JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO: 1/2001

COR: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.
THE HON. MR. JUSTICE PANTON J.A.

R v WAYNE CLARKE

Miss Lorraine Smith, Asst. Director of Public Prosecutions and **Janiece Nelson Brown,** Crown Counsel, for the Crown

Ronald G. Koathes for the appellant

25th September , 2001 and 31st July 2002

LANGRIN, J.A.:

This is an appeal from a conviction by Her Honour Ms. Frankson sitting in the St. Catherine Resident Magistrate's Court on the 11th July 2000. The appellant was convicted on an indictment for unlawful wounding and fined $4,000 or six months' imprisonment.

On March 9, 1998 Lanzie Brown, Special Constable and vendor's bailiff attended premises known as 22 Allamanda Drive, Portmore Pines, St. Catherine. He was accompanied by Special Constable Paul Russell. They were both employed to Singer Sewing Machine Company. The purpose of their visit was to recover the balance owing under a hire purchase agreement for a refrigerator , the subject of the hire purchase

agreement. They left and returned with three officers from the Portmore Police Station – Constables Hubert James, Verando Bennett and Henry.

The residents of 22 Allamanda Drive were the appellant , Detective Acting Corporal Wayne Clarke from the Elletson Road Police CIB, Dianne Kellyman and their son who was three years old at the time of the incident.

Miss Kellyman, who was the hirer under the agreement, was not there on this first visit. The appellant came to an agreement with the Constable that he would pay up the balance of $8,000 on the refrigerator. Sometime between this date and April 4, 1998 $5000 was paid to Singer Sewing Machine Company.

When Special Constable Lanzie Brown returned to the residence on April 4, 1998 there was a remaining balance of $3000. On this occasion Special Constable Brown was accompanied by Special Constable Glenroy Fagan. Both men were armed. Whey they arrived they were both met by the appellant who left them unattended for some twenty (20) minutes. Then a lady appeared with a young child as if about to leave. The appellant then re-appeared and asked the special Constables to leave the doorway of his residence. The Constables refused and the appellant said he was not giving them the refrigerator nor was he giving them the money.

Special Constable Lanzie Brown was facing the appellant while speaking with him. After he was met with the appellant's resistance, he decided to telephone the police for reinforcement. He then turned to his right to face Miss Kellyman and her son which meant that his left side was now facing the appellant. While in this position, he said to Miss Kellyman, "the fridge belongs to you; you should deal with it". While standing there with the phone at his right ear, he was shot with a 9mm pistol.

The sole bullet discharged by the appellant caused Constable Brown to suffer four wounds. The bullet entered on the left (outer) thigh, exited the left (inner) thigh, entered the right ankle, exited the sole of his foot and ricocheted.

At the trial the evidence of the prosecution and the defence were diametrically opposed. The prosecution's case was as previously stated while that for the defence ran thus. On the day in question, the appellant said that at about 9:45 a.m. he was looking out of his bedroom window when he saw two men approaching his home. Both men were armed. Constable Lanzie Brown had a 9mm Browning pistol and the other man had a .38 snubnose special. Constable Brown repeatedly attempted to force his way into the appellant's home. The appellant prevented him by repeatedly pushing him away. His colleague said, "Lanzie, mek mi try settle this". The appellant pushed Constable Brown and he backed off sideways putting his left side to the appellant.

Constable Brown put his hand on his firearm and the appellant said, "Don't touch it". Constable Brown pulled the firearm completely from his waist and was in the process of leveling it when the appellant, who was also armed with his service revolver in preparation for work, discharged one bullet. The appellant said:

> "I fired because I was fearful for my life. I was of the opinion that Mr. Brown was going to discharge his firearm".

After the explosion, the appellant said that the other man (Fagan) attempted to pull his firearm from his pocket but it was locked in the top part of his pocket and could not come out. It is also the appellant's evidence that his son, who was then three years old, had somehow got into the melée and he was also fearful for his safety.

