IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Criminal Appeal No. 0011 of 2018

In the matter between

UGNDA **APPELLANT**

And

1. LABEJA JOHN

2. OPIYO DENIS

3. OJOK PATRICK

4. OJOK PETER **RESPONDENTS**

Heard: 23 June, 2020.
Delivered: 14 August, 2020.

Criminal Law *— Attempted murder C/s 204 (a) of The Penal Code Act — There should be proof of a substantial or direct act done toward killing another person, with the intention of killing the victim and that the accused did or participated in commission of the act— An accused who does or omits to do an act for the purpose of carrying out a murder, is guilty of an attempt to commit that crime whether or not it was possible in the circumstances to commit it. — Unlike offences that require classification of the degree of injury inflicted, the court can safely make a determination, without the help of some medical or scientific evidence that a substantial or direct act was done towards killing another person. Intention may be inferred from evidence showing that the accused purposely meant to cause the victim bodily harm knowing it is likely to cause his or her death, and reckless whether death ensues or not. — However, in cases where the evidence discloses a possible defence of self-defence, the onus remains upon the prosecution to establish that the accused is guilty of the crime and the onus never shifts to the accused person — Doing grievous harm C/s 219 of The Penal Code Act — In the case of grievous harm, the injury to health must be permanent or likely to be permanent, the injury must be "of such a nature as to cause or be likely to cause" permanent injury*

to health. An injury that has no consequence upon the functioning of the body does not involve impairment of "health." — The evidence must therefore show a volitional act, done for the purpose of causing harmful or offensive contact with another person or under circumstances that make such contact substantially certain to occur, and that such contact occurred in fact.

Evidence *— Grave inconsistencies and contradictions unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected. Minor ones unless they point to deliberate untruthfulness will be ignored.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondents were jointly charged with two counts; in the first Count they were charged with the offence of Attempted murder C/s 204 (a) of *The Penal Code Act*. It was alleged that the respondents on 8th August, 2014 at Te-store village, Lalogi sub-county in Gulu District, attempted unlawfully to cause the death of Odong Isaac. In the second Count they were charged with the offence of Doing grievous harm C/s 219 of *The Penal Code Act*. It was alleged that the respondents on 8th August, 2014 at Te-store village, Lalogi sub-county in Gulu District, attempted unlawfully to cause the death of Okello Francis. All the respondents were acquitted of both counts.

[2] The prosecution case was that the complainants are father and son. The respondents are a neighbouring family. They own adjoining land separated by a common boundary. On 8th August, 2014 a dispute arose between them, the complaints contending that the third respondent Ojok Patrick had trespassed onto their land. A scuffle ensued during which the second complainant sustained a wound on the upper part of his thigh inflicted by a spear while the first complainant was hit on the head and he lost consciousness. The prosecution contended the respondents were the aggressors.

[3] In their respective defences, each of the respondents denied the accusation. They claimed that the complaints were the aggressors. They managed to disarm the second complainant and it is during that process that he was hurt.

Judgment of the court below.

[4] In his judgment, the trial Magistrate found that the prosecution did not adduce evidence to prove that P.W.1 Odong Isaac was injured and that P.W.2 Okello Francis sustained grievous harm. It is most likely that P.W.2 Okello Francis was injured by his own spear during a scuffle over land. The evidence on record could not sustain a conviction. Each of the respondents was accordingly acquitted of both counts.

[5] Counsel for the appellant filed a notice of appeal but did not file a memorandum of appeal nor submissions in support of the appeal, despite having been notified and given a month's period to do so. Consequently, neither did the respondents file submissions. However, considering that under section 28 (1) of *The Criminal Procedure Code Act*, a criminal appeal is commenced by a notice in writing signed by the appellant or an advocate on his or her behalf, it was incumbent upon this court to consider the merits of the appeal, despite the lapses of the appellant.

Duties of the first appellate court.

