the second appellant struck Jan Ali on the shoulder. Jan Ali was taken to hospital where he remained for about eight days. Each of the appellants gave evidence at the trial denying not only the assault but also their presence at the scene of the fire. From the opinions expressed by the assessors it is clear that they rejected the defence evidence and accepted that of the prosecution to the effect that the H

A physical injuries sustained by Jan Ali were, in fact, inflicted by the appellants. The learned trial Judge agreed with the assessors.

As to the first ground of appeal we quote the relevant passages from the summing up of the learned trial Judge:

"If you are satisfied that it was one or both of the accused who attacked Jan Ali, there is then another decision you have to make, and that is whether the offence was attempted murder, or some other offence. To find the accused guilty of B attempted murder you must be satisfied beyond a reasonable doubt that the purpose of the attack was to cause Jan Ali's death."

"Assuming that you are not satisfied about the intention to kill Jan Ali the only other offence to consider is unlawfully and maliciously causing grievous harm. Attacking with a cane knife must be unlawful—except in certain circumstances (such as self-defence) of which there is no suggestion in this case, and you can C surely not be in any doubt that the injuries to Jan Ali amounted to grievous harm, even though the injury to the shoulder was by no means as serious as the other two blows to the head. In this offence you are concerned with the intention of the accused in striking the blows. All you must be satisfied is that the attack with the cane knives was deliberate and unlawful, and that the injuries resulting amounted to grievous harm. I suggest that there can't be much room for doubt D on either score."

Section 258 of the Penal Code is in these terms:

"Any person who unlawfully and maliciously does grievous harm to another is guilty of a felony, and is liable to imprisonment for seven years with or without corporal punishment."

E It is to be noted that the learned trial Judge gave no direction to the assessors as to the significance of the word "maliciously" in the definition of grievous bodily harm. He recognised that in his subsequent judgment delivered after the assessors had expressed their opinions. There he went on to explain "a deliberate attack with a cane knife in the circumstances described by Jan Ali, must be unlawful and it must be malicious". He then expressed the opinion that his omission to direct the assessors on the element of maliciousness can have had no effect of their opinions.

F The Court of Criminal Appeal in *R. v. Cunningham* (1957) 2 All. E.R. 412 considered the meaning to be applied to the word "malicious" in the definition of a crime. At page 414 the Court cites the definition set out in Kenny's Outlines of Criminal Law 16th Edition:

"....in any statutory definition of a crime 'malice' must be taken not in the old G vague sense of 'wickedness' in general, but as requiring either (i) an actual intention to do the particular kind of harm that it fact was done, or (ii) recklessness as to whether such harm should occur or not (i.e. the accused has foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it). It is neither limited to, nor does it indeed require, any ill will towards the person injured."

H The judgment proceeds "we think this is an accurate statement of the law....In our opinion, the word 'maliciously' in a statutory crime postulates foresight of consequence". It is relevant to take into consideration the definition of "malice" approved by the Law Lords in *Allen v. Flood* (1898) A.C.: 1

"Malice, in its legal sense, means a wrongful act done intentionally without just cause or excuse." A

In the passage from the learned trial Judge's summing up quoted above, he directs the assessors that before expressing the opinion that the appellants were guilty of grievous bodily harm, they must be satisfied that the attack with the cane knives was deliberate and unlawful and that the injuries resulting amounted to grievous harm. In our opinion the deliberate use of the knives in the circumstances outlined undoubtedly proved malice as above defined; and the assessors could have B been left in no doubt as to what had to be established by the evidence to substantiate a finding of grievous bodily harm. In this respect we substantially agree with what the learned trial Judge says in his judgment on this point.

Under Section 258 of the Penal Code it has to be proved that the act causing grievous bodily harm must be "unlawful and malicious". The learned trial Judge made it clear to the assessors that they must be satisfied that the attack was C "deliberate and unlawful". In other words, that it was done intentionally without just cause or excuse. Applying the definition in *Allen v. Flood* (supra) this is sufficient to establish malice. So though the word 'malicious' was not used by the trial Judge, we are satisfied that the summing up on this point was adequate.

It was further contended by counsel for appellants that if a conclusion that the offences are attempted murder had not been established the assessors could have D considered other alternative charges such as "unlawful wounding" under Section 261 of the Penal Code under which the maximum penalty is two years' imprisonment. But the learned trial Judge made it clear that the gravity of the injuries caused could undoubtedly come within the meaning of grievous bodily harm; and that being so it was in our opinion not necessary that he should give the assessors the option of considering a minor offence. Towards the end of his summing up he said: E

"To find the accused guilty of the offence of unlawfully causing grievous harm you must be satisfied beyond a reasonable doubt that each deliberately struck the blow or blows attributed to him by Jan Ali in the circumstances he described, and caused the injuries described by the doctor. Provided that you are also satisfied that the blows were unlawful and that the injuries amounted to grievous harm—and there has been no dispute on these points, then you may, F again dealing with each accused quite separately find them guilty of this offence."

