SUDU BANDA
v.
THE ATTORNEY-GENERAL

COURT OF APPEAL
JAYASURIYA, J.,
KULATILAKE, J.
C.A. NO. 223/93
H.C. KANDY NO. 832/93
SEPTEMBER 09, 1998

Criminal Law – Non-production of weapon preparation – Attempt – Tests to identify attempt – Equivocality test and proximity test – Evidence ordinawe S. 114 C, 165.

Where the allegation was that intended victim had by sprawling on the ground availed being hit by a gunshot fired by the accused, the offence is attempted murder.

The proper tests to apply to determine whether the act is an attempt are the equivocality test and the proximity test. Where an accused has gone far enough to make his action unequivocal then the equivocality test applies.

Intention is the essence of the crime. A distinction must be drawn between preparation and attempt. The act must be sufficiently proximate to the actual commission of the act.

Where the accused by his utterance that he was waiting for the Police, and fired the gun aiming at his victim, who escaped by taking defensive action, both the Proximity Rule and the Equivocality test are satisfied.

Although the gun was listed as a production but not produced, the non-production was not fatal to the prosecution.

Cases referred to:

1. *Hichin v. Ahquirt Brothers* (1943) 2 All ER 722.

2. *Lucus v. William and Sons* (1892) 2 QB 113; (1872) 66 Law Times 706.
3. *Rex v. Francis* 1874 Law Reports CCR 128, 132.
4. *Chandradasa v. Eldrick de Silva* 70 NLR 169, 174.
5. *King v. Usman* 49 NLR 143.
6. *City Carriers Ltd. v. The Attorney-General* 74 NLR 217.
7. *Davey v. Lee* (1967) 2 All ER 423.
8. *Rex v. Miskell* (1954) 1 WLR 438; (1953) 37 Cr. App. Rep. 214.
9. *Rex v. Cope* (1921) 16 Cr. App. Rep. 77.
10. *Eagleton* (1855) Dears 515.
11. *Rex v. Robinson* (1915) 11 Cr. App. Rep. 124; (1915) 2 KB 342 at 441.
12. *Rex v. Woods* (1930) 22 Cr. App. Rep. 41, 44.
13. *Kensington v. Edirisinghe* 3 NLR 326.
14. *AG v. Deonis Weerakoon* Reports 13.
15. *Rex v. Whybrow* (1951) 35 Cr. App. Rep. 141.

APPEAL from judgment of the High Court of Kandy.

Dr. Ranjith Fernando with *Miss A. Jayaratne, Miss S. Godagama* for the accused-appellant.

Vijitha Malalgoda, SSC for the AG.

Cur. adv. vult.

Septembr 09, 1998.

JAYASURIYA, J.

We have heard learned counsel appearing for the accused-appellant. Learned counsel referred to the fact that in this case insufficient evidence had been led on behalf of the prosecution in regard to the adduction of evidence under section 241 of the Criminal Procedure Code against the accused on the fact that the accused was absconding at the trial. The Police Officer, Inspector of Police, Lakshman Weerasekera, Officer-in-Charge of the Walapane Police Station has given evidence to the effect that the accused was detained at the Pallekelle Rehabilitation Centre and that he had escaped from lawful custody whilst he was detained at the centre. Thereafter, he has stated, that he had directed his junior officers to look for the accused in the village and all searches for the accused in the village had been

fruitless and he spoke also to what the Grama Sevaka and the villagers have stated in this regard. This evidence was unimpugned and uncontradicted at the trial. Thus, there is clear evidence that the accused was detained at the Pallekelle Rehabilitation Centre and that he had wrongfully and unlawfully escaped from lawful custody. That fact, taken in conjunction with the evidence led through the officer-in-charge of the Police station, gives rise to the presumption of continuity which is a presumption recognized in section 114C of the Evidence Ordinance and therefore the learned trial judge having regard to the presumptive evidence and the oral evidence before him, was entitled to hold that the accused was absconding, at the inquiry held by him prior to the commencement of the trial. His finding is justified and valid in law.

