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RESEARCH ARTICLE

One Offence, Different Intentions: The Judicial Controversy of the *Mens Rea* for the Offence of Attempted Murder in Botswana

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Abstract
Certainty is a cornerstone of every criminal justice system. In instances where controversy arises as to the application of any law, it is essential for it to be addressed promptly. Contrary to this need for certainty, there is judicial ambiguity regarding the *mens rea* for the offence of attempted murder in Botswana. There are cases which hold that the *mens rea* required is a specific intention to kill, and that nothing else suffices. However, some cases hold that an intention to cause grievous harm and recklessness are also sufficient. Unfortunately, the Court of Appeal, the apex court in Botswana, has made decisions that support each of these divergent positions. This article addresses the controversy of the *mens rea* for attempted murder in Botswana and argues that the Court of Appeal should resolve the issue by specifically overruling some of its previous decisions.

Keywords: *mens rea* for attempted murder; intention to kill; intention to cause grievous bodily harm; reliance on English criminal law

Introduction

Section 217 of the Botswana Penal Code holds that the offence of attempted murder is a separate offence.[1] In 2018, Parliament amended section 217 of the Penal Code and introduced a minimum mandatory sentence of ten years' imprisonment for the offence of attempted murder.[2] At the very least, this amendment is reflective of the fact that attempted murder is regarded as a serious offence. The introduction of the minimum mandatory sentence may be criticized for the extent to which it curtails the exercise of judicial discretion in sentencing.[3] However, it would be difficult to sustain an argument that the offence of attempted murder does not warrant imprisonment for ten or more years. In *Rakala v The State*,[4] the Court of Appeal observed that, contrary to popular expectation,

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1 Cap 08:01.
2 Penal Code (Amendment) Act (Act 21, 2018). The amendment also introduced a minimum mandatory sentence of 15 years' imprisonment for murder with extenuating circumstances.
3 BJ Dambe "Legislative erosion of judicial discretion in relation to murder with extenuating circumstances in Botswana: A critique of the amendment of section 203(2) of the penal code" (2021)32 *Criminal Law Forum* 285.
4 2011 (2) BLR 817 (CA).

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there should not be a large disparity between the sentence for murder and that for attempted murder. McNally JA pointed out that the difference in the moral blameworthiness of murder and attempted murder is often very negligible – the difference simply lies in the would-be killer's efficiency in executing his/her intention to kill.

To that end, in *State v Gabaakanye*,[5] the court noted that a sound sentencing policy should take very little notice, if any at all, of a factor which lies outside the control of the offender.[6] In *Magubane v The State*,[7] the trial court sentenced the accused to seven years' imprisonment for attempted murder, which the accused then appealed. The Court of Appeal took a dim view of the sentence and held that it was a disproportionately lenient sentence for an offence which, but for sheer luck of the victim in surviving, would have been a cold, calculated murder. Consequently, the Court of Appeal increased the accused's sentence to 14 years' imprisonment.[8] Granted, if a person forms the intention to kill another and proceeds to put that intention into action, that person must be punished sternly, irrespective of his/her failure to achieve the intended death of the victim.

The reprehensible nature of the offence of attempted murder does not detract from the requirement that the applicable laws must be crafted with clarity and applied with consistency and certainty. It has been noted that certainty of the law serves the purpose of guiding human conduct and that a law which is ambiguous or obscure fails to achieve this objective.[9] The objective of certainty is equally applicable to the manner in which laws are crafted by the legislature as to how the laws are ultimately interpreted and applied by the judiciary. The consequences of uncertainty in a law are equally undesirable whether the uncertainty is attributable to how a provision is drafted or to the misapplication of the provision by the courts. A survey of the decisions of the courts in Botswana reflects a concerning lack of consistency regarding the *mens rea* required for the offence of attempted murder. There is a set of decisions which holds that only a specific intention to kill is sufficient. These decisions hold that a person cannot be said to have had the required *mens rea* for attempted murder when the intention with which s/he acted was either an intention to cause grievous bodily harm or recklessness. However, another set of decisions holds that both an intention to cause grievous bodily harm and recklessness are sufficient to sustain a conviction for attempted murder. The approach behind this set of decisions is that the intention prescribed for the complete offence of murder in terms of section 204 of the Penal Code is adequate intention for the inchoate offence of attempted murder.

As far back as 1988, in *State v Basson and Another*, Aboagye J was of the view that "[t]he law is now settled that in order to sustain a conviction on a charge of attempted murder the prosecution must prove beyond reasonable doubt that the attempt made by the accused person was done with the specific intent to kill his victim."[10] Even in 1988, however, it would have been difficult to accept that the position on the *mens rea* required for the offence of attempted murder in Botswana was settled as requiring a specific intention to kill. This is because the Court of Appeal had earlier expressed a contrary position in *Sekuma Mukono v The State* (*Sekuma Mukono*),[11] where it held that an intention to cause grievous bodily harm would suffice as *mens rea* for attempted murder. Post 1988, the Court of Appeal has continued to render conflicting decisions on the *mens rea* for attempted murder. Consequently, in 2008, the High Court, in *State v Somolekae*

5 1986 BLR 437 (HC).

6 R Christopher "Does attempted murder deserve greater punishment than murder? Moral luck and the duty to prevent harm" (2004) 18 *Notre Dame Journal of Law, Ethics, and Public Policy* 417.

7 1991 BLR 286 (CA).

8 The court indicated that given the circumstances of the case, it would have imposed a sentence of 20 years' imprisonment but noted that it would be unjust to triple the sentence of the trial court.

9 DDN Nsereko *Criminal Law in Botswana* (2nd ed, 2015, Wolters Kluwer) at 60.

10 1988 BLR 452 (HC) at 456.

11 1964–1967 BLR 259 (CA).

