

ANGUILLA

IN THE COURT OF APPEAL

MAGISTERIAL CRIMINAL NO. 2 of 1989

BETWEEN:

CONNELL LORENZO HARRIGAN - Appellant

and

THE QUEEN - Respondent

Before: The Honourable Mr. Justice Bishop - Chief Justice (Acting)
The Honourable Mr. Justice Moe
The Honourable Mr. Justice Byron (Acting)

Appearances: Lee Moore and T.W.R. Astaphan for the Appellant
Mr. DeFrietas for the Respondent

1990: May 14, 15,
1991: May 13.

JUDGMENT

MOE, J.A.

The appellant was tried before a magistrate on a complaint which charged that on the 8th day of June, 1988 at Shoal Bay he did unlawfully and maliciously wound St. Clair Harrigan. Contrary to Section 19 of the Offences against the Person Act, Cap. 56.

On the date concerned the appellant engaged two men to cut a road with a Bulldozer through a piece of land at Shoal Bay. There was a dispute between the appellant and St. Clair Harrigan about the ownership of the land over which the road was to go. When the two men arrived at the area where the incident occurred, St. Clair, his wife and daughter were there. St. Clair had come there carrying a stick and his wife had a machete. They intercepted the bulldozer operator who got in touch with the appellant who later arrived on the scene carrying in a holster in his waist a fully loaded firearm. There was a stand-off at the scene.

The magistrate made specific findings that Crystal Harrigan, wife of St. Clair Harrigan saw an act of the appellant in pulling back his shirt disclosing his revolver which caused her to become frightened, and that St. Clair Harrigan in fear for his wife's safety jumped the accused and wrestled for possession of the revolver. The magistrate accepted that had the accused not made the movement with

/his hand.....

his hand exposing the gun and causing fright St. Clair Harrigan would not have jumped him and the wrestling for the gun would not have taken place.

St. Clair Harrigan received a wound to his leg from a shot discharged from the appellant's revolver. The magistrate was satisfied that the shot went off as a result of both St. Clair and the appellant fighting for possession of the revolver. The magistrate considered the act of the appellant in pulling back his shirt and disclosing his revolver as reckless and showing utter disregard on the appellant's part as to whether such an act in what was an already tense situation would cause harm. Being satisfied there was sufficient evidence that the wounding was unlawful and malicious the magistrate convicted the appellant.

It is unnecessary to set out seriatim the grounds of appeal filed and argued. The main complaint against the decision is that on the totality of the magistrate's findings there is no fault attributable to the appellant. It was submitted that the magistrate found no act on the part of the appellant which was the proximate or direct cause of the wound to the virtual complainant St. Clair Harrigan. Further that the intervening actions of St. Clair Harrigan render inoperative any effect of the appellant exposing his gun.

The respondent's submission was that the appellant initiated a course of events in a reckless manner which ultimately resulted in the wound to St. Clair Harrigan. He created a dangerous situation and is guilty of the injury which occurred as a result, no matter in what way the injury occurred. That the appellant ought to have foreseen that physical harm might result from exposing his firearm in the particular circumstances and the magistrate was correct to hold that exposing the firearm was a reckless act. He referred to R.V. MOWATT (1967) 3 W.L.R. 1192 with particular reference to the following passage from the judgment of Diplock L.J. at page 1196:

"In the offence under section 20, and in the alternative verdict which may be given on a charge under section 18, for neither of which is any specific intent required, the word "maliciously" does import upon the part of the person who unlawfully inflicts the wound or other grievous bodily harm an awareness that his act may have the consequence of causing some physical harm to some other person. That is what is meant by "the particular kind of harm" in the citation from Professor Kenny. It is quite unnecessary that the accused should have foreseen that his unlawful act might cause physical harm of the gravity described in section, i.e., a wound or serious physical injury. It is enough that he should have foreseen that some physical harm to some person, at best of a minor character, might result."

/The magistrate.....