Next, the learned counsel complained that the firearm alleged to have been used was listed as a production in the indictment but that it was not produced at the trial. Two witnesses, Upendra Gunaratne and Kularatne Banda, have given evidence to the effect that the accused had a gun in his hand and when he saw the Police officers, the accused had uttered the remark : 'උඹලා පොලිසියෙන් වුවද එනකල් තමයි බලාගෙන ඉන්නේ කියලා'.

Thereafter, the accused-appellant had fired the gun which was in his hand and there is evidence that a shot emanated from that gun and it did not hit the witness because the witness had taken defensive action in sprawling on the ground and avoiding the gun shot injuries. The issue arises whether it was imperative in these circumstances for the gun to have been produced as a production or whether the court could have acted on the oral evidence adduced by the two witnesses in regard to the nature of the implement in the hand of the accused-appellant and what emanated from firing the said gun. Sir Fitzgerald Stephen who is the author of our Evidence Ordinance in his speech in the Indian Parliament, in introducing the Act, has stated categorically that he did not, in defining evidence, include *real evidence* as part of the definition of evidence. He has said that omission was *deliberate* and intentional so that the law in India would

be different to the law in Great Britain. His views on this matter have been criticized by his assistant. However, in proviso 2 to section 60 of the Evidence Ordinance he has made provision for the adduction of real evidence *subject to a condition.* Section 60 proviso 2 sets out thus: "Provided also that if oral evidence refers to the existence or condition of any material thing other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection. "Likewise, the court could act in this respect again in the exercise of its power enshrined in section 165 of the Evidence Ordinance." Thus, there is a definite change in the law as far as the Evidence Ordinance is concerned when one compares it with the English law. Even in England there are a series of decisions which have taken the view that the non-production of the material object is not necessarily fatal to a conviction. Vide the following *cursus curiae – Hichin v. Ahquirt Brothers*[1]; *Lucus v. William and Sons*[2]; *Rex v. Francis*[3] at 132 for the observations of Lord Coleridge. It appears that Stephen has followed this line of reasoning manifested in these English cases that I have adverted to. In the circumstances, the contention that as the gun was listed as a production in the indictment, its non-productign at the trial is fatal to the conviction, is an untenable proposition certainly as far as the law of Sri Lanka is concerned. It is to be stressed that both witnesses have given oral evidence in regard to the nature of the weapon which was in the hands of the accused-appellant and with which the accused-appellant had fired at the police constables who were attempting to arrest him.

Both on the issue of whether the accused was absconding and on the issue whether the object that was used a firearm, *more than prima facie* evidence has been placed before the trial court by the oral testimony of the witnesses for the prosecution and there has been a wholesale failure to contradict and impugn such cogent and convincing evidence, on the part of the accused. This is a special feature in the prosecution and it is "a matter" which any trial judge or a Court of Appeal Judge ought to take into consideration and failure to do so would amount to a non-direction which amounts to a misdirection. Justice H. N. G Fernando was eloquent in expressing

the view that such a feature in a case is "a matter" falling within the definition of the word 'proved' and that it is obligatory on any Judge to take this fact into consideration in determining whether a particular issue has been proved and established before the court. Vide the salient observations of Justice H. N. G Fernando in *Chandradasa v. Eldrick de Silva,*[4] at 174 in the circumstances, we hold that the first two contentions advanced by learned counsel are devoid of merit and are unsustainable in law.

Thirdly, he argued that the ingredient of an attempt to commit murder, which is relevant to constitute the offence has not been discharged by the prosecution beyond all reasonable doubt. In considering this submission this court has to take into account the positions at which the prosecution witness and the accused were stationed shortly before this firearm was used by the accused-appellant and when he took aim at the Police officers and fired the gun which was in his hand. The gun shot would have definitely alighted on the prosecution witness, had he not taken defensive action in sprawling on the ground soon after the gun was fired. It is manifest that the distance was only six yards which separated the two adversarial parties. We hold that these acts clearly amounted to an attempt to commit murder in terms of the PROXIMITY RULE and the EQUIVOCALITY TEST on which learned counsel for the accused-appellant has completely failed to advance any submissions before this court. We hold that his contention is wholly untenable. The Proximity Rule was applied by the court in *King v. Usman*[5]. The accused was arrested when attempting to open a part of a window. He was arrested when he had not succeeded in opening it at that stage. It was contended that the reasonable inference to be drawn from the accused's action is that he intended to enter the house. The court emphasized, although it is a reasonable inference, it is not the onlly reasonable inference that can be drawn. The complainant acted precipitately in arresting the accused at that stage without waiting till the accused proceeded to an extent which would have made his action UNEQUIVOCAL. As matters stood at the time of the accused's arrest, his action could not be said to be unequivocal and that it pointed