[6] This being a first appeal, this court is under a duty to reappraise the evidence, subject it to an exhaustive scrutiny and draw its own inferences of fact, to facilitate its coming to its own independent conclusion, as to whether or not, the decision of the trial court can be sustained (see *Bogere Moses v. Uganda S. C. Criminal Appeal No.1 of 1997* and *Kifamunte Henry v. Uganda, S. C. Criminal Appeal No.10 of 1997*, where it was held that: "the first appellate Court has a duty to review the evidence and reconsider the materials before the trial judge.

The appellate Court must then make up its own mind, not disregarding the judgment appealed against, but carefully weighing and considering it").

[7] An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination, (see *Pandya v. Republic [1957] EA. 336*) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (see *Shantilal M. Ruwala v. R. [1957] EA. 570*). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (see *Peters v. Sunday Post [1958] E.A 424*).

Ingredients of the offence of attempted murder,

[8] For the respondents to be convicted of the offence of Attempted murder C/s 204 (a) of *The Penal Code Act*, the prosecution had to prove each of the following essential ingredients beyond reasonable doubt;

1. A substantial or direct act done towards killing another person.
2. Done with the intention of killing the victim.
3. The accused participated in commission of the act.

1st issue; whether a substantial or direct act was done towards killing another person.

[9] When a person, intending to commit an offence, begins to put his or her intention into execution by means adapted to its fulfilment, and manifests his or her intention by some overt act, but does not fulfil his or her intention to such an extent as to commit the offence, he or she is deemed to attempt to commit the offence (see section 336 (1) of The Penal Code Act). Merely preparing to kill someone or planning to do so is not sufficient to satisfy the elements of

attempted murder. The required direct act may consist of using a deadly weapon against another and either inflicting serious wounds or targeting vulnerable parts of the body most likely to result in death, such the chest or head. An accused who does or omits to do an act for the purpose of carrying out a murder, is guilty of an attempt to commit that crime whether or not it was possible in the circumstances to commit it.

[10] P.W.1 Odong Isaac testified that he was assaulted from the home of his son Okello Francis at around 3.00 pm. He was hit by A1 Labeja John on top of the head with a stick and he fell down unconscious. When he came round he found that he was bleeding from a wound on the head. He was taken by motorcycle to Opit Health Centre where he was admitted for three days and the wound was stitched.

[11] Unlike offences that require classification of the degree of injury inflicted, the court can safely make a determination, without the help of some medical or scientific evidence that a substantial or direct act was done towards killing another person. An assault in which a weapon is directed at a vulnerable part of the body and delivered with such force that it results in the victim losing consciousness and being admitted for three days at a medical facility, is a life threatening act. One who deliberates attacks another with reason to believe that death is a likely result, will be deemed to have attempted to murder, in the event that death does not result.

[12] This evidence was not discredited by cross-examination and neither was any other evidence adduced to controvert it. I therefore find that the trial court misdirected itself when it failed to find that the prosecution had proved beyond reasonable doubt that a substantial or direct act was done towards killing another person.

2nd issue; whether the act was done with the intention of killing the victim.

[13] Merely causing serious bodily harm or disfigurement to someone is not sufficient to prove attempted murder unless there is evidence of the actual intent to kill the person. Criminal intent to kill is a required element for an attempted murder charge. In order to prove that the accused acted with intent to kill, the prosecution must prove that the accused made the decision to kill another person, or acted in such a reckless indifference for human life that killing a person was a real possibility. Where the actions of the accused are so dangerous, that death or serious injury is a virtual certainty, (barring some unforeseen intervention) as a result of the accused's actions and that the accused appreciated that such was the case, intention to kill may be inferred (see *R v. Nedrick (Ransford Delroy) (1986) 8 Cr. App. R. (S.) 179* and *R v. Woollin [1999] AC 82*).

