JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 95/2003

BEFORE: THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A. (Ag.)

NEVILLE ANDRADE
v. REGINA

Arthur Kitchin for the appellant.

Jeremy Taylor, Crown Counsel (Acting) and Miss Joan Barnett, Asst. Crown Counsel, for the Crown

February 14, 15 and 17, 2006

PANTON, J.A.

1. The appellant was given leave to appeal against a sentence of twelve years imprisonment imposed on him by Norma McIntosh, J. on May 8, 2003, after he was convicted by a jury for the offence of wounding with intent. However, his application for leave to appeal against conviction was refused by the single judge. He has renewed that application before us.

2. On the morning of January 22, 2002, there was an argument between the appellant and one Anthony Pottinger on a public road in the vicinity of Parks Road School in Saint Andrew. The appellant and Pottinger were vendors who plied their trade at the gate to the school premises. The behaviour of these men

drew rebuke from the complainant, Desmond Robinson, the brother-in-law of Pottinger, who was passing on the road. According to the prosecution, the appellant responded by throwing a bottle at Robinson, who was unarmed, and then he used a machete to inflict serious injuries to Robinson's left arm and face. The injuries, according to the prosecution, were inflicted while Robinson was on the ground, he having lost his balance after he had "sighted" the bottle thrown by the appellant. There was medical evidence supporting the prosecution's case that Robinson's injuries were received while he was in a defensive mode.

3. The appellant gave evidence, asserting that he acted in self-defence. He said that during the dispute with Pottinger, Robinson approached him (the appellant) with a machete and chopped him in his head. This was after Robinson and the appellant had thrown stones at each other. The appellant grabbed his machete from his nearby stall and rushed at, and wounded, Robinson. In a matter of this nature, we do not have the benefit of the full transcript of the evidence given by the appellant. However, we are guided by the summary given by the learned judge in her directions to the jury. As regards the actions of the appellant, the learned judge summarized his evidence thus:

> "...after he chop me and blood spurred all over mi face and he was coming to chop me again, I just rush him and started to chop, chop, chop".[page 43 lines 14 to 17].

The transcript also reveals the following in the learned judge's directions to the jury:

> "Now when the incident occurred, the principal was coming through the school gate. She came to buy yam, he said, but didn't get to because of what was happening and then he was asked this question: 'Tell us, at the time you started chopping, what was Mr. Robinson doing?' And his answer was, 'Mr. Robinson was chopping'. [page 44 lines 8 to 14]

Further, at page 47 lines 9 to 16, the learned judge said:

> "I have heard nothing nor was I able to find any note to indicate that the accused man said anything about Mr. Robinson on the ground at any time. He has given you an account for an attack and having been attacked that the man was coming back again with the machete raised and then he started to chop and chop, that is his account".

4. Pottinger gave evidence on behalf of the defence. He said that Robinson had a machete. Robinson and the appellant threw stones at each other. When the appellant's stones were finished, he ran down on Robinson and chopped him. Robinson then used his machete to slap the appellant on his forehead. In Pottinger's opinion, if Robinson had chopped the appellant, the latter would have died as Robinson's machete was "well sharp". The appellant's nephew, Simon, also gave evidence. He saw Robinson appear on the scene with a machete. Robinson, who was wearing a windbreaker, took it off and went towards the appellant. The latter went to his stall and got his machete. Robinson threw a bottle towards the appellant. Both men threw stones at each other. Simon saw

Robinson raise his machete while standing in front of the appellant. At that point, Simon's means of transportation arrived and he left without seeing the rest of the altercation.

5. Dr. Seshaiah gave evidence that he examined the appellant, and found him suffering from deep lacerations to the head and right shoulder. The wounds were sutured, and X-rays showed a compound fracture of the right frontal bone of the appellant's scalp. The doctor referred the appellant to a neurosurgeon as he was of the view that the head injury was significant. The injuries to the appellant were consistent with having been inflicted by a machete with a good amount of force. In the opinion of the doctor, the lacerations could have been caused by machete chops, whereas the fracture could not have been caused by a slap.

6. The main ground of appeal reads:

> "The learned trial judge misdirected herself on the evidence and/or failed to properly consider and/or direct the jury on the applicant/appellant's defence of self-defence, or to put his defence in its proper context, as a consequence whereof the applicant/ appellant was denied a fair trial".

