ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL No. 7 of 2002

BETWEEN:

CLARENCE FRANCIS

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Albert Redhead	Justice of Appeal
The Hon. Mr. Adrian Saunders	Justice of Appeal
The Hon. Mr. Brian Alleyne	Justice of Appeal

Appearances:

Mr. Dane Hamilton for the Appellant
Mr. Cosbert Cumberbatch, DPP for the respondent
Mr. Payton with him

2003: September 16;
2004: January 12.

JUDGMENT

[1] REDHEAD J.A. On Christmas Day, 25th December, 2000 a report was made by one Rohan Hector at the Bolans Police Station. The report concerned a threat by Gerald Collymore Horsford, the virtual complainant, to chop off his, Rohan Hector's, head.

[2] The appellant at that time was a corporal of police. He had served about 18 years in the police service of Antigua and Barbuda. He was the officer in charge of the Bolans' Police Station where the report was made. At about 3.00p.m that day, the appellant left the Police Station to investigate the report. He was accompanied by P.C. Cornell Tittle, an officer of two years experience.

[3] Before leaving the police station, the appellant armed himself with a 357magnum, police revolver. He explained to the court that he tucked the gun in a holster in his waist. The holster was not the correct holster for that gun, only the nozzle stuck in the holster.

[4] The appellant left for Jennings by jeep in search of Mr. Gerald Collymore. He was not found at his home in Jennings, so the appellant and P.C. Tittle proceeded to Ebenezer where a street fair was in progress.

[5] There Mr. Collymore was seen sitting on a step with some other men. The appellant and P.C Tittle were dressed in plain clothes. The appellant who was the driver of the vehicle, on seeing Mr. Collymore, parked the vehicle and he P.C. Tittle walked over to where the Mr. Collymore was sitting. They identified themselves to Mr. Collymore. The evidence is that P.C. Tittle took out his pocket book and spoke to Collymore. Up to this point the prosecution and the defence do not have any dispute as to the facts. From hereon however, there is disagreement about the facts.

[6] The prosecution's case was that while the appellant was speaking to Mr. Collymore. Mr. Collymore got up and walked across the street in the direction of a music shed. The appellant then shouted "lock him up" or "arrest him". He then pulled his gun and shot Mr. Collymore in the leg.

[7] The defence on the other hand is that when P.C. Tittle and the appellant began to speak to Mr. Collymore about the incident, Mr. Collymore became angry and said to the appellant, "An ass you be the man told me he licence to kill. So me license to do what me want.' The appellant then told him that threatening language was an offence and he was going to report him for making use of threatening language and also for insulting language for calling him an ass. Mr. Collymore then got angry, got up flung out his hand, saying "ah don't want to hear all you pig all you be"

[8] The appellant swore on oath before the jury that Mr. Collymore in flinging his hand struck him on his shoulder. He then informed the virtual complainant that he was arresting him

for battery on a police officer. Collymore then walled across the road with a couple of guys.

[9] The appellant then walked towards Collymore and held on to him by the shoulder. Mr. Collymore then boxed off the appellant's hand and in the process striking the appellant in the chest. The appellant then held on to Collymore who grabbed the appellant by the waist.

[10] The appellant testified that he then let go of Collymore's shoulder and held on to his hand. Collymore's hand was at this time on the weapon. A struggle then ensued. During the struggle the gun came out of the holster. The appellant swore that during the struggle both his hand and Collymore's hands were on the gun. He was trying to free Collymore's hand from the gun when he heard an explosion, the virtual complainant was shot.

[11] The appellant was charged on three counts of the indictment with wounding with intent, unlawful wounding and assault. The appellant was acquitted on the wounding with intent charge. He was convicted on the unlawful wounding charge. The prosecution withdrew the charge of assault because of lack of evidence.

[12] The appellant appeals to this court against his conviction. Three grounds of appeal are filed on behalf of the appellant:

1. The verdict is inconsistent
2. The verdict of the jury is unreasonable having regard to the evidence
3. The learned trial judge failed adequately to direct the jury as to the elements of the offence of unlawful wounding, alternatively misdirected the jury as to the ingredients of the offence.

[13] Grounds 1 and 2 were dealt with together by learned counsel for the appellant. Ground 3 was argued first. Learned counsel contended that the case as presented by the prosecution left no scope for the view other than the appellant acted willfully and unlawfully and fully cognizant of his actions.

[14] Mr. Hamilton referred to page 87 of the record where the learned trial judge in directing the jury on the offence of unlawful wounding said:-

> " Now if the Crown doesn't satisfy you of the first offence you can consider the second offence. Where the difference in the second offence lies is in the intent, so the second count is that of unlawful wounding. The particulars of the offence are that Clarence Francis on the 25th December, 2000 at Ebenezer unlawfully and maliciously wounded Gerald Collymore Horsford. So again when you look at this count you have to say that he did not have any legal justification for so acting, and maliciously, I have already explained to you what malicious in law means."

[15] Mr. Hamilton, learned counsel, for the appellant argued that the learned trial judge failed to identify to the jury the salient evidence which was capable of assisting them on this count and what evidence constitutes the unlawful conduct.