[14] Intention may be inferred from evidence showing that the accused purposely meant to cause the victim bodily harm knowing it is likely to cause his or her death, and reckless whether death ensues or not. In the absence of exceptional circumstances, a sane person who engages in conduct which would ordinarily give rise to criminal liability does so consciously and voluntarily. Behaviour prior, during and after the incident may be shown to be consistent with a direct intent to murder or a reckless disregard for life, having regard to all the facts of the case, including the nature of the accused's actions during the relevant period. A conviction for attempted murder could be sustained where the prosecution proves on the part of the accused either an intent to kill the potential victim or an intent to cause bodily harm which he knew was likely to cause death and was reckless whether death ensued or not.

[15] P.W.1 Odong Isaac testified that he was attacked and hit on top of the head with a stick and he fell down unconscious, bleeding from the wound, which wound had to be stitched. To refute that, D.W.1 Labeja John testified that it is the

complainant P.W.1 Odong Isaac who came with his entire family to attack the 3rd respondent Ojok Patrick from his garden. He responded to the alarm and found Okello Francis was carrying a spear but was disarmed and the spear was taken to Lalogi Police Post. D.W.2 Opiyo Denis testified that heard an alarm and rushed to the scene. He found that Odong Isaac and his entire clan had attacked the 3rd respondent Ojok Patrick testified that he was in his garden when Okello Francis demanded to know why he was clearing the garden. He began to abuse the accused and he later was joined by other members of his family. The rest of the respondents too responded to the commotion and a fight broke out. It is not true that he speared the complainant.

[16] D.W.4 Ojok Peter testified that when he responded to the alarm made by Athe 4th respondent, he found that he had been attacked by the family of the complainants who were armed with a spear. They were disarmed and the spear was taken to the police. D.W.5 Ayoo Pereji testified that she responded to an alarm made by the 3rd respondent only to find him surrounded by the complainants and members of their family. Okello Francis was armed with a spear and a stick. He was disarmed. The complainants were hurt during the scuffle aimed at disarming them. D.W.6 Ajok Christine testified that she overheard a quarrel between A3 and Okello Francis with the latter demanding that the former vacates the garden. She drew near and shortly Odong Isaac too came. She raised an alarm after a scuffle ensued during which Okello Francis was disarmed of a spear which was then taken to the police. No one was injured during the scuffle.

[17] The defence of self-defence is a total defence provided under Section 15 of *The Penal Code Act*. Under that section, the principles of English law apply. Under English law there is a broad distinction made where questions of self-defence arise. If a person against whom a forcible and violent felony is being attempted repels force by force and in so doing kills the attacker the killing is justifiable, provided there was a reasonable necessity for the killing or an honest belief

based on reasonable grounds that it was necessary and the violence attempted by or reasonably apprehended from the attacker is really serious. It would appear that in such a case there is no duty in law to retreat, though no doubt questions of opportunity of avoidance of disengagement would be relevant to the question of reasonable necessity for the killing.

[18] In other cases of self-defence where no violent felony is attempted a person is entitled to use reasonable force against an assault, and if he is reasonably in apprehension of serious injury, provided he does all that he is able in the circumstances, by retreat or otherwise break off the fight or avoid the assault, he may use such force, including deadly force, as is reasonable in the circumstances. In either case if the force used is excessive, but if the other elements of self-defence are present there may be a conviction of manslaughter.

[19] The question whether a person acted in self-defence or not is one of fact and each case must be considered and judged on its facts and surrounding circumstances as a whole. If a person against whom a forcible and violent felony is being attempted repels force by force and in so doing kills the attacker the killing is justifiable, provided there was a reasonable necessity for the killing or an honest belief based on reasonable grounds that it was necessary and the violence attempted by or reasonably apprehended from the attacker is really serious. It would appear that in such a case, there is no duty to retreat, though no doubt questions of opportunity of avoidance or disengagement would be relevant to the question of reasonable necessity for the killing.