The magistrate made no finding that an act of the appellant fired the revolver resulting in the wound to St. Clair Harrigan. The magistrate appears to have proceeded on the basis that the gunshot wound is to be attributed to the appellant's act of disclosing the gun and that that act of disclosing the gun was reckless.

To have established recklessness on the part of the appellant the prosecution must have shown that the appellant knew or foresaw that some physical harm might result from his act and yet went on to take the risk of it. Section 19 of the Offences Against the Person Act, Cap. 56 is in terms similar to section 20 of the Offences Against the Person Act, 1861 (U.K.). There is a series of authorities on the meaning of recklessness in relation to such a statutory provision but I think it worthwhile to repeat here a statement of Geoffrey Lane L.J. in *Stephenson v. Reg.* 69. Cr. App. Rep. 213 where at page 219 he said:

"A man is reckless when he carries out the deliberate act appreciating that there is a risk that damage to property may result from his act. It is however not the taking of every risk which could properly be classed as reckless. The risk must be one which it is in all the circumstances unreasonable for him to take. Proof of the requisite knowledge in the mind of the defendant will in most cases present little difficulty. The fact that the risk of some damage would have been obvious to anyone in his right mind in the position of the defendant is not conclusive proof of the defendant's knowledge, but it may well be and in many cases doubtless will be a matter which will drive the jury to the conclusion that the defendant himself must have appreciated the risk. If he had the necessary knowledge or foresight and his bad temper merely caused him to disregard it or put it to the back of his mind not caring whether the risk materialized or if it merely deprived him of the self-control necessary to prevent him from taking the risk of which he was aware then his bad temper will not avail him. This was the concept which the Court in *Parker (Daryl)* (1976) 63 Cr. App. R. 211, 214 (1977) 1 W.L.R. 600, 604 was trying to express when it used the words "in closing his mind to the obvious fact that there is some risk of damage resulting from that fact". We wish to make it clear that the test remains subjective, that the knowledge or appreciation of risk of some damage must have entered the defendant's mind even though he may have suppressed it or driven it out."

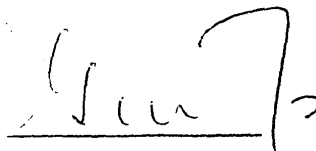
In *Flack v Hunt* 70 Cr. App. Rep. 51 at page 51 Browne L.J. indicated that exactly the same principle applies in a case of unlawful wounding. In *Grimshaw v Reg.* 1984 Crim. L.R. 100, where the appellant was charged under S.20 of the Offences Against the Person Act, 1861 (U.K.) the Court of Appeal held that in determining whether an accused was reckless it was the jury's view of what a defendant foresaw, not their view of what he ought as a reasonable man to have foreseen, that was material.

/In this....

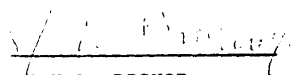
In this case in seeking to determine whether the behaviour of the appellant was sufficient to amount to recklessness the magistrate asked this question "should he have foreseen that harm might come to someone and yet taken the risk of it happening?" The magistrate evidently considered the matter from the point of view of the ordinary reasonable man, applied the objective test, and concluded that the appellant was reckless - showed utter disregard as to whether his act of disclosing his gun would cause harm.

We do not see that one is bound to infer that harm would result from the act of disclosing a gun in one's waist and that the appellant therefore must have been so aware. Doing an act to indicate that one is armed or even to cause fear or fright does not necessarily mean one knows or foresees that physical harm is likely to result from that particular act.

We are not satisfied that the magistrate correctly directed her mind to the issue or that she would inevitably have come to the same conclusion if she had so directed herself. In the circumstances we did not feel the verdict was a satisfactory one. We therefore allow the appeal, and set aside the conviction and sentence against the appellant.



G.C.R. MOE,
Justice of Appeal



R.H.A. BISHOP,
Chief Justice (Acting)



C.M.D. BYRON,
Justice of Appeal (Acting)