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(*Somolekae*),[12] acknowledged the existence of the controversy regarding the intention required for attempted murder:

> "What is of great controversy is the position of the law. There are two opposed schools of thought. One is that for attempted murder there must be proof of an actual intention to kill while the other is that an intention to cause grievous bodily harm with an appreciation that there is some risk coupled with recklessness as to whether or not death results is sufficient".[13]

It is for that reason that, in 2014, in *State v Makgetla* (*Makgetla*),[14] the High Court observed, accurately so, that when it comes to an examination of the mental element required for the crime of attempted murder in Botswana, "our reported case law has not proved a model of consistency".[15] In 2009, in *State v Tautona* (*Tautona*),[16] having highlighted the existence of the controversy of the *mens rea* required for attempted murder, Makhwade J expressed his hope that the position would soon be clarified. Unfortunately, the controversy remains today, and courts continue to render conflicting decisions.

This article interrogates the judicial controversy of the *mens rea* for attempted murder in Botswana. It assesses the conflicting decisions with a view to discerning which approach is the appropriate one. In this regard, the paper observes that the position that both an intention to cause grievous bodily harm and recklessness are sufficient for attempted murder emanates from Botswana courts relying on South African cases on the point. On the other hand, the authorities holding that only a specific intention would suffice rely on English criminal law. We argue that in light of the provisions of section 2(2) of the Penal Code, it is inappropriate to rely on South African case law on a point on which it varies with English criminal law. For further guidance, we make reference to approaches adopted in other jurisdictions with comparable statutory provisions on the offence of attempted murder. The paper highlights the extent to which the Court of Appeal, as the apex court whose decisions are binding on the lower courts, has contributed to the controversy by rendering decisions which support either of the conflicting positions. Consequently, we make recommendations on how the Court of Appeal should intervene to resolve the controversy and ensure that there is certainty on the *mens rea* required for the offence of attempted murder. Furthermore, we assess whether there might be a need for legislative intervention in the event that the Court of Appeal does not resolve the controversy. Finally, we recommend that, pending a determinative resolution by either the Court of Appeal or the legislature, the Directorate of Public Prosecutions must play an active role in minimizing the effects of the controversy.

An intention to cause grievous bodily harm or recklessness as sufficient *mens rea* for attempted murder

As mentioned above, there are decided cases in Botswana in terms of which courts have held that an intention to cause grievous bodily harm was sufficient to sustain a conviction for attempted murder. The earliest Court of Appeal decision supporting this position is *Sekuma Mukono*.[17] In dealing with the *mens rea* required for attempted murder, the court held that "sufficient intent occurs when there is an appreciation that there is some risk to life coupled with recklessness as to whether the risk is fulfilled in death".[18] For reasons that will become apparent below, it is essential to highlight that the

12 2008 (2) BLR 217 (HC).
13 Id at 219.
14 2014 All Bots 317 (HC).
15 Id, para 20 of the judgment.
16 2009 All Bots 94 (HC).
17 *Sekuma Mukono*, above at note 11
18 Id at 259.

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Court of Appeal in *Sekuma Mukono* relied on a number of South African cases, particularly *Rex v Heubsch*.[19] This South African case has been followed in numerous decisions of the High Court which held that both an intention to cause grievous bodily harm and recklessness are sufficient *mens rea* for the offence of attempted murder.[20] Significantly, *Sekuma Mukono* was subsequently followed by the Court of Appeal itself in *Matthys v The State* (*Matthys*).[21] *Matthys* has also been followed by a number of decisions of the High Court endorsing the position that the *mens rea* for attempted murder necessarily includes the intent to kill or to cause grievous bodily harm required for murder.[22]

The authorities that accept an intention to cause grievous bodily harm and recklessness as sufficient *mens rea* for the offence of attempted murder contend that if such an intention is sufficient for the complete offence of murder, then it must be sufficient for attempted murder. Under section 204(a) of the Penal Code, a conviction for murder may be held if it is established that there was an intention to cause grievous bodily harm.[23] Furthermore, section 204(b) of the Penal Code provides for recklessness as sufficient malice aforethought for the offence of murder.[24] Adopting this reasoning, in *State v Magazine*,[25] Chinhengo J held as follows:

> "The evidence before the Court may not be sufficient to prove beyond any reasonable doubt that the accused actually intended to kill the baby. It did, however, prove beyond any shadow of doubt that she had the legal constructive intention contemplated by Section 202 read with Section 204(b) of the Penal Code, to kill the baby. The intention was satisfied by conduct which was accompanied by recklessness as to its consequences, in this case recklessness as to whether the baby would die".

Accordingly, the court convicted the accused of attempted murder. Chinhengo J adopted the same approach in *State v Kgatiso*,[26] holding that the accused's actions, in setting fire to a hut with occupants inside after securing the door from outside, at the very least amounted to the definition of malice aforethought required for murder in terms of section 204(b) of the Penal Code, that being recklessness. To this end, the court rejected the argument that only a specific intention to kill would suffice for attempted murder. From the reasoning of the court, it is clear that the judge equated the *mens rea* required for attempted murder with that required for murder. It is for that reason that the court repeatedly referenced section 204 of the Penal Code, the provisions of which deal with the intention required for murder, despite the fact that the court was dealing with a case of attempted murder. Similarly, in *State v Dioka*,[27] the court held that recklessness was also sufficient intention for the purposes of attempted murder. In doing so, the court relied on the definition of malice aforethought under section 204 of the Penal Code without making a

19 1953 (2) SA 571. The court also referenced the South African cases of *Rex v Thibani* 1949 (4) SA 720 (AD) and *R v Sofianos* 1945 AD 809 (AD).

20 *State v Ntollo* 2012 All Bots 133 (HC); *State v Malongwa and Another* 2007 (3) BLR 213 (HC); *State v Matthys* 2003 (1) BLR 528 (HC).

21 2005 (1) BLR 69 (CA).

22 *State v Othusitse* 2016 All Bots 364 (HC); *State v Thabakanaka* 2015 All Bots 269 (HC); *State v Maeke* 2016 All Bots 380 (HC); *State v Banyantsang* 2007 All Bots 284 (HC).

23 *Rannatshe v The State* 1991 BLR 300 (CA); *Ndlovu v The State* 1995 BLR 432 (CA); *Masono v The State* 2000 (1) BLR 46 (CA); *Mojagi v The State* 1985 BLR 560 (CA); *Moloigaswe v The State* 2010 (3) BLR 503 (CA); *Tumagole v The State* 2012 (1) BLR 729 (CA).

