JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 105/97

BEFORE: **THE HON. MR. JUSTICE FORTE, J.A.**
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.

R. v. ANTHONY ROSE

Walter Scott for Applicant
Miss Kathy Pyke, and Donna-Marie Parkinson for the Crown

June 29, and July 31, 1998

HARRISON, J.A.

The applicant was convicted in the Circuit Court for the parish of St. James on the 25th day of July, 1997 for the capital murder of Daniesha Williams on the 8th day of June 1996, and sentenced to death. Consequently he applied for leave to appeal.

The grounds argued by the applicant are as summarised hereunder:

> "(1)The learned trial judge erred in law by failing to uphold the no case submission as the prosecution failed to adduce any evidence to prove mens rea in the applicant on the charge of capital murder.
>
> (2) The verdict is unreasonable and cannot be supported having regard to the evidence as the prosecution failed to adduce any evidence either directly or inferentially to prove that the applicant, if he was the man seen running away from the burning house with the gallon bottle,

intended to kill the deceased or to cause grievous bodily harm to her.

(3) The learned trial judge erred in law by failing to identify those pieces of evidence, if any, which could cumulatively amount to circumstantial evidence sufficient to convict the applicant of the offence charged, thereby leaving the jury to speculate and consequently denied to the applicant a fair chance of acquittal.

(4) The learned trial judge erred in law in leaving the issue of manslaughter to the jury as the issue arose neither on the case for the defence nor of the prosecution, thereby eroding the defence of alibi and denying the applicant a fair chance of acquittal."

The facts as found by the jury, based on the circumstantial evidence led by the prosecution and the inferences drawn therefrom follow.

On the 5th day of June 1996, at about 9:00 p.m. the witness Nikiesha Rose, sister of the applicant, who was in the room of her house at Mafoota District in the parish of St. James heard the applicant's voice and saw him going towards the house of Clifton Rose, a brother of theirs. The applicant used a bad word and said to her "Hey gal, go in and lock the door." She obeyed and then after less than one (1) minute heard the sound "boom." She opened her door and saw the applicant running towards her from the direction of Clifton's house "with a jug in his hand." He ran past her at arms length. She had grown up with the applicant for the period of her sixteen years.

The witness Nikiesha Rose told the jury of an earlier incident involving a quarrel between the applicant, Clifton Rose, Vivienne Rose and their parents. The applicant accused Vivienne of causing the quarrel. Clifton said that if that was so the applicant

should share the blame. The applicant "draw a knife after Clifton and ... Clifton dress back ..." The applicant then said "Watch whey a goh happen..." and ran off.

The witness Sharon Campbell, the mother of the deceased saw the applicant running from the back of Clifton's house, which she saw on fire, going in the direction of Nikiesha's house. She called to the applicant when he was about nine (9) yards from her saying "Tony, Tony, you bun up me baby." The applicant did not reply, but continued running. She knew the applicant for more than fifty years for which period she would see him every day. She saw his face at the time for about five minutes while he was running... from the light coming from the blazing fire." The witness Clifton Rose, the brother of the applicant, with the aid of the fire from the burning house, saw the applicant running "on the left side of the house with a gallon jug in his hand." He had known the applicant for twenty-six years because they grew up together in the same district. After the fire this witness did not see the applicant for about one year. Another witness Vivienne Rose, also a sister of the applicant said that she was standing at her gate along with Sharon Campbell, Clifton Rose and her boyfriend when she heard a sound "boom" and saw fire coming from the house at its rear. She heard Sharon say "Tony, Tony you bun up mi baby." She Vivienne did not then see the applicant nor afterwards. She said her belongings were burnt up in the house. She said that there had been a fuss earlier at their parents' house in which Clifton Rose "hold up (her) father." The applicant drew a knife and held it at Clifton who drew a machete. The applicant had then said to his father "Come mek wi goh deal with dem case over there soh" and the applicant ran off. About one hour after she heard the sound "boom" while standing at her gate.