[20] It is recognised that though a person threatened need not take to his heels and run in a dramatic way, but he must demonstrate that he is prepared to temporise and disengage and perhaps to make some physical withdrawal and this is necessary as a feature of the justification of self-defence (see *Selemani v. Republic [1963] EA 442* and *R. v. Julien [1969] 2 ALL.E.R. 856*). In cases where the evidence discloses a possible defence of self-defence, the onus remains

upon the prosecution to establish that the accused is guilty of the crime and the onus never shifts to the accused person to establish this defence any more than it is for him to establish provocation or any other defence apart from that of insanity (see *Oloo S/o Gai v. R. [1969] EA 86; R v. Wheeler [1967] 1 WLR 1531 and Chan Kau v. R. [1955] 2 WLR 192*).

[21] The common law extends the right of self-defence to defend against any number of assailants, who are acting together, when the accused or a third party whom the accused intends to defend, is in danger of serious bodily harm. When two or more persons undertake overt action to harm another, the victim may use an appropriate amount of force to defend himself against either aggressor, or all of them. If supported by the evidence, the accused is entitled to the court's consideration of threatened harm from all assailants, not just the one against whom the accused may have retaliated. A person who is attacked or believes that he is about to be attacked may use such force as is both necessary and reasonable in order to defend himself. If that is what he does then he acts lawfully. A person about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike (see *R v. Beckford [1988] 1 AC 130*).

[22] Lawful self-defence exists when (1) the accused reasonably believes that he or she is in imminent danger of an attack which causes reasonable apprehension of death or grievous hurt; (2) the accused reasonably believes that the immediate use of force is necessary to defend against that danger, and (3) the accused uses no more force than is reasonably necessary to defend against that danger. In no case does it justify the inflicting of more harm than it is necessary to inflict for the purpose of defence. It is accepted proposition of law that a person cannot avail himself of the plea of self-defence in a case of homicide when he was himself the aggressor and wilfully brought on hint without legal excuse, the necessity of killing. An accused person raising this defence is not expected to prove, beyond reasonable doubt, the facts alleged to constitute the defence.

Once some evidence is adduced as to make the defence available to the accused, it is up to the prosecution to disprove it. The defence succeeds if it raises some reasonable doubt in the mind of the court as to whether there is a right of self-defence.

[23] In a bid to establish this defence, D.W.1 Labeja John testified that it is the complainant P.W.1 Odong Isaac who came with his entire family to attack Athe 3rd appellant Ojok Patrick from his garden. Okello Francis was carrying a spear but was disarmed and the spear was taken to Lalogi Police Post. D.W.2 Opiyo Denis testified that he heard an alarm and rushed to the scene. He found that Odong Isaac and his entire clan had attacked the 3rd respondent. On his part, the 3rd respondent Ojok Patrick testified that he was in his garden when Okello Francis demanded to know why he was clearing the garden. He began to abuse the respondent and he later was joined by other members of his family. The rest of the respondents too responded to the commotion and a fight broke out. It is not true that he speared the complainant.

[24] D.W.4 Ojok Peter testified that when he responded to the alarm made by the 4th respondent he found that he had been attacked by the family of the complainants who were armed with a spear. They were disarmed and the spear was taken to the police. D.W.5 Ayoo Pereji testified that she responded to an alarm made by the 3rd respondent only to find him surrounded by the complainants and members of their family. Okello Francis was armed with a spear and a stick. He was disarmed. The complainants were hurt during the scuffle aimed at disarming them. D.W.6 Ajok Christine testified that she overheard a quarrel between the 3rd respondent and Okello Francis with the latter demanding that the former vacates the garden. She drew near and shortly Odong Isaac too came. She raised an alarm after a scuffle ensued during which Okello Francis was disarmed of a spear which was then taken to the police. No one was injured during the scuffle.