24 *State v Ramodisa* 2012 All Bots 93 (HC); *State v Sehophe* 2008 All Bots 530 (HC); *State v Manyema* 2005 All Bots 104 (HC).

25 2004 (2) BLR 432 (HC).

26 2007 (2) BLR 97 (HC).

27 2007 (1) BLR 249 (HC).

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distinction between the *mens rea* for the offence of murder and the *mens rea* for the offence of attempted murder.

The other school of thought: nothing but a specific intention to kill would suffice

Contrary to the decisions discussed above, there are authorities that contend that neither an intention to cause grievous bodily harm nor recklessness is sufficient *mens rea* for the offence of attempted murder. In *Manjesa v The State*,[28] the Court of Appeal held that only a specific intention to kill would suffice for attempted murder. The court further held that the wider ambit of malice aforethought, as defined under section 204 of the Penal Code, is not applicable to attempted murder. In this regard, the court emphasized that neither an intention to cause grievous bodily harm nor recklessness is sufficient *mens rea* for the offence of attempted murder. In adopting this approach, the court cited, with approval, the decision of *State v Burnett*,[29] where the court had held that although an intention to cause grievous bodily harm is sufficient *mens rea* for murder, it is plainly not an intent to commit murder and could not be sufficient for a charge of attempted murder. Furthermore, the court held that "the notion of attempt requires an intended result".[30] The reasoning of the court in this respect was that a person cannot be said to have attempted to murder someone if s/he had never intended to achieve the death of that person. In similar fashion to the Court of Appeal cases of *Sekuma Mukono* and *Matthys*, which express a contrary position, *Manjesa* has also been followed by numerous decisions of the High Court.[31] Another Court of Appeal decision in which it was held that nothing less than a specific intention to kill is sufficient to sustain a conviction for attempted murder is *Lekgoba and Another v The State* (*Lekgoba*).[32] The court held that an intention to cause grievous bodily harm cannot, in law, be elevated to attempted murder. Similarly, the *Lekgoba* Court of Appeal decision has been relied upon by numerous decisions of the High Court.[33]

One of the justifications advanced for excluding an intention to cause grievous bodily harm from the intention required for attempted murder is that there would be no practical difference between the offence of attempted murder and assault occasioning grievous bodily harm.[34] In *People v Muir*,[35] the court held that, given the varied penalties for attempted murder and aggravated battery, it was inconceivable that the legislature intended that the *mens rea* for attempted murder should be indistinguishable from the *mens rea* for aggravated battery. In Botswana, the offence of assault occasioning grievous bodily harm is created by section 230 of the Penal Code. A defendant convicted of assault occasioning grievous bodily harm is liable to imprisonment for a period of not less than seven years but not more than 14 years.[36] However, a court is empowered to impose a sentence less than the minimum of seven years where it finds that there are extenuating circumstances.[37] As indicated above, the penalty for the offence of attempted murder is a minimum mandatory sentence of ten years' imprisonment, up to life imprisonment.

28 1991 BLR 391 (CA).

29 1987 BLR 436 (HC).

30 Id at 446.

31 *State v Monei* 2010 (2) BLR 242 (HC); *State v Timela* 2017 All Bots 448 (HC); *State v Sebopeng* 2018 All Bots 276 (HC); *State v Amogelang* 2017 All Bots 349 (HC); *State v Maripe* 2007 All Bots 320 (HC); *State v Kgwefane* 2006 All Bots 116 (HC).

32 2009 (2) BLR 77 (CA).

33 *State v Khunou* 2016 All Bots 297 (HC); *State v Chibiya* 2016 All Bots 670 (HC); *State v Keabetswe* 2014 All Bots 82 (HC); *State v Motswalefe* 2017 All Bots 631 (HC).

34 NL Barrett "Specific intent made more specific: A clarification of the law of attempted murder in Illinois – *People v Harris*" (1978) 28/1 *De Paul Law Review* 157.

35 38 Ill App 3d, 1051 (1976).

36 Penal Code sec 230(1).

37 Id at 230(2). See *Odibetse v The State* 2015 All Bots 259 (HC) for a comprehensive discussion of the offence of assault occasioning grievous bodily harm.

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In *State v Kgoroba*,[38] the court held that although an accused person should not be convicted of attempted murder in the absence of a specific intention to kill, s/he could still be convicted of lesser offences such as assault occasioning grievous bodily harm and unlawful wounding.[39] In *State v Homeboy Timela*,[40] the defendant was accused of striking the complainant on the neck with an axe following an altercation; he was charged with attempted murder. The court held that although there was clearly an intention to cause grievous bodily harm, there was no evidential material from which an intention to kill could be inferred. To this end, the court held that the evidence before it was insufficient to prove attempted murder; it did, however, prove a lesser offence of assault occasioning grievous bodily harm. Conviction on an alternative lesser offence is permissible in terms of section 187 of the Criminal Procedure and Evidence Act.[41] In *State v William Mosarwana*,[42] the court acquitted the accused of attempted murder owing to the absence of a specific intention to kill. However, he was convicted of assault occasioning grievous bodily harm under section 230 of the Penal Code as a competent alternative verdict. In some instances, the circumstances under which a potential charge of attempted murder arises may support a conviction for the commission of some other offence. For example, in *State v Twoboy Gavu*,[43] the accused person had set light to a house while the occupants were inside. He was ultimately charged with both attempted murder and arson. In relation to the attempted murder charge, he argued that he did not have an intention to kill the occupants but rather wanted to "smoke out" a woman with whom he wanted to have sexual intercourse. The court held that it could not be proved that he had a specific intention to kill and acquitted him of attempted murder; he was, however, convicted of arson.