Det. Constable Khani Simpson received a report and went to Mafoota District at about 10:00 p.m. He saw a large crowd, a fire engine and "the shape of a two bedroom house" and "ashes of wood lying on the ground." He also saw "two charred bed springs." He spoke to Vivienne and Nikiesha carried out investigations returned to the station and prepared a warrant for the arrest of the applicant for the offence of arson. Subsequently, on the 8th day of June 1996, on receiving further information he went to the Bustamante Childrens' Hospital to which the deceased had been taken, and then he returned to the Ade1phi Police Station where he prepared a warrant for the arrest of the applicant for the murder of the deceased child.

On the 20th day of January 1997 Det. Cpl. Vernon Ellis arrested the applicant on the said warrants and when cautioned the applicant said, "Electricity burn down the house." Det. Ellis had been looking for the applicant from August 196, when he came to that police area, but did not find him.

Clifton Rose whilst he was running towards the house had seen the applicant run away from his Clifton's house, and afterwards the witness Clifton ran towards the burning house, hit off the door and went inside. The deceased Daniesha, one year and eleven months old was lying on a bed in the room. He smelt the odour of gas in the room and particularly on the bed on which the deceased was lying and on the floor of the room. The floor, the bed and the deceased were all on fire. He took deceased off the burning bed and turned to leave the room. The doorway through which he had entered was now ablaze. The child fell from his hands onto the blazing floor. Shortly after his girlfriend then told him that she had got out the deceased and he Clifton jumped out through a window. The kerosene lamp with a shade were on the table, intact, when he entered the room, but, in his words, "... the whole room under fire." He

was taken to the hospital, along with the deceased. The medical evidence is that the deceased died from the extensive deep burn through the skin, consistent with flame burns, to her face, head, neck, upper limbs and upper body.

The defence was one of alibi. The applicant gave evidence admitting his involvement in the earlier incident, but stated that he developed a pain in his stomach and left telling his mother that he was going home. He went home and remained at home until the following morning leaving home at about 8:00 o'clock. He denied committing any offence and denied leaving the area. He did not attend the deceased's funeral. Lovena James, the applicant's mother supported his alibi that he left before the fire started.

In support of his first ground Mr. Scott for the applicant argued that there was no evidence of mens rea in the applicant directly or inferentially of intention to kill or to cause grievous bodily harm sufficient for a case to be answered. Nor was there any evidence that the applicant knew that a child was in the house and he intended to kill or cause grievous bodily harm or that he knew that his act would probably cause the child grievous bodily harm.

An examination of the transcript of the evidence which was led by the prosecution reveals that the witness Clifton Rose said that he had to hit off the back door of the house in order to enter and when he entered he smelt gas on the bed on which the deceased was lying, as also on the floor and on the deceased herself. The bed and the deceased were both in flames as well as the floor. That was evidence from which the jury could draw the inference that "gas" was deliberately thrown on to the bed on which the deceased, a child aged one year and eleven months was lying, that the person who did so, allegedly the applicant must have seen the child, and the

jury could draw the further inference that in the circumstances, it must have been evident to such person namely the applicant that the probability was that death or grievous bodily harm would be caused to the deceased.

When on a charge of murder, the person charged is shown by his conduct or words or both, that the inference can be drawn that he had the intention to kill or to cause grievous bodily harm or that he knew that his acts would probably result in grievous bodily harm to someone, then the requisite mens rea is proven. In **Hyman vs Director of Public Prosecutions** [1974] 2 All ER 41, the conviction of the appellant for murder was upheld, in circumstances where, jealous of her former lover's relationship with the mother of the deceased she drove to the latter's home and set fire to it, knowing that the occupants were inside, although stating that she had only intended to frighten them. Lord Hailsham in describing the intention necessary to prove mens rea in murder, in the circumstances of that case said at page 56:

> "(1)Before an act can be murder it must be 'aimed at someone' as explained in **Director of Public Prosecutions v Smith [1960] 3 All ER at 167, [1961] AC at 327,** and must in addition be an act committed with one of the following intentions, the test of which is always subjective to the actual defendant:
> (i)...
>
> (ii)...
>
> (iii) Where the defendant knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse, the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the defendant desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed."