[25] To refute the defence, the prosecution relied on the evidence of P.W.1 Odong Isaac who testified that he was assaulted from the home of his son P.W.2 Okello Francis at around 3.00 pm. He was hit by the 1st respondent, Labeja John who approached him from in front. He was hit on top of the head with a stick and he fell down unconscious. The 2nd respondent Opiyo Denis speared P.W.2 Okello Francis on the right thigh and he too was taken to hospital. The 3rd respondent Ojok Patrick participated in beating up people at the home of P.W.2 Okello Francis. The 4th respondent was part of the group that attacked the home. The respondents are close neighbours. P.W.2 Okello Francis testified that it is the 1st respondent Labeja John who hit P.W.1 Odong Isaac. The 2nd respondent Opiyo Denis run after him and speared him on the left thigh. It is the 3rd respondent Ojok Patrick who began the fight when he mobilised the rest for the attack.

[26] It is a general principle that if the accused initiates an attack against another, the accused cannot claim self-defence (see D.C. Ormerod and K. Laird*, Smith and Hogan's Criminal Law* (14th Ed, 2015, OUP) at 446). Under the common law, an aggressor is not justified in using force to protect himself from the counterattack that he provoked by unlawful force. Generally, one loses the right to defend himself from an attack and becomes an initial aggressor when he is the first to physically attack another or initiates the fray by threatening to physically attack another. This rule has two exceptions.

[27] The accused can be the initial aggressor and still raise a self-defence claim if the adversary responds with excessive force under the circumstances (see *R v. Rashford [2005] EWCA Crim 3377; [2005] All ER (D) 192*), or if the accused withdraws from the attack and in such a manner that his adversary knows or should know that he or she desires to withdraw and discontinue the conflict, but the adversary persists. The necessity rule provides that force should not be used against another person unless, and only to the extent that, it is necessary. Where the use of force is unnecessary because the aggressor has started to retreat, then the defence will not be available (see *R v. Clegg [1995] 1 AC 482*).

[28] In the instant case, each of the two parties accused the other of being the aggressor. However, the respondents never put their version to the prosecution witnesses. It is trite that the accused's case should be put to the prosecution witnesses in cross-examination. In other words, it is desirable that what the accused relies upon be put or suggested to the prosecution witnesses so that they can refute or explain (see *Browne v. Dunn (1894) 6 R 67 (HL*). That rule of practice is necessary both to give the witness the opportunity to refute or explain or otherwise deal with that other evidence, or the inferences drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn.

[29] When the accused's version is not put to the prosecution witnesses during cross-examination, the Court could draw a reasonable inference that what the accused finally said in his or her evidence did not form his instructions to his counsel, and hence was an afterthought. An accused who fails to avail himself or herself of the opportunity to put his case to the prosecution witnesses during cross-examination, cannot expect that his or her story kept a secret until when he is giving own evidence, will receive much credit.

[30] On the other hand, the majority of the defence witnesses testified that P.W.2 Okello Francis being the aggressor, was disarmed and the spear was taken to the police. In their version, they did not account for the injuries he sustained. Whereas D.W.5 Ayoo Pereji testified that the complainants were hurt during the scuffle aimed at disarming them, D.W.6 Ajok Christine was categorical that no one was injured during the scuffle. These discrepancies coming from persons who claimed to have witnessed the same incident were never explained, yet they were grave and related to a material fact; the causation of injuries sustained by the victims.

[31] It is settled law that grave inconsistencies and contradictions unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected. Minor ones unless they point to deliberate untruthfulness will be ignored (see *Alfred Tajar v. Uganda, EACA Cr. Appeal No.167 of 1969, Uganda v. F. Ssembatya and another [1974] HCB 278, Sarapio Tinkamalirwe v. Uganda, S.C. Criminal Appeal No. 27 of 1989, Twinomugisha Alex and two others v. Uganda, S. C. Criminal Appeal No. 35 of 2002* and *Uganda v. Abdallah Nassur [1982] HCB*). In light of those unexplained contradictions, the trial court ought to have rejected the defence version of circumstances in which the victims sustained injuries.

[32] Even if the respondents had been attacked, a person may not use deadly force to combat an imminent deadly assault if some non-deadly response will apparently suffice, such as situations where the accused knows or should know that he could avoid death by disarming the aggressor, or by using non-deadly force. A person is not regarded as having acted reasonably in the circumstances if the degree of force used was grossly disproportionate.