Turning a blind eye to judicial controversy: an avoidant approach by the Court of Appeal

A concerning reality with the manner in which the Court of Appeal has treated the *mens rea* for attempted murder is the seemingly deliberate approach by the Court of Appeal to avoid referencing its conflicting decisions on the point. As indicated above, the earliest reported case in which the Court of Appeal dealt with the *mens rea* for attempted murder was *Sekuma Mukono*, which appeared in the 1964–1967 law report. In 1991, when the Court of Appeal rendered the *Manjesa* decision and held a position contrary to the one given in *Sekuma Mukono*, the Court of Appeal did not refer to *Sekuma Mukono* at all. In 2005, when the Court of Appeal rendered a decision in *Matthys* and held a position contrary to the one it had held in *Manjesa*, it did not refer to *Manjesa*. In similar fashion, in 2009 when the Court of Appeal rendered the *Lekgoba* judgment and held a position contrary to the one it had held in *Matthys*, it did not so much as refer to *Matthys* either. In a more recent reported decision in which the Court of Appeal dealt with the intention required for attempted murder – *Poloko v The State* (*Poloko*)[44] – the Court of Appeal did not refer to either of its contrary decisions in *Sekuma Mukono* and *Matthys*. Given this trend, one can only draw the conclusion that the failure of the Court of Appeal to refer to its conflicting decisions is a deliberate one. This is rather unfortunate as it only serves to compound the controversy.

Commendably, however, there have been a number of decisions by the High Court which have fully acknowledged the controversy of the *mens rea* required for attempted murder and which have referenced the various conflicting decisions when giving guidance as to the correct approach. In discussing these decisions, it is important to highlight that although they are noteworthy for the

38 1996 BLR 290 (HC).

39 *R v Morrison* 2003 (1) WLR 1859 (CA). The minority judgment of Lesetedi J in *Lekolori v The State* 2012 (1) BLR 1092 (CA), also noted that where the accused only harbours an intention to cause grievous bodily harm, s/he may be charged with assault occasioning grievous bodily harm under section 230 of the Penal Code, rather than attempted murder.

40 2017 All Bots 448 (HC).

41 Cap 08:02.

42 1968–1970 BLR 302 (HC).

43 1997 BLR 542 (HC).

44 2018 All Bots 144 (CA).

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guidance that they offer, these decisions do not resolve the controversy in that they cannot overrule the conflicting decisions of the Court of Appeal, which is the superior court. In *Somolekae*,[45] the High Court noted that in order to resolve the controversy relating to the intention required for attempted murder in Botswana, it was necessary to trace the history of Botswana's criminal law. In particular, the court noted that due regard had to be given to the import of the provisions of section 2(2) of the Penal Code, which mandates that "[e]xcept where the context otherwise requires, expressions in this Code shall be presumed to be used with the meaning attached to them in English criminal law and shall be construed in accordance therewith".

The court further noted that the definitive leading English authority on the intention required for attempted murder is *R v Whybrow* (*Whybrow*).[46] In that case, the court held that if a person attacks another with the intention to cause grievous bodily harm and death does not result, the offence is not attempted murder but wounding with intent to do grievous bodily harm. Consequently, the court held that only a specific intention to kill would suffice for attempted murder.[47] The court in *Somolekae* further noted that in *Matthys*,[48] the attention of the Court of Appeal was not drawn to section 2(2) of the Penal Code, hence it erroneously relied on South African decisions instead of following the approach adopted in English criminal law.

Another High Court decision which gives instructive guidance on the appropriate approach to the *mens rea* for attempted murder is that rendered in *Makgetla*.[49] The accused had set fire to a hut in which the complainants were sleeping. He was charged with attempted murder. The court was called upon to determine whether the prosecution had proved that he had attempted to kill the occupants of the house, and whether an inference that he had intended to cause grievous bodily harm to the occupants would suffice for a conviction of attempted murder. The court held that the mental element that was required in order to sustain a conviction of attempted murder under section 217 of the Penal Code was a specific intention to kill. Therefore, the court held that an intention to cause grievous bodily harm or recklessness as to the causing of death would not suffice. Quite impressively, the High Court made a survey of the judgments of the courts in relation to the element of *mens rea* for attempted murder and highlighted that there were glaring inconsistencies. The court also emphasized the implications of section 2(2) of the Penal Code and reiterated that the correct approach is the one adopted by the English cases and not the South African authorities.

Lastly, in *Tautona*,[50] the High Court made reference to the variance in judicial opinion regarding the appropriate intention necessary for attempted murder. Having highlighted the numerous cases bearing out this divergence, the judge made the following observation, which remains true:

> "The purpose of making reference to this vexed question is not to settle it, for this question can only be settled by a decision of the Court of Appeal by reference to the conflicting decisions of the Court of Appeal. I am of the view that if the Court of Appeal in the Matthys case had intended to settle the question the court would have made specific reference to the Manjesa case and indeed the body of decided cases by the High Court. It is hoped that the position would be clarified soon".[51]

However, subsequent decisions of the Court of Appeal have not made any attempt towards settling the point. As indicated above, one of the more recent decisions of the Court of Appeal dealing with

45 *Somolekae*, above at note 12.

46 (1951) 35 Cr App R 141.

47 Id at 146–47. Quoted with approval in *State v Gola* 1998 BLR 73 (HC). See also *Regina v Grimwood* 1962 (2) QB 621 (CA).

48 *Matthys*, above at note 21.

49 *Makgetla*, above at note 14.

50 *Tautona*, above at note 16.

51 Id at para 13 of the judgment.

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the intention required for attempted murder is that for *Poloko*.[52] Therein, the court held that only a specific intention to kill was sufficient for attempted murder. The court referenced the sentiments expressed by the High Court in *Somolekae*[53] that, in accordance with the provisions of section 2(2) of the Penal Code, Botswana courts had to rely on the approach adopted by English criminal law and that South African decisions on the point were not applicable. However, the Court of Appeal, once again, failed to refer to any of its previous conflicting decisions on the point, let alone overrule them. Consequently, the case does not settle the controversy on the *mens rea* required for attempted murder, it simply remains another individual authority for the position that only a specific intention to cause death is sufficient *mens rea* for attempted murder. As matters stand, there is no Court of Appeal decision that settles the point by specifically overruling earlier decisions of the Court of Appeal that are to the effect that an intention to cause grievous bodily harm is sufficient for attempted murder.