At the time of trial, the appellant was suspended from the force.

Two main grounds of appeal were argued on behalf of the appellant. It is only necessary to deal with the first ground of appeal as the Court found no merit in the arguments in respect of the second ground. Ground 1 was as follows:

> "The Learned Magistrate did not consider the question of whether the defendant/appellant was activated by mistake as to the designs of the complainant."

Mr. Koathes for the appellant made the following submissions:

(1) That Section 22 of the Offences against the Person Act includes the mens rea of an unlawful intention to wound. It is a part of the offence of wounding and there is an evidential burden,

proof of which the prosecution bears. Once the appellant introduced facts which could have supported a conclusion that he might have been mistaken, and that his actions might in consequence have lacked the necessary mens rea, there was a burden on the Crown. The magistrate did not in any way direct her attention to this aspect of the case nor resolve it in her findings.

(2) In all the circumstances, she ignored an issue, the determination of which should have been made before arriving at any decision to hold the complainant guilty .

(3) She failed or neglected to consider one of the primary and most important factors that needed to be considered and the conviction is unsafe and unsatisfactory.

The decision of ***DPP v Morgan*** [1975] 2 All ER 347 marked a change in the law relating to honest belief. In ***R v Williams*** [1987] 3 All ER 411 the decision of ***DPP v Morgan*** was extended to the offence of assault occasioning actual bodily harm. In that case the defence was that he honestly believed that the youth was being unlawfully assaulted by M. It was held that if a defendant was labouring under a mistake of fact as to the circumstances when he committed an alleged offence, he was to be judged according to his mistaken view of the facts regardless of whether his mistake was reasonable or unreasonable. The reasonableness or otherwise of the defendant's belief was only material to the question of whether the belief was in fact held by the defendant at all.

In ***Solomon Beckford v R.*** (PC) [1987] 3 All ER 425 their Lordships' Board approved the case of ***R v Williams*** (supra). There it was said that if a genuine belief, albeit without reasonable grounds, is a defence to rape

because it negatives the necessary intention, so also must a genuine belief in facts which if true would justify self defence to be a defence because the belief negatives the intent to act unlawfully. (emphasis supplied).

In the instant case, the learned magistrate noted that the case for the defence and that of the prosecution were diametrically opposed. She outlined the inconsistencies in each side's case, but found that the prosecution's case was more plausible. She said at page 75 of the record:

> "I find it difficult to accept how the complainant, his left side to the defendant, was pulling a firearm from the right side of his waist and leveling it at the defendant."

She found that the evidence by the appellant concerning the complainant's attempt to take the firearm from his waist never happened. Even though she does not use the words honest belief in her judgment, the learned magistrate did recite the case for the defence and in so doing she said at page 74 of the record that:

> "He (the appellant) took his action because he thought the complainant was going to discharge his firearm and he was fearful for his life. Also his three year old son had gotten between him and the complainant".

The above is her account of what the defendant said he honestly believed which shows that she addressed her mind to the subjective test adumbrated in ***Beckford v R.*** It cannot be sustained that the learned

Resident Magistrate did not address her mind to this important part of the appellant's defence. It was after this account that the learned magistrate goes on at page 75 to address her mind to the truth of the defendant's assertions and assessed whether they were in fact ever held at all. It was at this time that she said she found it difficult to accept how the defendant could apprehend being shot when the firearm was out of his line of sight. The learned magistrate therefore rejected the defence and favoured the case for the prosecution. She was justified in so doing as it can be seen that she used the words which indicated that she had the subjective test in mind in arriving at her decision. Once the learned Resident Magistrate found that at the time the complainant was shot he had a cellular phone in his right hand to his right ear and a contract and computer print-outs in his left hand, that concluded the case in favour of the Crown. This was the fact which negatived the defence of self defence raised by the defendant.

Consequently the appeal is dismissed. The conviction and sentence of the court below are affirmed.