The complaint as to misdirection on the evidence arises from the learned judge's reference to the medical examination on the appellant as having been conducted "on the 22nd of January, which is the day after the incident". The true position is that the doctor did see the appellant on the date of the incident. By stating that

the appellant was seen on the day after the incident, the impression may have been created in the minds of the jury that the appellant may have received his injuries after the incident involving Robinson and himself, and so have no bearing on the case at hand. Although there may be some merit in the complaint, given the high level of violence in the society, we do not think that standing by itself this mis-statement of the evidence is sufficient to affect the conviction that has been recorded. We think it more appropriate to concentrate on the judge's treatment of self-defence.

7. Mr. Kitchin complained that the learned judge did not give sufficient focus to the appellant's evidence. He said that the appellant had received a serious injury to the head, and also another injury to his shoulder; yet, there was no direction given to the jury to consider the appellant's action in the context of how the appellant said he had received his injuries, and as to his effort to prevent a further attack. Consequently, he said, the appellant's defence was nullified, eroded or glossed over by the judge.

8. Having carefully examined the transcript, and having taken into consideration the written and oral submissions of Mr. Taylor for the Crown, we are of the view that there is merit in Mr. Kitchin's complaint. In this case, the complainant, Robinson, was quite firm and unyielding in his evidence that he had no weapon. The appellant, Pottinger and Simon said otherwise. This fact was not highlighted in the summation. Surely, an entirely different perspective would

have to be taken of the case if indeed Robinson had a machete. His credibility was at stake. Further, as the learned judge acknowledged, he was "the only witness (for the prosecution) who gave direct evidence as to what transpired" [see page 41 lines 5 and 6]. Now, there is no doubt that the appellant received injuries from a machete. It was therefore necessary for the jury to be instructed to consider the circumstances in which such injuries were received. Robinson had said that he was unarmed and had been set upon while he was merely trying to make peace. On the other hand, the appellant had said that Robinson was no peace-maker, as he had attacked and injured him, and was in the act of continuing the attack when the appellant tried to disable him from so doing.

9. In directing the jury, the learned judge said the following:

> "Now, I must point out to you that a person who is in fact the aggressor or who injures another as an act of revenge or retaliation acts unlawfully, for it is not necessary for him to use force. So, if persons are fighting and somebody does something, one of them does something before and the other one does something bad to the other one that is not self-defence. That is retaliation and that in law is unlawful action; it might even be a situation where it starts out as a belief that it was a necessary defence, but if the person gets carried away and acts in a way which deprives him of the defence of self-defence; that is, if that person strikes once and continues, and he continued to strike and strike and strike and the person is not able to help themselves anymore that will not amount to self-defence, if it started out that way that will no longer be self-defence". [p.18 line 19 to p.19 line 18].

After the jury had retired for approximately an hour and a half, they returned to the courtroom and requested the learned judge to clarify "what can be regarded as self perception of self-defence or retaliation". This query from the jury indicates that they were concerned about the question of retaliation. And so they should have been. However, the jury needed also to have been concerned about the credibility of Robinson especially as he had said that he had no weapon, yet the doctor had found the appellant suffering from serious injuries to the head and shoulder, the result of chops. At page 67, lines 2 to 10, the learned judge had said this immediately prior to the retirement of the jury:

> "In this case, you have heard evidence of Mr. Robinson also being charged, but you must not concern yourselves with anything to do with that because there is no case against him before you. That is the case against Mr. Andrade. It certainly is a situation where both persons will have the Courts considering injuries they have received as a result of the incident".

This statement to the jury required qualification to the extent that the appellant was saying that it was one incident wherein he, having been attacked, and faced with an imminent further attack, did what he considered necessary to prevent Robinson from inflicting further harm on him.

10. The learned judge, in her summation, placed great emphasis on the issue of revenge and retaliation, based on how the prosecution had projected its case. This may be observed on pages 17, 18, 19 as well as the passages referred to earlier. She also mentioned, on more than one occasion, the fact that the

appellant in his account did not say anything about Robinson falling to the ground. Of course, there was no duty on the appellant to say anything. While there was this emphasizing of the prosecution's position, there was, from our perspective, a singular disregard of the appellant's unmistakable position that Robinson had lied on oath in a significant respect, had attacked and seriously injured the appellant, and that he had received his injuries while the appellant sought to prevent him from continuing the attack.

11. In the circumstances, we are not satisfied that the appellant's case had been adequately put to the jury. Accordingly, we grant the application for leave to appeal against the conviction. We treat the hearing of the application as the hearing of the appeal which is allowed. We quash the conviction and set aside the sentence. Given the time that has passed, and the fact that the appellant has been in custody, we will not order a new trial. A judgment and verdict of acquittal is accordingly entered.