clearly and necessarily to the conclusion that the accused was attempting to enter the house. Thus, the court applying the Equivocality Test has held the charge of attempted house-breaking failed in these circumstances. In *City Carriers Ltd. v. The Attorney-General*[6] both Justice H. N. G Fernando and Justice de Krester applying the *ratio decidendi* in the decision in *Davy v Lee*[7] and the Equivocality Test (propounded by Turner in Modern Approach to Criminal Law at page 278 and at 185, pages 273-291) proceeded to determine whether the acts proved in the instant case amounted to an attempt to commit an offence.

The proximity rule was applied in *Rex v. Miskell*[8] and in the decision in *Rex v. Cope*[9]. In *Rex v. Miskell (supra)* Justice Hilbury referred to the controversy and observed : "Not all acts which are steps towards the commission of the crime can be regarded as attempts to commit the crime; but just where the distinction is to be drawn between the preliminary acts of preparation and acts which are nearly enough related to the crime to amount to attempt to commit is often a difficult and a nice question. This case indeed affords an example of the difficulty. . .The question is whether these acts of the appellant were an attempt to procure the commission of that offence. Applying the principle as stated in *Eagleton*[10] (which principle was approved in *Rex v. Robinson*[11] and in *Rex v. Wood*[12] at 44 the question was raised : "was there on these facts an act *sufficiently proximate to procuring* the boy to commit the offence, to amount to an attempt to procure?" Vide – the decision in *Kensington v. Edirisinghe*[13] the decision in *AG v. Deonis*[14].

In *Rex v. Whybrow*[15] the principle was clearly laid down that in the law relating to attempt, intention is the essence of the crime. Hence, in a charge of attempted murder, the essenrce of the offence is the intent to murder but in a charge of murder malice afore-thought would be sufficient to support the count of murder. But if the charge is one of attempted murder, intent becomes the principal ingredient of the offence. Thus, "if A attacks B intending to do grievous bodily harm and death results, that is murder, but if A attacks B and only

intends to do grievous bodily injury and death does not result, it is not attempted murder but wounding with intent to do grievous harm". This statement of the law emphasizes and stresses that in the offence of attempt intention is the essence of the crime.

Now, reverting to the facts of the instant case the accused has clearly manifested by his utterance his *intention to commit the murder* of the Police officer in whose direction he had fired the shot after making the aforesaid utterance. The acts established by the prosecution evidence satisfy both the Proximity Rule and the Equivocality Test which are the correct criteria to determine whether the act of the accused constituted an attempt to commit murder. Hence, it is manifest that the contention of learned counsel for the appellant that the ingredient of an attempt to commit murder has not been established in the instant case is wholly misconceived both in fact and in law. In the circumstances, we dismiss the appeal.

Finally, it was urged that the learned trial judge had not given sufficient reasons for his finding in terms of section 283 of the Criminal Procedure Code. On a perusal of the judgment it is manifest that the learned Judge had referred to the evidence of the two prosecution witnesses, summarized the effect of their evidence and stated that there is consistency *inter se* in their testimony and that the evidence of one corroborates the evidence of the other. Emphasis on these aspects, taken together with the failure to impugn and contradict by cross-examination their testimony, supports to the hilt the findings reached by the learned trial judge. We see no merit in this appeal and, therefore, we proceed to dismiss the appeal and we affirm the finding, conviction and the sentence imposed on the accused.

KULATILAKA, J. – I agree.

Appeal dismissed.