The one Court of Appeal case in which one finds an attempt to refer to the conflicting decisions on the *mens rea* required for attempted murder is *Lekolori v The State* (*Lekolori*).[54] Therein, Lesetedi JA made the following remarks:

> "I note in passing that our courts may not have been entirely consistent as to what suffices as an intention to commit the offence of attempted murder. One view, which appears to be a minority view, is that such intention must include the intention to cause grievous bodily harm as defined under Section 204(a) of the Penal Code. See *Matthys and Another v The State* [2005] 1 BLR 69, CA at pp 72G–73C. The other view is that to suffice for an offence of attempted murder, the intention must be to kill. See for instance, *Lekgoba and Another v The State* [2009] 2 BLR 77, CA. The latter appears to be the dominant view and finds consistency with the English approach".[55]

Having acknowledged the inconsistency, Lesetedi JA referenced the English cases of *R v Mohan*[56] and *Whybrow*[57] and held that, in terms of section 2(2) of the Penal Code, the position that only a specific intention to kill was required was reflective of the law in Botswana.[58] However, it is critical to note that Lesetedi JA was rendering a minority judgment. The majority judgment, penned by Legwaila JA, with Gaongalelwe JA concurring, did not specifically address the question of the *mens rea* for attempted murder and the inconsistency arising out of previous decisions of the Court of Appeal. One can only speculate as to the circumstances that led Lesetedi JA to pen a separate judgment, and not a dissenting judgment, and perhaps the reasons as to why the point addressed by Lesetedi JA could not be encompassed in the main judgment. Even then, Lesetedi JA was cautious in his approach in that he made it clear that he was only addressing the controversy

52 *Poloko*, above at note 44.

53 *Somolekae*, above at note 12.

54 *Lekolori*, above at note 39. At the time Lesetedi JA made this observation, the positions were each supported by two decisions of the Court of Appeal. It can be deduced then that by classifying one position as the minority view and the other as the dominant view, Lesetedi JA was referring to the number of decisions rendered by the High Court in support of the respective views. Our survey of High Court judgments supports this conclusion.

55 Id at 1102.

56 1975 (2) All ER 193 (CA).

57 *Whybrow*, above at note 46.

58 As a side note, it is interesting to note that during his tenure as a judge of the High Court, Lesetedi JA subscribed to the view that an intention to cause grievous bodily harm was sufficient for attempted murder. For example, he was the presiding judge in the cases of *State v Matthys and Others*, above at note 20, *State v Malongwa and Another* 2007 (3) BLR 213 (HC) and *State v Ntollo* 2012 All Bots 133 (HC). Lesetedi J (as he then was) rendered the *Ntollo* decision on 12 April 2012 and specifically endorsed the position of the Court of Appeal in *Sekuma Mukono* and *Matthys*. His separate opinion at the Court of Appeal was delivered 7 months later, on 2 November 2012, after he had been appointed to the Court of Appeal in August 2012.

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in passing. In this regard, *Lekolori* is to be regarded as a missed opportunity. One would have thought that, to the extent that the separate judgment of Lesetedi JA at the very least acknowledged the existence of this controversy, the Court of Appeal would have subsequently made a more concerted effort to authoritatively lay the matter to rest. However, more than ten years later, the controversy remains.

One of the ways in which lower courts avoided being bound by the authority of the Court of Appeal decision in *Sekuma Mukono* was either to distinguish it or to treat it as having been reached *per incurium*.[59] For example, in *State v Motlhabane alias Matswinyane*,[60] the court noted that it was aware of the decision of *Sekumo Mukono* but avoided having to follow it by distinguishing it on the facts. Moreover, in *State v Keemetswe*,[61] the High Court also assessed the approach adopted by the Court of Appeal in *Sekuma Mukono*. The court observed that there was no indication that the attention of the Court of Appeal in *Sekuma Mukono* had been drawn to the fact that section 217 of the Penal Code expressly prescribed "intent to unlawfully cause the death of another" as an element of the offence of attempted murder. Consequently, the court concluded that the *Sekuma Mukono* decision was reached *per incurium*, and therefore it avoided being bound by its precedent. Unfortunately, the High Court's view that a decision of the Court of Appeal was reached *per incurium* does not overturn that decision. This observation did not dissuade subsequent High Court decisions, and even the Court of Appeal itself, from relying on *Sekuma Mukono*. Owing to the extent that *Sekuma Mukono* has subsequently been followed by numerous decisions rendered by the High Court and endorsed by the Court of Appeal itself, it is no longer feasible to simply treat it as an unfortunate misdirection whose precedence can easily be circumvented.

It is evident that the prosecution also continues to advance the Court of Appeal decisions of *Sekuma Mukono* and *Matthys* as the authority on why the court should hold that an intention to cause grievous bodily harm is sufficient intent for attempted murder.[62] Quite naturally, for as long as the prosecution considers these decisions of the Court of Appeal to be good law, they will play a part in the exercise of prosecutorial discretion as to which charges are applicable. In this regard, the state may continue to charge those who harm others with an intention to cause grievous bodily harm with attempted murder. Of even greater concern, a person so incorrectly charged may be convicted for attempted murder, if s/he is unfortunate enough to appear before a judge who is inclined towards the *Sekuma Mukono* and *Matthys* school of thought. This reality accentuates the necessity for the Court of Appeal to intervene and settle this controversy, once and for all.

Lessons from other jurisdictions

The uncertainty surrounding the *mens rea* required for the offence of attempted murder is not peculiar to Botswana. Other jurisdictions have grappled with the issue. Consequently, it is helpful to briefly look at the approaches taken by such jurisdictions to discern if there are lessons to be learnt from how they ultimately resolved the controversy. Canada is just one such jurisdiction. Much like in Botswana, where the Court of Appeal has rendered conflicting decisions on the *mens rea* required for attempted murder, the Supreme Court of Canada has also rendered decisions based on either of the conflicting positions. The notable difference between the approach adopted by the Botswana Court of Appeal and the Canadian Supreme Court is that the latter eventually unequivocally overruled itself and settled the law on one position. In *The Queen v Ancio*,[63] the Supreme Court comprehensively dealt with the question of whether the *mens rea* for attempted

59 *Tautona*, above at note 16, para 12 of the judgment.
60 1984 BLR 180 (HC).
61 1979–1980 BLR 7 (HC).
62 See *State v Amogelang* 2017 All Bots 349 (HC).
63 1984 1 SCR 225.

