JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 56/94

COR: **THE HON MR JUSTICE CAREY JA**
THE HON MR JUSTICE GORDON JA
THE HON MR JUSTICE PATTERSON JA

REGINA V. JEFFERY ROBINSON

Frank Phipps QC for appellant

Hugh Wildman for Crown

9th & 25th October 1995

CAREY JA

In the Hanover Circuit Court on 17th June 1994 before Reckord J and a jury, the appellant was convicted of wounding Warren Patterson with intent to do him grievous bodily harm and sentenced to 5 years imprisonment at hard labour.

The prosecution case was that on 7th July 1991 the victim, Patterson, who was by a beach in Lucea, Hanover, was approached by the appellant, a police constable, and another officer both in plain clothes. The appellant, addressing Patterson as "hey bwoy," brusquely told him that he came for him. He declined to inform him of the reasons for his arrest. The appellant sought to detain Patterson by holding him in the waist of his shorts. The latter resisted saying he had done nothing and refused to budge. The appellant suggested that Patterson was acting like "a bad man" and threatened to shoot him. But the victim remained firmly unintimidated and made the appellant to understand that he was neither thief nor robber, persons who as such deserved to be shot. Whereupon the appellant pulled out a gun. At this time, the other police officer in support of his colleague delivered himself of the following advice - "The time you out there arguing with bwoy, bun di bwoy skin and come." The appellant placed the gun on his victim's side and shot him.

Thereafter, on the insistence of persons around, the appellant took the injured man to the hospital where he remained for 2 months and 3 weeks. It appears that he was shot in the region of the left groin. No medical evidence was called. There were two eyewitnesses to this shooting called by the prosecution who confirmed the victim's story.

The appellant gave sworn evidence. He testified that he went to execute warrants of arrest which he had at the police station on Patterson whom he found by the sea shore. There, having identified himself as a police officer, he required Patterson to accompany him to the police station where he had the warrants. Patterson refused. The officer then held him in the waist of his shorts, but Patterson resisted and also tried to get at the officer's firearm. There was a struggle, in the course of which, the firearm went off, injuring Patterson. The jury plainly rejected the appellant's version of these events and there was ample evidence in our view to support their verdict. The learned trial judge properly left the issues of accident and self defence for the jury's consideration.

Mr. Phipps QC did not seek to impugn the directions of the learned trial judge on any of these issues. The attack launched against conviction was directed first at evidence which Mr. Phipps QC submitted was inadmissible on the ground that it amounted to hearsay. That inadmissible evidence, it was argued, was the statement attributed by a prosecution witness to constable Campbell, the colleague of the appellant: "you round there arguing with di boy so long, shot him and come or bun him skin and come." It was after these words of encouragement that the appellant shot and injured Patterson. There was also a suggestion that this evidence was unreliable because it was not mentioned either in statements given by the victim or those of the two eye-witnesses. It is enough to say that the weight to be accorded evidence was entirely a matter for the jury and is not, of course, a test of admissibility. We return then to consider the matter of substance viz, did the evidence offend the hearsay rule? Learned Queen's Counsel complained that the trial judge, in respect of that statement, gave directions to the jury that the appellant's intention to cause grievous bodily

harm to the victim could be inferred therefrom. That statement, he urged was hearsay and accordingly the directions in that regard eroded the defence and amounted to a misdirection. He referred us to **R v Mary Lynch** (unreported) SCCA 16/93 delivered 28th June 1993, in which **Ratten v R** [1971] 3 All ER 801 was applied.

Mr. Wildman for the Crown argued that a statement uttered in the presence of an accused was always admissible in circumstances in which it could be said that the accused adopted the statement either expressly or by conduct. He relied on **R v Christie** [1914] AC 545.

We think that Mr Wildman is right. Lord Atkinson at p. 554 stated the law thus:

> "The rule of law undoubtedly is that a statement made in the presence of an accused person even upon an occasion which should be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated save so far as he accepts the statement so as to make it in effect his own." ...

