JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 65/2005

BEFORE: **THE HON. MR. JUSTICE PANTON, J.A.**
THE HON. MR. JUSTICE K. HARRISON, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A.(Ag.)

MICHAEL RICHARDS
v. R.

Mrs. Valerie Neita-Robertson for the appellant.

Chester Crooks for the Crown.

February 6, and 7, 2006

PANTON, J.A.

1. The appellant was convicted on May 13, 2005, in the Manchester Circuit Court of the offence of causing grievous bodily harm with intent. He was sentenced to five years imprisonment at hard labour. On September 6, 2005, a single judge of this Court granted him leave to appeal against this conviction on the basis that the learned trial judge, Marjorie Cole-Smith, J., had instructed the jury not to consider the defence of accident. The question for determination, according to the single judge, was whether this action on the part of the judge had resulted in a miscarriage of justice.

2. Learned attorney-at-law Mrs. Valerie Neita-Robertson formulated and argued one ground of appeal. It reads thus:

> "The learned trial judge erred when she withdrew the defence of accident from the jury thereby depriving the appellant of the fullest consideration of his case and consequentially a fair trial".

3. There is no dispute that on May 8, 2004, the complainant Nicholas Campbell and the appellant had an altercation at Georges Valley. This had followed the making of a complaint by Campbell to the police in respect of the brother of the appellant. Campbell, while at the Georges Valley square, went to purchase yam from a vendor when the appellant drove up, parked his car, came out of it and accosted Campbell in respect of the complaint made to the police. There was physical contact between them as they pushed each other. The prosecution claims that other persons joined in on the side of the appellant, whereupon Campbell ran to the rear of a shop. Campbell then returned to the front of the shop and while he was on the sidewalk trying to make telephone contact with the police, the appellant drove his vehicle across the street directly at him (Campbell) thereby fracturing his left foot. The appellant then drove from the scene.

4. The appellant made an unsworn statement. He said that he saw his brother in the square at Georges Valley. His brother spoke to him. Subsequently, he saw Campbell, and he called to him indicating he wished to speak to him. He

parked his car, went to Campbell and remonstrated with him in respect of the report Campbell had made to the police. Campbell, he said, then assaulted and threatened him. A brother of the appellant as well as a brother of the complainant entered the fray at this stage. However, a Mr. Fagan, uncle of the appellant, escorted the appellant to his car and encouraged him to leave the scene and not allow his car to be smashed. He said that he went into his car and was in the act of driving in the direction from whence he had earlier come, when Campbell ran from behind the shop into the side of his car. He continued driving, he said, in an effort to protect himself.

5. The learned judge, in instructing the jury, said this at page 9 lines 1 to 4:

> "In order to establish its case, the prosecution must prove that the accused deliberately, not accidentally, did an act which inflicted really serious bodily harm on the complainant".

Having said that, she then said:

> "On the facts of the case...it is my view that neither on the Crown's case nor on the case for the defence the question of accident arises. If you accept the defence's view he is saying that the complainant ran into the car, there was mayhem, he ran into the car mirror, and the mirror hit him. So there is no question of accident.
>
> If you accept the prosecution's case, on the other hand, the complainant is saying the accused drove down on him when he stepped one foot off the sidewalk and the car hit him and hoisted him in the air and he fell twelve feet from the car. If you accept the evidence of the prosecution, on the other hand, there is no question of accident, that was a deliberate act" (page 9, lines 9 to 23).

6. In the passages quoted above, the learned judge pointed to the need for the prosecution to satisfy the jury as to the deliberateness of the act that caused the injury, while at the same time ignoring the likelihood of it being accidental. We agree with Mrs. Neita-Robertson that on any construction of the defence, the appellant was saying that he did not deliberately cause the injury in that he was driving from the scene and the complainant, through no fault of the appellant, suffered the injury when he came into contact with the moving car. It is inconsistent for the judge to have instructed the jury that the prosecution "must prove that the accused deliberately, not accidentally, did an act" which caused the injury, while at the same time saying, "on the facts of this case...it is my view that neither on the Crown's case nor on the case for the defence the question of accident arises".

7. In our view, the learned judge was in error in withdrawing the question of accident from the jury's consideration. It was a question of fact for the jury to determine whether the appellant had deliberately injured the complainant or not. The jury ought to have been instructed to deliberate on whether the contact between the complainant and the car had come about by accident. The appellant was indicating that he was driving away from the scene when the complainant ran into the car. There was no deliberate act on the part of the appellant, if his version was accepted. As far as he was concerned, it was an accident. In the

circumstances, the defence not having been fully put to the jury, the conviction cannot be allowed to stand.

8. The learned judge told the jury that the issue in the case was one of credibility (page 26, line 25 to page 27, line 1). However, having combed the summing-up with the help of counsel for the Crown, we have been unable to find any instruction to the jury that they were to acquit if they believed the appellant. In the circumstances, the appeal is allowed, the conviction is quashed and the sentence set aside. In the interests of justice, a new trial is ordered to take place as soon as possible in the Manchester Circuit Court.