JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 18/90

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

REGINA

VS

GARFIELD SINCLAIR

Norman Davis for the appellant

Carolyn Reid for the Crown

11th July, 1990 & 20th December, 1991

DOWNER, J.A.

The appellant Garfield Sinclair was on 15th November, 1988, convicted of unlawful wounding contrary to section 22 of the Offence Against The Person Act by His Honour Mr. C.B. Lawrence, Resident Magistrate for Portland. A fine of $800 or 3 months imprisonment at hard labour was imposed on him.

It is necessary to refer to the evidence of the prosecution to ascertain if he ought to have been called on to answer the charge. It will also be pertinent to examine a crucial finding of the Resident Magistrate to determine whether in any event, his findings of fact could have been upheld.

Clive Black recounted that he was with a friend near Trident Hotel between 4:00 - 5:00 p.m. on 11th April, 1988 and that he overheard three shots. He also saw some cows running. Dwayne Brown was with his grandmother Gloria Smalling, the complainant, viewing television when she heard a bang on the window. His grandmother was overheard saying "A what hit me in a mi belly." Whereupon Dwayne saw a bullet under the kitchen table. He also saw a hole in the window frame.

As for the complainant, she recounted that she lived in the Anchovy Housing Scheme. She explained that as she was about to take something from the table, she heard a crash and felt as if something tore out her belly. Then she felt giddy and realised she was wounded. Thereafter she took the bullet to the police station and the bullet was subsequently tendered in evidence. She was treated at the hospital and sent home.

The other aspect of the prosecution's case was the police evidence. Acting Corporal Elvis Gordon received the spent bullet from the complainant Gloria Smalling when he commenced his investigations. He observed the hole in the louvre blade. Thereafter, he spoke to the appellant who told him that he had fired four shots at three cows earlier that day. After caution, he handed over a .38 Smith & Wesson Revolver, five rounds of .38 cartridges and three spent .38 cases. Inspector Bailey was in charge of the investigations. He also visited the house of the complainant and he estimated that the distance from the home of the accused to the home of the complainant was about 5 to 6 chains. With regard to the discharge of his firearm, Inspector Bailey said the accused said he fired when he saw some cows on his lawn that day.

The only other evidence from the prosecution was the expert evidence of Detective Deputy Superintendent Linton who received the firearm, and bullets including the spent one, found under the table in the home of the complainant. In his opinion, the range of the firearm was 1,600 yards and the effective lethal range was 1,500 yards. It was also his opinion that this spent bullet was discharged from the appellant's firearm.

It was on the basis of the above evidence that the appellant was called upon to answer. The issue of whether a prima facie case was made out that the accused inflicted a wound on the complainant was not raised before the Resident Magistrate. It ought to have been raised as it was necessary to establish that the necessary

intent could have been proved. The necessary intent was to "unlawfully and maliciously wound or inflict any grievous bodily harm." The issue of the meaning to be attributed to the word maliciously in a statute has been settled in the criminal law. It is therefore pertinent to refer to R. v. Cunningham (1957) 2 Q.B. 396 or 41 Cr. App. R. 155 where after an examination of the authorities, the principle was stated. It appears in the headnote in Cr. App. R. at page 155 as follows:

> "... either (1) an actual intention to do the particular kind of harm that in fact was done; or (2) recklessness as to whether such harm should occur or not, i.e., the accused person must have foreseen that the particular kind of harm might be done and yet gone on to take the risk of it. It is neither limited to, nor does it indeed require, any ill-will towards the person injured."

The only evidence as regards the discharge of firearms comes from the police officers. It was at its highest, that the appellant said he fired shots at cows on his lawn. The accused ought not to have been called on to answer as a necessary ingredient of the charge was not established when the prosecution closed its case. Moreover, although the Resident Magistrate called on the appellant to answer he found as follows:

> "(18) I found that although the accused was a respectable businessman he was very negligent on this occasion and I found him guilty for unlawful wounding."

The intent required is recklessness, and very negligent is not an equivalent for purposes of the criminal law.

Such a finding of "very negligent" demonstrates that an essential ingredient of the charge was not proven on the evidence. It was in those circumstances that this Court had no hesitation in allowing the appeal at the end of the hearing and therefore set aside the verdict of guilty and entered a verdict of acquittal.