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murder was restricted to a specific intention to kill or if it encompassed recklessly causing grievous bodily harm with the knowledge that death will likely result. The court assessed whether the mere fact that an intention to cause grievous bodily harm was sufficient to sustain a conviction for murder means that such an intention should be sufficient for a conviction for attempted murder. The court highlighted that the offence of attempted murder developed as "an offence separate and distinct from murder".[64] To that end, the court held that there was nothing illogical in holding that the intention to cause grievous bodily harm was sufficient for murder although such an intention would not suffice for attempted murder.[65] The court came to the conclusion that only a specific intention to kill would suffice for the charge of attempted murder. The Supreme Court accordingly overruled its earlier decision in *Lajoie v The Queen* (*Lajoie*)[66] wherein it had held that the intention to cause grievous bodily harm was sufficient to sustain a conviction for attempted murder.[67]

A reading of both the *Ancio* decision and the *Lajoie* decision reflects that the Canadian Supreme Court heavily referenced the approach adopted by the English courts in respect of the *mens rea* required for attempted murder. In particular, both cases reference *Whybrow*. As reflected in the discussions above, the approach followed by the English courts – referring to *Whybrow* in particular – has also been extensively relied upon in decisions of the courts in Botswana based on the authority of section 2(2) of the Penal Code. This commonality of reliance on English criminal law renders the decisions of the Canadian Supreme Court highly instructive.[68] In addition to the lessons to be drawn on the substantive approach to the mental element required for attempted murder, the greater lesson is that the Supreme Court recognized that its earlier decision in *Lajoie* was not good law and accordingly overruled it. This is in contrast to the approach taken by the Court of Appeal in Botswana, which has on several occasions rendered conflicting decisions on the *mens rea* required for attempted murder without so much as referencing these conflicting decisions, let alone overruling them.

Prior to the 2018 amendment, which introduced a minimum mandatory sentence of ten years for the offence of attempted murder, section 217 of the Botswana Penal Code was a verbatim duplicate of the equivalent provision of the Queensland Penal Code.[69] In *Kgoboki v The State* (*Kgoboki*),[70] the High Court indicated that in the area of substantive criminal law, courts in Botswana can obtain guidance from cases of jurisdictions with similar penal codes, especially where the statutory provisions under consideration correspond. Consequently, decisions of the courts in Queensland on the *mens rea* for attempted murder are instructive. In determining the *mens rea* required for the offence of attempted murder, the courts in Queensland have consistently held that only a specific intention to kill would suffice.[71] This position was recently affirmed by the Supreme Court in *R v Etheridge*,[72] in which it emphasized that if the intention established by the evidence is an intention to cause grievous bodily harm, then the accused must be convicted of the lesser offence of assault occasioning grievous bodily harm, and not attempted murder. The jurisprudence of the courts in Queensland is also helpful in relation to the assessment as to whether the minimum mandatory term of ten years' imprisonment imposed by the Botswana legislature in respect of attempted murder is reasonable. In *R v Etheridge*, the Supreme Court noted that a survey

64 See also the subsequent decision of the Supreme Court of Canada in *R v Logan* 1990 2 SCR 731.

65 In this respect, the Court relied on the English decision of *Whybrow*, above at note 46.

66 1974 SCR 399.

67 See AN Enker "*Mens rea* and criminal attempt" (1977) 2/4 *American Bar Foundation Research Journal* 845 at 862 for a discussion of the approach adopted by the Supreme Court in *Lajoie v The Queen*.

68 Although Section 239(1) of the Canadian Criminal Code, which creates the offence of attempted murder, is worded differently from the Botswana provision, the essence of the provisions is the same and there are no material differences.

69 Criminal Code 1899, sec 306.

70 1985 BLR 283 (HC).

71 *Cutter v The Queen* 1997 143 ALR 498; *Knight v The Queen* 1992 175 ALR 495; *Alister v The Queen* 1984 154 CLR 404.

72 2023 QCA 52.

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of cases indicated that the sentence imposed for the offence of attempted murder ranged from ten to 17 years' imprisonment.[73]

A time for judicial self-correction: the Court of Appeal must overrule itself

The designation of the Court of Appeal as the apex court does render the court infallible. In embracing its position as the apex court and the final arbiter, the Court of Appeal must continuously reflect upon its decisions with a view to discerning and addressing any misdirections which may have occurred, inadvertently or otherwise.

The Court of Appeal has been responsive in addressing an incorrect position it had previously taken. For example, in *Mzwinila v The State* (*Mzwinila*),[74] the Court of Appeal entertained an appeal against the refusal of the High Court to grant the accused bail. In *Peloewetse v The State*,[75] however, it held that it did not have the jurisdiction to entertain such an appeal. The Court of Appeal acknowledged that it had previously entertained such an appeal in *Mzwinila*, but pointed out that, in *Mzwinila*, it had just been assumed, without any consideration, that an appeal lies with the Court of Appeal.

As reflected above, the divergence on the *mens rea* required for the offence of attempted murder is premised on whether the court in question applies English criminal law or relies on South African authorities. It is perhaps necessary to highlight that the *mens rea* for attempted murder is not the only aspect on which conflicting decisions have arisen in Botswana on account of the differences between South African criminal law and English criminal law. One such area is in relation to the competence of a conviction of manslaughter where the plea of self-defence fails on account of the use of excessive force.[76] The position in English criminal law is that where self-defence fails then the appropriate conviction is one of murder, and not manslaughter.[77] On the other hand, South African authorities consider that if self-defence fails on account of excessive force, the accused may still be convicted of manslaughter, depending on the circumstances.[78] In *David Leabaneng Mokgwathi v The State*,[79] the Court of Appeal followed the South African approach and relied on South African authorities in holding that manslaughter was a competent conviction when self-defence failed.[80] The Court of Appeal once again relied on South African authorities in *Makwati v The State* (*Makwati*).[81] On the other hand, other cases have applied the English approach and held that in the event that self-defence failed on account of excessive force, the only competent conviction was murder.[82]

In recognition of the fact that courts in Botswana had adopted conflicting approaches on whether a conviction for manslaughter was a competent verdict for a charge of murder where self-defence had failed, the Court of Appeal set out to settle the question in *Mokgethisi v The State*.[83] Having referred to the conflicting approaches and referenced the cases discussed above, the Court of Appeal observed that in *Makwati*, the court had not referred to the English authorities and to the implications of section 2(2) of the Penal Code. The court further highlighted that the rationale for section 2(2) was that the Botswana Penal Code was in many respects based on the

73 See *R v Williams* 2015 QCA 276; *R v John* 2014 QCA 86; *R v Francis* 2017 QCA 182.

74 1986 BLR 168 (CA).