[33] Whether the degree of force used in any case is reasonable is to be considered by reference to the circumstances as the accused believed them to be. It is difficult for a person in circumstances such as these to measure precisely what level of force is required, and if that person does no more than seems honestly and instinctively to be necessary that is itself potent evidence that the force used was proportionate. It was the testimony of P.W.2 Okello Francis that he was attacked as he was escaping the attack while P.W.1 had no time to react. I find that this evidence was not discredited by cross-examination. The evidence adduced to controvert it did not establish the defence of self-defence. There was therefore ample evidence establishing an intention of killing the victim.

[34] By hitting the complainant on the head with such a force as to result in unconsciousness is a reckless act that demonstrates a blatant disregard for

human lives. Such conduct is of a person purposely intending to cause the victim bodily harm knowing it is likely to cause his death, and reckless whether death ensues or not. The trial court misdirected itself when it failed to find that the prosecution had proved beyond reasonable doubt that the act was done with the intention of killing the victim, and not in self-defence. The last element is common to both counts and will be considered last.

Ingredients of the offence of Doing grievous harm.

[35] For the respondents to be convicted of the offence of Doing grievous harm C/s 219 of *The Penal Code Act*, the prosecution had to prove each of the following essential ingredients beyond reasonable doubt;

1. The victim sustained grievous harm.
2. The harm was caused unlawfully.
3. The accused caused or participated in causing the grievous harm.

3rd issue; whether the victim sustained grievous harm.

[36] Bodily harm is any physical injury that interferes with health. Section 2 (f) of The Penal code Act defines "grievous harm" as any harm which amounts to a maim or dangerous harm or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement or to a permanent or serious injury to any external or internal organ, membrane or sense. The differences between the two definitions are (1) that in the case of grievous harm, the injury to health must be permanent or likely to be permanent, whereas, to amount to bodily harm, the injury to health need not be permanent (2) a mental injury may amount to grievous harm but not to bodily harm (3) in order to amount to bodily harm, the physical injury must "interfere with" health, whereas in the case of grievous harm, the injury must be "of such a nature as to cause or be likely to cause" permanent injury to health. Both definitions use the word "health" which is not defined by the Act.

[37] The prosecution will ordinarily show that the grievous harm occurred by adducing the victim's testimony or through medical records, or the testimony of doctors, or some combination thereof. The question of whether the injury amounts to "bodily harm" is one of degree, which can only be decided by reference to the facts in each case. In determining this question, it is necessary to focus on the injury and its immediate consequences. An injury that has no consequence upon the functioning of the body does not involve impairment of "health." The fact that the victim has been left with only a cosmetic disability is irrelevant if the immediate consequences of the injury interfered temporarily with her health. It is relevant also to consider the nature of any treatment received and whether any part of the body was unable to perform its functions fully, either as a result of pain or otherwise and there may well be other relevant matters. The ordinary sense of the term health focuses on the functioning of the body, which of course may often be impaired by disease or illness but also by deliberately inflicted injury.

[38] In, *Pollyanna Nungari Wayne v. Michael Gerard Boldiston, (1992) 108 FLR 252; (1992*) *85 NTR 8*, the victim sought medical treatment, and a number of stitches were inserted to stem the flow of blood. The victim was also given painkillers, and she was in a distressed condition whilst at the hospital. She felt a lot of pain, and was dizzy for a week, her ability to chew food properly was interfered with for about a week, her ability to move her eyes was temporarily interfered with by pain, and her ability to speak normally was also temporarily affected. In these circumstances the Supreme Court of the Northern Territory of Australia found that the assault did interfere with her health and therefore did result in bodily harm within the meaning of that expression in the Code. The appellant reached over the counter at the complainant's place of work and slashed her across the face with the broken glass, in retaliation for the complainant having hit her in the face with a stone three days before.

