JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL 148/97

COR: THE HON. MR. JUSTICE GORDON, J.A
THE HON. MR. JUSTICE PATTERSON, J.A
THE HON. MR. JUSTICE BINGHAM, J.A

REGINA vs OREAN ROBINSON

Lord Gifford Q.C. for Applicant

Kathy Pyke for the Crown

3rd March and 3rd April 1998

GORDON. J.A.

The applicant was convicted in the Home Circuit Court on the 3rd day of November, 1997 of the offence of unlawful wounding and sentenced to serve eighteen months imprisonment at hard labour. On the 3rd day of March, 1998, we heard submissions in his application for leave to appeal and at the conclusion thereof we refused the application. We then promised to put our reasons in writing and this promise we fulfil.

The evidence of the prosecution was given by the complainant and two other witnesses. The complainant testified that on the 8th August, 1990 at around 5:30 in the afternoon he was walking with his witnesses down Mountain View Avenue. A car drove passed them, then turned and stopped where they were. He saw a gun protruding through the car window and a voice said: "You bwoy stop." He was ordered to lift up his shirt by the driver of the car, the sole occupant of the

car, and as he was about to do so he heard an explosion. He said it came from the car and from the gun in the hand of the applicant the man who sat in the car. He was struck by a bullet in the left side of his abdomen. He saw blood running down his left hand . He collapsed and was assisted by the applicant into the motor car. The applicant who had discharged the weapon took the complainant to the Kingston Public Hospital where emergency surgery was performed and he remained for some eight to twelve days. He said he was never charged with any offence by the applicant or anyone.

The evidence of the other witnesses corroborated the complainant's testimony. Both witnesses said that after the complainant was shot and was taken to the hospital, they went to the Kingston Public Hospital to visit the complainant and there they were arrested and charged with firearm offences. They went to the Gun Court on a number of occasions; and the cases were not heard and were eventually adjourned sine die.

The defence case was that the applicant at the time, a member of the Jamaica Constabulary Force in plain clothes and in an unmarked police vehicle, was driving down Mountain View Avenue and he saw a line of men. At the back of the line was "Phantom" **whom he knew very well and who had been shot** and should have been in custody. He called to the group of men. "Phantom" bent, fired at him and began to move away down the road. He returned the fire and subsequently discovered that the complainant was injured. He asserted that he was not mistaken in his identification of "Phantom" and further that himself and other policemen had taken "Phantom" into custody three months previously.

Lord Gifford, Q.C. for the applicant complained in grounds 1 and 2, which he argued together, that the summing-up of the learned trial judge contained

constant and unnecessary repetitions of the prosecution evidence which rendered it seriously unbalanced in favour of the Crown. He also complained that the learned trial judge made excessive and unwarranted comments which ridiculed and undermined the defence.

The trial judge's comments were prefaced and sometimes followed by "if you accept", then he went on to state the complainant's evidence. The trial judge had indicated to the jury that he as well as counsel for the prosecution and for the defence may make comments and express opinions and that these comments could be accepted if they provided assistance. He emphasised that the burden of proof lay on the prosecution to satisfy the jury so that they felt sure.

We did not accept the contentions of Lord Gifford, Q.C. The comments, al'hough repetitive, did not enure to the benefit of the prosecution's case but p.'rhaps could have weakened it in the eyes of the jury as they may have thought th 3t the judge himself did not believe in the strength of the prosecution's case. The issue was left for the jury's consideration.

We now look at the complaint regarding the ridicule of the defence case by the learned trial judge who referred to "Phantom" as the "ghost taken from the comic strip". The comment was made as follows:

> "Mr. Foreman and members of the jury, a comment I make is this, the man who is called Phantom must be a ghost who is taken from the comic strip. He is supposed to be in custody; but the accused man is not saying he is mistaken, he is saying it is Phantom. He says he knows Phantom personally. So, it is a matter for you, based on what he tells you, but I am asking you since there is no evidence, to say how Phantom come back out. There is no evidence before you. All the evidence you have is that a Phantom was taken into custody by the accused and another police and that he was shot and injured. So do not allow your minds to speculate about people shot and injured and taken maybe to the hospital and the next thing, you see them appear. Do not allow your mind to

> speculate about that. There is nothing to support that as far as the evidence is concerned. That is my view. In that, the evidence you cannot speculate on it. The evidence is that the accused man tells you that Phantom was in custody three months before the incident happened. So you would have to ask yourselves this question, if Phantom was taken into custody three months before, what is Phantom doing out there?"

The background to the learned trial judge's comment was the applicant's evidence that he said he knew "Phantom" personally, and was not mistaken as to his identify and that he saw Phantom. He shot at "Phantom" from a distance of at most two and one half (2 1/2) yards away. Subsequent to the exchange of fire between Phantom and the applicant, Phantom disappeared without a trace and the complainant was discovered suffering from a gunshot wound to his abdomen. The comment was made using positive language with no untoward implication discernible if taken in its proper context.

It was for the jury to find whether they accepted the evidence or not. Consequently, we found no comments made by the learned trial judge which could be construed as unfair to the applicant. At its highest, although repetitive, they were not so unbalanced as to effect a miscarriage of justice. We do not consider that the jury would have been misled or improperly influenced by them when the summing up was considered as a whole. For these reasons the application for leave to appeal was refused the conviction and sentence affirmed and sentence ordered to commence on December 17, 1997.