[16] In directing the jury on the offence of shooting with intent on the first count. The learned trial judge told the jury:-

> " You must also find that he did so maliciously. I must tell you that when the word malicious is used in law it doesn't mean what we might generally term ill will or spite of the person. At law you have an actual intention to do a particular kind of harm that is done or recklessness as to whether such harm could result from the act. So in this case whether he shot recklessly or he shot with intent to do harm. So the intent is that he shot and the other element is that he shot to do grievous bodily harm. All that means is that the Crown is of the opinion that when he shot Collymore he did so with the intention to cause him serious harm. That is all that grievous bodily harm means."

[17] Mr. Hamilton argued that at best this direction on unlawful wounding could only have confused the jury. In unlawful wounding it is not necessary to establish a specific intent only that it was a conscious act on the part of the appellant and that he had no legal justification for so acting.

[18] Learned Counsel contended that the appellant's defence was accident. The jury may have concluded that the appellant acted recklessly in the discharge of the firearm. He referred to the following cases:- R v Charleston,[1] R v Mowatt,[2] Sookram v The State[3]

[1] 1955 1 AER 859
[2] 1967 3 AER 47
[3] 1971 18 WIR 195

[19] Mr. Hamilton submitted that the learned trial judge ought to have gone further and directed the jury that if they were satisfied that if the gun was accidentally discharged during the course of a struggle between the appellant and Collymore then neither the specific intent required for the count of shooting with intent or the offence of unlawful wounding would have been made out. I agree entirely with this submission.

[20] How did the learned trial judge deal with this issue?

[21] At the beginning of the summation she instructed the jury as follows:.

> "The defence is saying that there was a struggle for the gun, that in the struggle the gun went off. Now I tell you something about accident.
> Essentially somebody said the lack of intention to do the act of which it relates to. Now it is important for you when considering what the defence is saying to remember it is not for the accused to convince you or satisfy you in any way that the firing of the gun was in any way an accident and that it was caused by Gerald Collymore Horsford in his struggle with the accused. It is always for the prosecution to satisfy you that the accused had the intent as charged and that it was not an accident. Always remember that it is the prosecution to satisfy you that it was not an accident, they have to satisfy you, not him."

[22] Apart from what I have agreed with above I am of the view that it would have been more appropriate to have dealt with this issue when the learned trial judge dealt with the defence at pages 103 –110 of the record.

[23] Learned counsel for the appellant argued that the case advanced by the prosecution was solely on the issue that the appellant throughout acted unlawfully. He had no justification for detaining and/or arresting Mr. Collymore and had willfully shot him. According to the prosecution at no time was he acting in self-defence but at all times acted unlawfully. There was no struggle and nothing done on that day was done under the colour of law.

[24] Mr. Hamilton argued that the jury having acquitted the appellant of the offence of shooting with intent, it must be concluded that he lacked the intent a defined by the learned trial judge. That intent as defined included recklessness.

[25] There is no doubt in my mind that the directions given by the learned trial judge on wounding with intent equated with that of unlawful wounding.

[26] Mr. Hamilton questioned the basis on which the appellant's conviction rests having regard to the direction. He submitted that the choice facing the jury was stark in that either the appellant deliberately shot Mr. Collymore, or the gun went off in a struggle.

[27] In relation to the first contention, there would have been no legal justification for the appellant to draw his gun and shoot Mr. Collymore if the prosecution's case was not accepted. Alternatively, there would have been no justification for the appellant to draw his gun and use it against an unarmed Mr. Collymore in pursuance of a lawful arrest. In this regard the force would have been excessive in the extreme. Moreover, this was never advanced either by the prosecution or defence and no direction given by the learned trial judge on this issue.

[28] Learned Counsel submitted that there was no rational basis in the evidence led and the issues canvassed by which the jury could have concluded that the appellant was guilty of unlawful wounding.

[29] He contended that a less confusing direction on the count of unlawful wounding may have resulted in a better appreciation of the issues and that if a proper direction had been given the jury may well have concluded that the appellant is not guilty on either of the two counts.

[30] I agree that there is little or no direction on unlawful wounding. I also agree that having regard to the case as presented by the prosecution the verdict of unlawful wounding is an inconsistent one. Because if a man points a loaded gun to the leg of another and pulls the trigger (the prosecution's case) he could have no other intention but to cause serious harm.

[31] Mr. Cumberbatch, learned counsel for the respondent, in his skeleton arguments submitted that it was consistent for the jury to find that the appellant did not intent to cause

the complainant grievous bodily harm but he acted unlawfully and maliciously in wounding him. As a general proposition I agree with this submission but the case as presented by the prosecution does not support this view.

[32] Learned counsel referred to the case of Ronald Hunte 1968 52 C A.R. 580 and Reginald William Durante 1972 56 C A.R. 708. The latter says among other things that the mere fact that a jury has returned inconsistent verdicts on counts in an indictment does not mean that that the Court of Appeal is obliged to quash the convictions.

[33] In light of the foregoing can this conviction stand? I have the greatest of difficulty in so holding having regard to the fact that there was little or no direction on the verdict which was returned, i.e. unlawful wounding and having regard to the fact that the verdict is inconsistent with the case presented by the prosecution and with the acquittal of the accused on the first count.

[34] The appeal is therefore allowed. The conviction and sentence are hereby set aside.

A.J. Redhead
Justice of Appeal

I concur

Adrian Saunders
Justice of Appeal

I concur

Brian G K Alleyne
Justice of Appeal