JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 58/92

COR: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (AG.)

R. v. HOWARD HENRY

Canute Brown for Applicant

Miss Paulette Williams for Crown

December 7 & 18, 1992

WOLFE, J.A. (AG.)

The appellant was convicted in the Trelawny Circuit before Courtenay Orr, J., sitting with a jury, for the offence of wounding with intent. Following upon this conviction, he was ordered to be imprisoned for three years at hard labour.

Having heard the arguments, we allowed the appeal, quashed the conviction, set aside the sentence and ordered that the appellant be retried in the next session of the Trelawny Circuit Court. The appellant was offered bail in the sum of $5,000 with a surety. We promised to put our reasons in writing. We now make good that promise. A retrial having been ordered, in the interest of justice, we will refrain from entering upon any detailed analysis of the evidence.

Briefly, the Crown contended that the appellant went to the home of the complainant along with other policemen and Jamaica Public Service Co. Ltd. personnel to investigate a case of abstracting electricity, a felony. The police party surrounded the house. The complainant ran from the house, whereupon he was chased by the appellant and shot in the buttocks while in flight.

The defence, on the other hand stated that the victim bolted from the house armed with a knife. The appellant shouted, "Police, stop". The victim ran up a hill and the appellant gave chase. During the chase the appellant stumbled and his firearm went off. "Shots were also heard from another firearm."

Seven **grounds** of appeal were filed, but for purpose of this judgment, only two of these grounds require any treatment.

Ground 6

Complaint is made as follows:

> "That the learned Trial Judge failed to direct the jury adequately on the issue of accident and that this defect juxtaposed with his treatment of the Applicant's statement resulted in the Applicant being denied the consideration that the jury should have given to his defence."

This was essentially a case in which the appellant was asserting that his firearm was accidentally discharged. In dealing with the plea of accident, the only direction given by the learned trial judge to the jury, prior to their retirement was as follows:

> "Because he has come here today, Madam Foreman and members of the jury, and told you that it was an accident. Therefore, if it was an accident, why would he have this man go to Court and perjure himself, to tell the judge a lie. What was the need for him to go to Court and perjure himself? Well the officer asked him, he said it was an accident. Nobody can charge you for an accident."

This could hardly be considered a direction in law on the plea of accident. This was no more than a comment on the conduct of the appellant in trying to get the victim to plead guilty to the offence of assault at common law. No where did the judge tell the jury what in law amounted to an accident. Neither did he specifically tell the jury that the burden of negativing the plea of accident rested on the prosecution.

Counsel for the Crown appreciated this defect in the summing-up. At the end of the summation he addressed the Court thus:

"MR. CLARKE: Before the jury retires, I don't know if I heard your Lordship deal with the defence of accident.

HIS LORDSHIP: I dealt with it. I cited the classic defence, in connection, and I dealt with the defence. I told them how they should deal with it.

MR. CLARKE: Very well, sir."

On careful examination of the summing-up we have concluded that the observation of counsel for the Crown was extremely valid.

The jury retired at 2:22 p.m. and were recalled at 2:40 p.m. when the learned trial judge directed them as follows:

> "Members of the jury I call you back just to make **it** clear what the defence is saying. This revolver went off accidentally, he was chasing after him, he stumbled and fell and if he was injured, then he was injured in an accident, and you remember I told you at the beginning that the Crown says it was not by accident.
> So, if you believe the story, that would be no offence, because he would not have shot the man, it would be accident. I hope you understand that. So, if what he told you this morning, if that is true, that's how it happened, it would be accident and he would not be guilty of any offence. What the Crown is saying is it was a deliberate shooting. That's what you have to decide. I hope I make myself clear. So, please go back for me."

This further direction did not, in our view, adequately address the earlier omission. Merely telling the jury that if they believe the appellant's story he should be acquitted was wholly inadequate. The trial judge ought to have told the jury, in clear and unmistakable language, that it was for the Crown to satisfy them that the shooting was not accidental and that if they entertained any reasonale doubt as to whether or not the shooting was accidental then the accused was entitled to be acquitted.

The failure to so direct the jury amounted to a misdirection in law.

Ground 7

In this ground the appellant complains that:

> "... the learned Trial Judge erred in law and in his interpretation of the facts when he told the jury that there was 'no contest' about the complainant being wounded by the Applicant in light of his equivocal statement from the dock as to who had shot the complainant and there being no evidence adduced by the prosecution that he had shot the complainant and in view of the evidence of the witnesses for the Crown that shots were fired by other policemen at the scene of the incident."

This complaint is justified. The learned trial judge left the issue of how the victim sustained his injury on the basis that the appellant had admitted thatthe shot which injured the victim was discharged from his firearm. This was clearly incorrect. In his statement from the dock the appellant said:

> "I gave chase and during the chase I stumbled, my firearm went off. Shots were heard also from another firearm."

This passage which contains the defence of the appellant, required the judge to direct the jury that they had to decide whether or not the shot which injured the victim was discharged from the appellant's firearm or the firearm of some other person. In the event that the jury found that the shot was discharged from the appellant's firearm then they would go on to consider whether it was discharged accidentally or deliberately, as the Crown asserted. On the other hand, if the shot which injured the victim was discharged from a firearm in the possession of some other person, then the appellant was entitled to be acquitted.

In failing to so direct the jury, it cannot be said that the defence of the appellant was fairly left to the jury. This non-direction amounted to a misdirection in law.

Miss Williams for the Crown urged that the Court should, in the circumstances of the case, consider applying the proviso. We cannot say that had the judge directed the jury properly, as we have indicated, they would necessarily have arrived at the same verdict. For this reason, we think it would not be appropriate to apply the proviso. However, because of the nature of the evidence adduced and which we have refrained from examining in detail because of the decision we have arrived at, we are of the view that the interest of justice requires that there ought to be a retrial.