75 1988 BLR 439 (CA).

76 See *State v Moreputla* 1985 BLR 380 (HC) for a comprehensive discussion on the difference in approaches.

77 *R v Clegg* [1995] 1 AC 482; *Palmer v R* [1971] AC 814.

78 *R v Krull* 1959 (3) SA 392 (A); *R v Thibani*, above at note 19; *R v Koning* 1953 (3) SA 220 (T); *R v Matlhau* 1958 (1) 350 (AD).

79 1964–1967 BLR 263 (CA).

80 The Court of Appeal relied on the South African case of *R v Thibani*, above at note 19.

81 1996 BLR 682 (CA). The Court of Appeal relied on the South African case of *R v Koning*, above at note 78.

82 *State v Moreputla*, above at note 76; *Mothobi and Others v The State* 2012 (1) BLR 369 (CA).

83 2013 All Bots 492 (CA).

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English criminal law as it existed in 1964 when the Code was promulgated. At that time, Botswana was called Bechuanaland Protectorate and was under the protection of the United Kingdom. Consequently, the court held that in terms of section 2(2) and the historical context of Botswana's criminal law, the expression "self-defence" is to be considered in terms of English criminal law and not Roman Dutch Law, as reflected in the South African authorities. The commendable approach in this regard is that the Court of Appeal intentionally engaged with its previous conflicting decisions with the view to resolving the controversy.

In many cases over the years, the Court of Appeal has emphasized the point that the Penal Code, as dictated by section 2(2), has to be interpreted in accordance with English criminal law.[84] It is perhaps convenient to highlight that as far back as 1985, in *State v Moreputla*,[85] the court lamented that many judges appeared to be overlooking the provisions of section 2(2) of the Penal Code and failing to appreciate that South African case law was no longer relevant in the interpretation of the Penal Code. Similarly, in *Kgoboki*,[86] the court highlighted that the substantive criminal law of South Africa is different in origin from that of Botswana. Consequently, the court noted that South African cases on substantive criminal law must be approached with caution.[87] The judicial controversy of the *mens rea* for the offence of attempted murder in Botswana is one of those areas where uncertainty could have been avoided by paying heed to the warnings regarding relying on South African criminal law.

Given the revered place of the Court of Appeal in the hierarchy of courts in Botswana, we posit that the Court of Appeal has a responsibility to the lower courts, upon which its decisions are binding, to ensure clarity and consistency in its decisions. It is therefore undesirable, at best, to have a situation in which the Court of Appeal has adopted two irreconcilable positions in respect of the *mens rea* required for the offence of attempted murder. This situation cannot be allowed to persist, nor should the lower courts be left with a choice of two schools of thought to follow, depending on the preference of the presiding officer. The judicial controversy of the *mens rea* required for the offence of attempted murder in Botswana is a serious one, with considerable consequences for the accused. Consequently, the controversy merits comprehensive redress by the Court of Appeal, rather than just a cursory mention in a minority judgment, as was the case in *Lekolori*.[88] Thus, it is imperative that the Court of Appeal authoritatively addresses the conflicting decisions that it has previously rendered. Barret underscores the necessity for an apex court to be more intentional when it is resolving an existing controversy.[89] Whereas she gives the Illinois Supreme Court credit for clarifying the controversy surrounding the *mens rea* for the offence of attempted murder by holding that only a specific intention to kill would suffice, she criticizes the court for not mentioning many of its previous decisions that adopted a contrary view. In her opinion, the Supreme Court should have had a more complete discussion of previous cases on the point.[90]

The intention with which an accused person acts is a factor that plays a part not only in the legal culpability of the accused person but also his/her moral blameworthiness. Invariably, the required intention informs the sentence to be imposed upon conviction. As reflected above, prior to the 2018 amendment of the Penal Code, once convicted for attempted murder, the accused faced imprisonment up to life, without the imposition of a minimum sentence. Even when courts adopted the wrong position of holding that an intention to cause grievous bodily harm and recklessness were

84 *Kebonang v State* 2015 All Bots 186 (CA); *Mothusi v State* All Bots 2015 161 (CA); *Rapelang v State* 2013 All Bots 537 (CA); *Poloko*, above at note 44.

85 1985 BLR 380 (HC).

86 *Kgoboki*, above at note 70.

87 GJ van Nierkerk "The application of South African law in the court of Botswana" (2004) 37/3 *The Comparative and International Law Journal of Southern Africa* 312.

88 *Lekolori*, above at note 39.