[39] P.W.2 Okello Francis testified that he was assaulted from his home. He was speared on the left thigh. They struggled over the shaft which got broken leaving the spear lodged in his flesh. He was carried to Lalogi Health Centre IV for treatment. He was stitched at a cost of shs. 60,000/= Unfortunately no medical evidence was adduced about the classification of the injury. This omission is significant in view of settled law that medical evidence is necessary to ascertain the nature of the harm (see *Uganda v. Eboru s/o Emeu [1979] HCB 169*). That the injury interfered temporarily with the health of the complainant is not in doubt but that it was life threatening was not proved. The prosecution did not prove classification as grievous harm but only as harm. The evidence supports an element of common assault.

4th issue; <u>whether that harm or injury was caused unlawfully</u>.

[40] This requires proof of an intentional wrongful act against another without legal justification or excuse and may be as a result of motives such as anger, hatred or revenge. Exhibiting aggressive, threatening behaviour toward another or expressing a threat to cause physical harm resulting in the complainant harbouring reasonable fear for his or her physical safety is an unlawful or wrongful act. Threat of harm generally involves a perception of injury. Causing real physical harm to someone else with intent of causing physical harm without his or her consent is also an unlawful or wrongful act. Assault and battery usually occur together. Physical contact with the body of the victim graduates the crime of assault into one of battery.

[41] The evidence must therefore show a volitional act, done for the purpose of causing harmful or offensive contact with another person or under circumstances that make such contact substantially certain to occur, and that such contact occurred in fact. Justifications would include consent of the victim and self-defence, defence of others, or defence of property. To prove self-defence, the accused must show the assault was reasonably necessary to protect the

accused against equal or greater bodily harm that would have been inflicted by the victim.

[42] P.W.2 Okello Francis testified that he was assaulted from his home. He was speared on the left thigh. They struggled over the shaft which got broken leaving the spear lodged in his flesh. The respondent's raised the defence of self-defence. This defence has been considered at length when evaluating evidence relating to the first count and has been rejected. There is therefore no evidence suggesting an excuse or justification for the attack on the complainant. The prosecution proved beyond treasonable doubt that the injury was inflicted during an attack that was unlawful.

5th issue; whether all or any of the respondents participated in attacking the victim in the first count and causing the injury to the victim in the second count.

[43] There should be credible direct or circumstantial evidence placing the accused at the scene of the crime as the perpetrator or an active participant in the commission of the offence. None of the respondents denied having been at the scene of crime and participating in the scuffle.

[44] Nevertheless there is evidence of identification of both P.W.2 Okello Francis and P.W.1 Odong Isaac both of whom testified that they saw an recognised the respondents as their assailants. Where prosecution is based on the evidence of an identifying witness under difficult conditions, the Court must exercise great care so as to satisfy itself that there is no danger of mistaken identity (see *Abdalla Bin Wendo and another v. R (1953) E.A.C.A 166*; *Roria v. Republic [1967] E.A 583*; *Abdalla Nabulere and two others v. Uganda [1975] HCB 77*; and *Bogere Moses and another v. Uganda, S.C. Cr. Appeal No. l of 1997)*. In doing so, the court considers; whether the witness was familiar with the accused, whether there was light to aid visual identification, the length of time taken by the

witness to observe and identify the accused and the proximity of the witness to the accused at the time of observing the accused.

[45] The two witnesses knew the respondents very well as their neighbours. The attack occurred during day time at around 3.00 pm. It involved assaults at close range. Although P.W.1 Odong blacked out when he was hit on the head, by that time he had recognised participants in the attack and was able to narrate the manner of each one's participation. I therefore find that the evidence f identification is free from error or the possibility of mistake.

[46] Under section 19 of *The Penal Code Act*, there are different modes of participation in crime; direct perpetrators, joint perpetrators under a common concerted plan, accessories before the offence, etc. This includes every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence and every person who aids or abets another person in committing the offence. Each of such persons is deemed to have taken part in committing the offence and to be guilty of the offence and may be charged with actually committing it. Section 19 (1) (b) and (c) of the *Penal Code Act*, lists persons who are deemed to have taken part in committing an offence and to be guilty of the offence and who may as a consequence be charged with actually committing it. This includes every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence and every person who aids or abets another person in committing the offence.