In addition, there was evidence that the applicant had said to Clifton Rose, in Nikiesha Rose's presence, less than an hour prior to the fire, "Watch whey a go happen" and to his father in Vivienne Rose's presence "Come mek we go deal with fi them case over deh so;" and when his father disagreed the applicant said "Watch, watch" and ran off. From these bits of evidence the jury could infer the intention of the applicant. Furthermore, the evidence shows that when the witness Sharon Campbell called to the applicant and said "Tony Tony you bun up me baby", the fact that he did not reply, but continued running, is evidence from which the jury could have drawn an inference of guilt. The inference is drawn not only from the point of view that one would have expected the applicant to have denied vehemently such an accusation, but also from his action in running away from a situation, where, his brother's house was on fire but instead of remaining to assist in extinguishing the flames he ran away.

Where an accusation is made directly to someone, in circumstances where a denial or some explanation is reasonably expected from him, in the absence of any such response it may be regarded as an acceptance by him of the truth of the said accusation **(R v Donald Parkes** [1974 12 JLR 1509].

We agree with counsel for the Crown that there was ample evidence to amount to proof of the intention of the applicant and therefore this ground as well as ground two both fail.

The complaint of the applicant on ground three, was the failure of the learned trial judge to identify specifically "... those pieces of evidence" which could amount to circumstantial evidence sufficient to convict the applicant of arson and overall of the offence charged, and as a consequence deprived the applicant of the chance of an acquittal.

A summing-up is not required to conform to any particular format nor to any set formula. What is required is a careful direction of the jury of their functions, the relative law involved, what evidence to look for and how to apply that evidence to the law in order to find facts. Kerr, J.A. in **Edwards v. R** (1983) 20 JLR 203, describing the nature of a summing-up said at page 205:

> "As recently as September of this year, in the case of **Beverley Champagnie** et al, Supreme Court Criminal Appeals Nos 22-24 of 1980, this court reiterated the oft expressed that it is the effect of the summing-up as a whole that is important; the trial judge is not obliged to follow any formula or pronounce any shibboleth, and went on to quote with approval a passage from **R. v. O'Reilly** [1967] (51) C.A.R. page 349. Where however, directions on a particular aspect of the law have been authoritatively approved and advocated by an appellate court, the prudent and appropriate use of such directions is recommended."

Neither is a trial judge required to identify every bit of evidence capable of amounting to a particular aspect of proof. He cannot be faulted, in the circumstances of some cases, if he describes the nature of the evidence capable of establishing proof, gives some examples and leaves it to the jury to decide what evidence they accept and what inferences they may draw as satisfactory proof.

In dealing with the offence of arson, the learned trial judge told the jury :

> "Now the offence of arson is committed where a person maliciously set fire to a dwelling house with intent to injure or defraud. So, in relation to arson the prosecution must prove:
>
> 1. That the accused deliberately committed some act which caused the damage of the property;
>
> 2. The accused had no lawful excuse for causing that damage;

> 3. The accused either intended to cause the damage to the property or was wreckless as to whether such harm occurred or not.
>
> So, if you find from the evidence that there was a deliberate act to intentionally kill someone, and this was done in the course or furtherance of arson in relation to a dwelling house, then it is open to you to convict this accused man of capital murder."

He also directed them on the inferences:

> "Now apart from finding the actual facts proved in this case you are entitled to draw reasonable inferences from such facts as you find proved in order to assist you in coming to your decision. You may draw inferences from proved facts where it is necessary to complete the element of guilt or establish innocence. But you must not draw an inference unless it is a reasonable one and you must be quite sure that it is the only inference which can reasonably be drawn."