The reaction of the appellant to the statement demonstrated by his shooting of the virtual complainant was evidence from which the jury could infer that the appellant intended to cause the victim grievous bodily harm.

We do not agree that the statement was hearsay. It could amount to hearsay if the statement was being tendered testimonially i.e. to prove the truth of its contents: that was not its purpose. But assuming for a moment, that the statement constituted hearsay evidence, then it could nonetheless be admissible as an exception to that rule and **Ratten v R** (supra) supports our opinion. In that case, the appellant was accused of murdering his wife by shooting her. The defence was accident. Evidence was admitted from a telephone operator of a call by the slain woman, saying "Get me the police please": It was held:

> "(i) the evidence of the telephonist was not hearsay evidence and was admissible as evidence of fact relevant to an issue, i.e. as evidence that, contrary to the appellant's account, a call was made only some three to five minutes before the fatal shooting by a woman who could only have been the deceased; it

> was also relevant as possibly showing (if the jury thought fit to draw the inference) that the deceased woman was at the time in a state of emotion or fear;
>
> (ii) even if there was some hearsay element in the evidence and the jury understood the words said to have been used to involve an assertion of the truth of some facts stated in them, the words were nonetheless admissible as part of the res gestae since there was ample evidence of the close and intimate connection between the statement ascribed to the deceased and the shooting which occurred shortly afterwards; they were closely associated in time and place and the way in which the statement came was being forced from the deceased by an overwhelming pressure of contemporary event: it carried its own stamp of spontaneity and this was endorsed by the proved time sequence and the proved proximity of the deceased to the appellant with his gun".

The Board thus held that the call was made at a particular time in relation to the shooting and further that the wife was in a state of fear caused by some present or impending danger to herself. Thus in the present case, the statement would be admissible as part of the res gestae. It was relevant to the shooting and contemporaneous with it. It could be used circumstantially to rebut the defences of accident or self defence in both of which, intention was of crucial significance. As **Ratten v R** shows, even if there was some element of hearsay, and we do not think that to be the present case, there was a close and intimate connection between the statement of the appellant's colleague and the appellant's shooting of the complainant which followed.

For these reasons we must reject the submission of Mr. Phipps QC in this regard and the ground of appeal on which he rested, fails.

It was next argued on behalf of the appellant that the learned trial judge had failed to direct the jury that if it found that the virtual complainant received injury as a result of his resisting a lawful arrest, then it should consider whether the force used was in all the circumstances reasonable. The jury should have been told that a finding that the appellant had done no more than he was entitled to do, would result in an acquittal.

This argument rests squarely on the premise that the arrest of the virtual complainant by the appellant was lawful. It is undoubtedly the law that a trial judge is required to leave to the jury all defences which fairly arise on the facts. However the facts in this case were all one way and provided no basis whatever for a direction such as Mr. Phipps QC contended. On the Crown's case, the arrest was unlawful because the appellant never informed the virtual complainant of the charges on which he was being arrested. There was one witness for the Crown who said that the police officer stated that he was arresting Patterson for "beating him up." The appellant did not confirm that lone voice when he gave evidence and indeed swore that he told the complainant that he had warrants at the station for his arrest. Plainly therefore the arrested man was not advised of the charges against him "as soon as reasonably practicable." The Constitution requires that where a person is arrested, he must be told the reason at the time of the arrest or within a reasonable time thereafter. This is of course, a recognition of the common law rule. It is stated in section 15 (2) of the Constitution as follows:

> " Any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language which he understands of the reasons for his arrest or detention."

The case of **Christie v Leachinsky** [1947] AC 573 which is of respectable vintage, is authority for saying that it is a condition of lawful arrest that the party arrested should know on what charge or on suspicion of what crime he is arrested. Where an officer arrests on a warrant, it is customary to read it to the person arrested. In the instant case, when the appellant arrested the complainant he did not have the warrants in his possession nor did he advise him then of the charges on the warrants he said he had and on which he was purporting to act.

We are satisfied that a direction as to the appellant's use of force qua police officer to effect an arrest, was not called for.

These then are the reasons we promised for our decision which we announced at the completion of submissions by counsel.