IN THE SEYCHELLES COURT OF APPEAL

DENIS BARRA **APPELLANT**

versus

REPUBLIC **RESPONDENT**

Criminal Appeal No: 4 of 2001

[Before: Ayoola, P., Silungwe & Pillay, JJ.A]

Mr. Anthony Derjacques for the Appellant
Ms. Dora Zatte for the Respondent

JUDGMENT OF THE COURT

(Delivered by Pillay, JA)

The appellant had been convicted by the trial Court for the offence of attempt at murder by firing twice at the complainant who was driving his taxi at Barbarons, contrary to Section 207(a) of the Penal Code and sentenced to 16 years' imprisonment. He is now appealing against his conviction and sentence.

All the grounds of appeal against conviction raise the issue of the requisite mens rea or intention of the appellant with regard to the offence of attempt at murder.

Section 207(a) of the Penal Code reads as follows:-

> "Any person who –
> (a) attempt unlawfully to cause the death of another;
> (b)...
> is guilty of a felony, and is liable to imprisonment for life."

The relevant part of Section 377, for the purposes of this appeal, is as follows:-

> "Where a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intentions by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.
>
> ...
> ..." (the emphasis is ours)

It is quite clear from Section 377 that mens rea or intention is required for the attempt of committing any offence. For the purposes of Section 207(a) of the Penal Code, however, the intention must be to cause the death of another or to kill another. This is made quite clear in **Whybrow (1951) Criminal Appeal Reports 141.** Goddard, Lord Chief Justice spoke (at pp 146-147) about the intention required in a case of murder and that required in one of attempted murder as follows:-

> "In murder the jury is told – and it has always been the law – that if a person wounds another or attacks another either intending to kill or intending to do grievous bodily harm, and the person attacked dies, that is murder, the reason being that the requisite malice aforethought, which is a term of art, is satisfied if the attacker intends to do grievous bodily harm. Therefore, if one person attacks another, inflicting a wound in such a way that an ordinary, reasonable person must know that at least grievous harm will result, and death results, there is the malice aforethought sufficient to support the charge of murder. But, if the charge is one of attempted murder, the intent becomes the principal ingredient of the crime. It may be said that the law, which is not always logical, is somewhat illogical in saying that, if one attacks a person intending to do grievous bodily harm and death results, that is murder, but that if one attacks a person and only intends to do grievous bodily harm, and death does not result, it is not attempted murder, but wounding with intent to do grievous bodily harm. It is not really illogical because, in that particular case, the intent is the essence of the crime while, where the death of another is caused, the necessity is to prove malice aforethought, which is supplied in law by proving intent to do grievous bodily harm" (the underlining is ours).

In Smith and Hogan, Criminal Law, (6th edition) at page 287, the learned authors had this to say:-

> "Where, as is commonly the case, the complete offence may be committed with mens rea falling short of an intention to commit the offence, the requirements of the law on a charge of attempt are stricter. An intention to cause grievous bodily harm is a sufficient mens rea for murder, but that is plainly not an intent to commit murder and so is insufficient on a charge of attempted murder.

No wonder that Justice Ayoola in his book, the ***Seychelles Digest of Supreme Court Cases on Criminal Law and General Principles***, stated that:-

> "To constitute an attempt the act done must be immediately and not merely remotely, connected with the commission of the offence. The mental element required to make a man guilty of an attempt to commit an offence is often, if not invariably, greater than that required for the full offence" (the emphasis is ours).

Turning to the facts of the present case, we hold that, as correctly submitted by learned Counsel for the appellant, there were many items of evidence which showed beyond doubt that the appellant never had the intention to cause the death of the complainant. Among them were the following:-

(a) The appellant and the complainant were complete strangers to each other and there was no motive for the appellant firing at the complainant;

(b) the complainant just happened to drive his vehicle at the spot where the appellant had indiscriminately fired at bushes, trees and, when he fired twice at the complainant, a sole bullet hit at the rear door of the complainant's car on his left hand side and the complainant was injured by a ricochet of the bullet.

(c) the appellant had been under the influence of alcohol at the relevant time; and

(d) the appellant who was a soldier and trained to fire with precision and at specific targets did not fire at the chest of the complainant.

For the reasons given, we consider that the trial Court was wrong to have found on the evidence on record that the appellant had been guilty of the offence of attempt to murder or to cause the death of the complainant, contrary to Section 207(a) of the Penal Code. We consequently allow the appeal and quash the conviction and sentence of the appellant.

E. O AYOOLA	**A. M. SILUNGWE**	**A. G. PILLAY**
PRESIDENT	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**

Dated at Victoria, Mahe this 15th. day of ***April*** 2002.