There was no direct evidence of an eyewitness who could say that he saw the applicant actually set fire to the said house. The Learned Trial Judge was in the circumstances quite correct to direct the jury on circumstantial evidence. Support for this approach is found in **Archbold, Criminal Pleading Evidence and Practice, 37th Edition.** The authors dealing with evidence in proof of the offence of arson, said at paragraph 2259:

> "It is seldom that a wilful burning by the defendant can be made out by direct proof; the jury, in general, have to presume his guilt from circumstantial evidence."

In giving his direction on circumstantial evidence, the learned trial judge said:

> "Now circumstantial evidence is evidence from which you may infer the existence of a fact in issue. Now no one saw this accused man putting the house on fire causing the death of Daniesha Williams, but that does not mean that because the prosecution cannot produce witnesses who saw this happening that the case against an accused

> cannot be proven. A case against an accused person can be proven by what is known as circumstantial evidence.
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> And circumstantial evidence goes like this. One witness is called who proves one fact and proves that fact to the extent that you are sure of it. Another witness proves another thing and perhaps a third witness proves something else. And collectively all the testimony of these witnesses must lead to the one inexcapable conclusion and that must be that it is this accused person who did the act. Each fact, standing by itself might not necessarily prove the guilt of the accused but taken collectively, all of them together must lead to the conclusion, which is that you are sure that this accused man did the particular act. None of the facts taken separately necessarily prove the guilt of the accused but taken together they lead to the inevitable conclusion of guilt. That method is much safer than if the crown brought one witness who says he saw the accused man do something, and this is so because that eyewitness may be speaking from vengeance or dislike, or may be making a mistake. But when each witness comes with one circumstance and that is put together to prove the guilt, then circumstantial evidence is perhaps a safer and better evidence on which to form a verdict of guilty."

Later in his summing up:

> "It is a fact of life that the great majority of crimes are done mostly when they can't be seen. But if each little circumstance put together leads to the conclusion of guilt on the part of an accused person, then inspite of there being no eyewitness, the verdict is more likely to be more plausible than a witness who might be lying or mistaken in relation to identity or some other factor. So you should not convict unless you are sure that the facts proved are not only consistent with the guilt of the accused but are also such as to be inconsistent with any other reasonable conclusion."

The learned trial judge in that regard gave the jury the direction on circumstantial evidence following the rule in **Hodge's** case 1838 2 Lewis CC 227. Carey J.A. relying

on the said rule in **R v. Everton Morrison** (unreported) SCCA No. 92/91 delivered 22nd February, 1993 said, at page 2:

> "We desire to say that it should be clearly stated to the jury that, circumstantial evidence consists of the inferences to be drawn from surrounding circumstances, there being an absence of direct evidence. The jury should be told (i) that if on an examination of all the surrounding circumstances, they find such a series of undesigned and unexpected coincidences, that as reasonable persons, their judgment is compelled to one conclusion; (ii) that all the circumstance relied on, must point in one direction and one direction only; (iii) that if that evidence falls short of that standard, if it leaves gaps, if it is consistent with something else, then the test is not satisfied. What they must find, is an array of circumstances which point only to one conclusion and to all reasonable minds, that conclusion only. The facts must be inconsistent with any other rational conclusion."

The learned trial judge reviewed the evidence of the various witnesses pointing out the vital areas, and how the jury should assess the evidence. He gave an adequate direction on the identification evidence against which there is no complaint, instructing the jury how to treat it. He dealt with the burden and standard of proof, discrepancies in testimony and the power of the jury to draw inferences from primary facts proven. In all the circumstances, having directed the jury's attention to the witnesses' testimony containing the fact that the applicant:

(a) uttered words of intent prior to the fire;

(b) was seen going towards the victim's house;

(c) ordered Nikiesha to lock herself in her house;

(d) was seen running about one minute later from the direction of the Clifton's house after an explosion, and;

(e) failed to respond when accused of "burning up" the victim, while running away,

the learned trial judge then told the jury:

> "So, there you have it, Mr. Foreman and members of the jury. You have two diametrically opposed versions. On the one hand, the crown through the evidence of Clifton Rose and Nikiesha Rose, they saw this accused man running from a burning house with a jug in his hand. Sharon Campbell, also saw the accused man running from the scene. Now, Vivienne Rose said she heard Sharon Campbell say, "Tony, Tony you burn up the baby."
>
> Then, you have the evidence of the police officers who carried out investigation, prepared warrants, search for the accused, found him later, arrested and charged him."