[47] Furthermore, according to section 20 of *The Penal Code Act*, when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence (see *Uganda v. Sebaganda and s/o Miruho [1977] HCB 8*; *R v. Salmon [1880] 6 Q.B 79* and *Nanyonjo Harriet and another v. Uganda, S.C.*

Criminal Appeal No.24 of 2002. In order to make the doctrine of common intention applicable, it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence. An unlawful common intention does not imply a pre-arranged plan. Common intention may be inferred from the presence of the accused persons, their actions and the omission of any of them to disassociate himself from the assault (see *No.441 P.C. Ismail Kisegerwa and No.8674 P.C. Bukombe v. Uganda [1979] 81* and *Bumbakali Lutwama and four others v. Uganda, S.C. Cr. Appeal No. 38 of 1989*). By virtue of both sections 19 and 20 of *The Penal Code Act*, it did not matter who among the respondents inflicted the injuries.

[48] Nevertheless, the prosecution having failed to prove that the injury inflicted on the victim in count two was life threatening, the element of grievous harm was thus not proved. Accordingly I find each of the respondents not guilty of the offence of Doing grievous harm C/s 219 of *The Penal Code Act* charged in the second count and each one of the respondents is accordingly acquitted of that offence.

[49] However, according to section 145 of *The Magistrates Courts Act*, when a person is charged with an offence and facts are proved which reduce it to a minor cognate offence, he or she may be convicted of the minor offence although he or she was not charged with it (see also *Uganda v. Leo Mubyazita and two others [1972] HCB 170; Paipai Aribu v. Uganda [1964] 1 EA 524 and Republic v. Cheya and another [1973] 1 EA 500*). The minor offence sought to be entered must belong to the same category with the major offence.

[50] Section 145 of *The Magistrates Courts Act* envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence and may then, in its

discretion, convict of that offence. In the instant case, the only distinction between the offence of Doing grievous harm C/s 219 of *The Penal Code Act* and the offence of Assault occasioning actual bodily harm C/s 236 of *The Penal Code Act*, is that the injury in the firmer is life threatening while in the latter it is not. Therefore by a process of subtraction, the offence of Assault occasioning actual bodily harm C/s 236 of *The Penal Code Act* is minor and cognate to that of Doing grievous harm C/s 219 of *The Penal Code Act*, and a person indicted with the latter offence and facts are proved which reduce it to the former, he or she may be convicted of the minor offence although he or she was not indicted with it. The circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by that charge constitute the minor offence too. The Charge under section 219 of *The Penal Code Act* gave the accused notice of all the circumstances constituting the offence under section 236 of *The Penal Code Act* for which he can be convicted.

Order:

[51] In the circumstances, I find that had the trial magistrate properly directed himself he would have convicted each of the respondents for the offence of Attempted murder C/s 204 (a) of *The Penal Code Act* and the offence of Assault occasioning actual bodily harm C/s 236 of *The Penal Code Act.* For those reasons, the appeal is allowed. The judgment of the trial court is set aside. Instead each of the respondents is found guilty and is accordingly convicted of the offence of Attempted murder C/s 204 (a) of *The Penal Code Act* charged in count one. Furthermore, each of the respondents is found guilty and is accordingly convicted of the offence of Assault occasioning actual bodily harm C/s 236 of *The Penal Code Act,* as a minor and cognate offence to that charged in the second count.

[52] Since the judgment has been delivered electronically, consequently a warrant of arrest returnable on 10th September, 2020 at 2.30 pm is issued for purposes of producing the respondent before court for sentencing.

Delivered electronically this 14th day of August, 2020 ……Stephen Mubiru……..

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant :

For the respondent :