89 Barrett "Specific intent made more specific", above at note 34.

90 Ibid.

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sufficient *mens rea* for the offence of attempted murder, it was open to the court, in its discretion, to rely on the nature of the intention of the accused and the circumstances of the offence in imposing a less stringent sentence. As a matter of fact, for the offence of murder itself, courts have held that where the accused person only had an intention to cause grievous bodily harm, such should be treated as an extenuating circumstance.[91] On the other hand, a specific intention to kill is treated as an aggravating factor.[92] However, there is no indication that in sentencing accused persons convicted of attempted murder, courts pay explicit regard to whether the accused person acted with a specific intention to kill or with an intention to cause grievous bodily harm.[93] It is to be recalled that the 2018 amendment to the Penal Code imposes a minimum mandatory sentence of ten years' imprisonment for the offence of attempted murder. This is reflective of the severity with which the legislature views the offence of attempted murder. Indeed, if a person harbours a specific intention to kill another and sets about executing that intention, that person must be punished severely, even if the intended victim survives.[94]

If the Court of Appeal continues to skate around the issue of the *mens rea* for attempted murder, then people who do not fall within the ambit of what the legislature contemplated, both in its crafting of the offence of attempted murder and in its prescription of the minimum mandatory sentence, will continue to be convicted and so sternly punished. Thus, it may be necessary for the legislature to intervene and prescribe the intention for attempted murder in the same manner in which it did for the offence of murder through section 204 of the Penal Code. The legislative solution in this respect does not have to be a complicated one. It may simply be that section 217 is amended by adding subsection 2, which would read: "The intention required for the offence of attempted murder is a specific intention to kill". This one line would bring an end to the present controversy and its undesirable consequences.

In the meantime, it is also the responsibility of the Directorate of Public Prosecutions (DPP) to ensure that it plays its part in minimizing the effects of this controversy. Botswana's criminal justice system is adversarial.[95] In terms of section 51A of the Constitution, the DPP is empowered to institute and undertake criminal proceedings against any person in respect of any criminal offence that person is alleged to have committed. Moreover, section 7 of the Criminal Procedure and Evidence Act[96] vests the DPP with the right and duty to prosecute crimes committed in Botswana. As part of its exercise of prosecutorial discretion, the DPP decides on the offence with which it charges an accused person as well as the evidence it tenders in support of that charge.[97] In so far as the offence of attempted murder is concerned, it is incumbent upon the prosecution to ensure that it only prefers a charge of attempted murder where there is a discernible intention to kill. An accused person who intended to bring grievous harm to the victim must be charged with assault occasioning grievous bodily harm, and not attempted murder. If the prosecution does not improperly apply the charge of attempted murder to people who intended to cause grievous bodily harm, then the courts cannot convict them of attempted murder. This seemingly simplistic approach would certainly mitigate the effects of the judicial controversy. We note that according to our research, no jurisdiction has promulgated a specific statutory provision in the manner that we propose. As highlighted above,

91 *Rapulana v The State* 1975 (1) BLR 37 (CA); *State v Manyake* 1978 BLR 10 (HC).

92 *Ntesang v The State* 1995 BLR 151 (CA).

93 For example, in *State v Monei* 2010 (2) BLR 242 (HC), the accused person was sentenced to 3 years' imprisonment for attempted murder, it being held that he had acted with a specific intention to kill the complainant. On the other hand, in *State v Banyatsang* 2007 (3) BLR 823 (HC), the accused was convicted of attempted murder, it being held that he had acted with an intention to cause grievous bodily harm, and he was sentenced to 7 years' imprisonment.

94 In *State v Modise Alias Mawana* 2007 BLR 105 (HC), the accused was sentenced to 12 years' imprisonment for attempted murder.

95 *Lembe v The State* 1985 BLR 576 (CA); *Mokwatso v State* 2009 All Bots 283 (CA); *Tlhabologang v State* 2013 All Bots 37 (HC); *State v Kelebemang* 2011 All Bots 64 (HC); *Modirele v State* 2014 All Bots 14 (HC).

96 Cap 08:02.

97 *Ngudura v State* 2017 All Bots 389 (HC).

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in those jurisdictions where controversy has arisen as to the *mens rea* for the offence of attempted murder, it has been competently resolved by the courts. It is for that reason that we call primarily on the Court of Appeal to intervene, with legislative intervention being an alternative solution.

Conclusion

The article highlights that the position on the *mens rea* required for the offence of attempted murder in Botswana is far from settled. Evidently, there are decisions which hold that only a specific intention to kill is required and that nothing else suffices.[98] There are also decisions holding that in addition to a specific intention to kill, an intention to cause grievous bodily harm and recklessness would also suffice.[99] We demonstrate that, unfortunately, the Court of Appeal has contributed to the controversy by rendering decisions supporting either of the conflicting positions. Consequently, decisions rendered by the High Court are also split along these conflicting positions. Moreover, we argue that this lack of certainty is undesirable, as it offends the basic tenants of criminal law. At worst, it has resulted in accused persons being charged with, convicted of and ultimately punished for the offence of attempted murder in the absence of the relevant *mens rea*. The necessity for clarity and certainty on the *mens rea* for attempted murder is further heightened by the 2018 amendment of the Penal Code, which prescribes a minimum mandatory sentence of ten years' imprisonment for the offence of attempted murder. Having assessed the conflicting positions and their justifications, we contend that the position that holds that only a specific intention to kill is sufficient *mens rea* for the offence of attempted murder is the accurate one. An accused person who inflicts injury on a victim with the intention of causing grievous harm must be appropriately charged with assault occasioning grievous bodily harm under section 230 of the Penal Code and should not face a charge of attempted murder. In this article, we argue that the Court of Appeal should intentionally engage with its previous conflicting decisions and specifically overturn its decisions in *Sekuma Mukono* and *Matthys* in which it held that an intention to cause grievous bodily harm is sufficient to sustain a conviction for attempted murder. Finally, we recommend that if the Court of Appeal fails to overturn its previous conflicting decisions, the legislature must intervene and enact a provision through which it prescribes that the intention required for the offence of attempted murder is a specific intention to kill. Either way, the judicial controversy around the *mens rea* for attempted murder must not be allowed to persist and should be addressed as a matter of priority.

98 *State v Twoboy Gavu*, above at note 43; *Lekgoba*, above at note 32; *Somolekae*, above at note 12; *Manjesa v The State*, above at note 28; *State* v *Burnett*, above at note 29; *State v Rasetshwane* 2005 (2) BLR 47 (HC); *State v Otloleng* 1989 BLR 40 (HC); *State v Moyo* 1995 BLR 532 (HC); *State v Ngwenya* 1997 BLR 466 (HC); *State v Sebopeng*, above at note 31.

99 *State v Kgatiso*, above at note 26; *Matthys*, above at note 21; *Sekuma Mukono*, above at note 11; *State v Banyantsang* 2007 All Bots 284 (HC).

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