Although the Learned Trial Judge did not follow studiously, the pattern of direction in **Hodge's** case we are of the view that the jury could not have failed to understand what was the nature of the circumstantial evidence they were required to examine in order to determine what facts were proved and the inferences they could draw from such facts. There was no room for the jury to speculate, as complained of by counsel for the applicant. We find no merit in this ground.

The final ground of appeal, was that the learned trial judge erred in leaving the defence of manslaughter for the consideration of the jury in that it did not arise on either the case for the prosecution or for the defence.

A judge conducting a trial is bound by an accepted principle of law, that if there is any evidence in the case on an issue fit to be left for the consideration of the jury, the trial judge should do so, despite the fact that it were not specifically raised by the defence or the prosecution **[R v. Donovan Douglas** (1986) 23 JLR 547 following **Director of Public Prosecutions v Camplin** [19781 A.C. 7051.

In his directions to the jury defining the offence of manslaughter the learned trial judge said:

> "What is manslaughter? Manslaughter is the unlawful killing of another person without the intention to kill or to cause serious bodily injury. So for this offence of manslaughter you must be satisfied so that you are sure that one, the accused man did an act which created a serious risk of causing the death of the deceased. Secondly, that risk would have been obvious to any reasonable, prudent person. And thirdly, the accused, when he did the act, either (a), had not given any thought to the possibility of there being any such risk or (b), knew that some risk of causing the death of Daniesha Williams was involved and nonetheless went on to do it."

Then concerning the possible verdicts, he said to the jury:

> "Now, I am going to leave an alternative offence of manslaughter with you. You may not therefore find this accused man guilty of both capital murder and manslaughter. First you should consider capital murder which is the more serious one. If you find the accused guilty of capital murder do not consider manslaughter. But if you are not satisfied that the accused is guilty of capital murder then you go on to consider manslaughter."

The mens rea in the offence of manslaughter does not involve the intent to kill or to cause grievous harm or the forseeable knowledge that his acts would probably result in grievous bodily harm.

There was clear evidence before the jury, as we have previously noted, that:

> "(a)the applicant was seen going towards the house and running from the direction of the house with a jug after the fire,
>
> (b) the applicant failed to respond when accused of setting fire to the deceased, and
>
> (c) the witness Clifton Rose said "Him gas the whole of the bed" and "Daniesha gas on the

> bed and lie down on the bed... fire on Daniesha."

There was evidence from which it could be inferred that both the bed and deceased had been doused with gasolene. Those were deliberate acts.

Even the words by the applicant to Det. Constable Simpson after arrest, "Electricity burn down the house sah," may only properly be construed as a display of knowledge peculiar to him or speculation offered, of the origin and cause of the fire to deflect blame away from him; it is unlikely that the words can be construed to mean, lack of intent.

We therefore can find no room for the view that there was any evidence of lack of intent to give rise to a consideration of the lesser offence of manslaughter. We find that the learned trial judge was, in all the circumstances, generous to the applicant. We find that any consideration of the verdict of murder or manslaughter could only arise after a rejection by the jury of the defence of alibi. By leaving the issue of manslaughter to the jury, it could not therefore be complained of as having "eroded the defence of alibi." This ground also fails.

For the above reasons therefore, because the application raised points of law the application for leave to appeal is treated as the hearing of the appeal. The appeal is dismissed and the conviction and sentence affirmed.