In the result we can find no merit in the first ground of appeal.

The second ground of appeal is based on the contention that though the learned trial Judge undoubtedly, at the commencement of his summing up, directed the G assessors fully and accurately as to the onus of proof, his direction was subsequently watered down to the extent that the assessors may well have understood that there was some onus on the accused persons.

One of these matters related to the defence of alibi raised by the appellants. Counsel contended that when dealing with this subject the trial Judge indicated that there is some onus on the accused when he said "and bear in mind that the accused H don't have to prove their alibis. It is sufficient for their purposes if they merely instil in your minds a reasonable doubt". Our attention was drawn to the judgment of the Court of Criminal Appeal in *R. v. Johnson* (1961) 1 W.L.R. 1478 where at page 1479 it was said:

"If a man puts forward an answer in the shape of an alibi....he does not in law thereby assume any burden of proving that answer....the burden of proof rests throughout on the prosecution."

In a passage in his summing up the trial Judge said:

"To sum up you must decide whether or not taking into account all the evidence, you consider that the prosecution has discharged the onus upon it of proving beyond a reasonable shadow of doubt that it was the two accused ~~or one of~~ them who attacked Jan Ali with cane knives."

This makes it perfectly clear—as do several other passages in the course of the summing up—that the onus is at all times on the prosecution to prove all the ingredients of the offence charged and that no onus rests at any time on the accused persons.

The duty of a judge in his summing up when the defence of alibi is raised was considered by the New Zealand Court of Appeal in *R. v. Taylor* (1968) N.Z.L.R. 981. The judgment of the Court on that point is summarised in the head note:

(where the defence of alibi is raised)

"A convenient way of directing the jury is to tell them that the burden of proof is on the prosecution but they must also consider the evidence of the defence and if the defence evidence along with all the other evidence leaves the jury in reasonable doubt the accused is entitled to acquittal."

In the present case the learned trial Judge did just that, as appears in the passage quoted above.

Counsel raises a further objection to the frequent use of the word "think" in asking questions of the assessors.

"Do you think that the evidence of Jan Ali and Taleem was covered by suspicion?"

"Do you think they were telling lies or were just guessing who was responsible?"

"Do you think he could sustain an untruthful account under cross-examination?"

It is agreed that in certain circumstances the use of the word "think" to the assessors may create in their minds a wrong impression as to the basis upon which their opinion must be founded. There have been judgments of this Court to the effect that the use of the word "think" may result in misunderstanding on the part of the assessors as to their obligations, but in our view there is nothing in the summing up of the learned trial Judge which in any way waters down his specific direction that the onus at all times lies on the prosecution to prove its case beyond reasonable doubt. On several occasions in the course of his summing up has he emphasised the burden of proof which at all times lies on the prosecution. It must be remembered that there is no magic formula, and if on a reading of the summing up as a whole the jury is left in no doubt where the onus lies, no complaint can be made: *Bullard v. R.* (1957) A.C. 635. Accordingly this ground of appeal fails.

Turning now to Ground 3 we observe that there are a number of inconsistencies in the evidence given by different witnesses as to some aspects of the case, and in

particular there are discrepancies between evidence given at the Preliminary Inquiry and that given at the trial. However, none of these inconsistancies directly relates to the fundamental points in issue: What injuries were caused to Jan Ali, who caused them and how? The learned Judge points out—correctly, in our opinion—that the discrepancy between what Jan Ali deposed in the Supreme Court and what he said in the Magistrates Court was not a serious one, He goes on to say: A

> "One must bear in mind that the witnesses—all the witnesses are recalling events that happened in the middle of the night rather dramatic circumstances, about 7 months ago, but nevertheless you must consider the evidence of these two witnesses, as of course you must consider every witness's evidence carefully in coming to a decision as to where the truth lies." B

He further points out that it is not uncommon for witnesses to differ in their recollection of events, particularly events which have taken place some time before. He adds "your task is to decide whether the contradictions cause a reasonable doubt on the essential part of the witness's evidence". We agree with counsel that the whole case here depended on the credibility of the witnesses. We can find nothing in the summing up of the learned trial Judge which overlooks the inconsistencies of which complaint is made, or which directs the assessors as to what facts they are to find from the evidence on the points concerned. In other words we can find no misdirection which might have led the assessors to misunderstand their duty in summing up the evidence. This ground of appeal therefore fails. C D

There was a further appeal against sentence in each case. We are unable to find that the sentences passed were manifestly excessive or wrong in principle and consequently cannot interfere with them.

In the result no ground has succeeded and the appeals are dismissed.

Appeals dismissed. E