JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 153/99

COR: THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE LANGRIN , J.A.

R v BRISTON SCARLETT

Lord Gifford Q.C. and **Hugh Thompson**
for the Appellant
Miss Paula Llewellyn , Senior Deputy Director of Public Prosecutions and **Mrs. Suzette Rogers**
for the Crown

February, 19,20,21,22 , 23, and April 6, 2001

WALKER, J.A.:

On October 12, 1999 in the St. James Circuit Court the appellant was convicted for capital murder having been tried on an indictment which charged that :

> "Briston Scarlett on the 7th day of October, 1997 in the parish of Trelawny murdered Shauna Morgan in the course or furtherance of arson in relation to a dwelling house".

Following his conviction the appellant was sentenced to death. He appealed his conviction and sentence and on February 23, 2001 we allowed the appeal, quashed his conviction, set aside the sentence imposed on him and in the interests of justice ordered a new trial of the case. We now give our reasons as promised.

The case for the prosecution was that for some time prior to September 30, 1997, the appellant had repeatedly made sexual advances towards a lady, Barbara Benjamin, who had, on every occasion, spurned him. On that date the appellant, who was then riding a bicycle passed Miss Benjamin on the road as she walked home accompanied by her boyfriend Mr. Lennox Nickel. Having arrived at her residence Miss Benjamin and Mr. Nickel entered the former's room where Shauna Morgan lay on a bed. Shortly afterwards Miss Benjamin smelt gas and observed fire coming from under the door leading into the room from outside. Upon looking through a window of the room she saw the appellant in her yard and called out to him. No sooner had she done so, the appellant threw a bottle with" fire on it" through the window with the result that the room, and everyone in it, was set ablaze. In the conflagration all three occupants of the room sustained serious burn injuries for which they were all hospitalized. On October 7, 1997 Shauna Morgan succumbed to her injuries and the appellant was charged with capital murder as a result of her death . A witness for the prosecution, Mr. Omar Shippy, who was a neighbour of Miss Benjamin gave evidence of having at the time of the fire seen the appellant leaving Miss Benjamin's premises hurriedly through the gate. There was also evidence of a medical examination of the appellant which was done on October 7, 1997. That examination revealed burn

injuries to the dorsal aspect of the appellant's right hand which the doctor opined were flame burns of an age of between one to two weeks. When he was apprehended, and after being cautioned by the police, the appellant said "mi never mean to hurt nobody".

The appellant's defence which was one of alibi, was made by way of an unsworn statement in which he also denied setting the fatal fire.

The meritorious ground on which we determined this appeal complained that the trial judge misdirected the jury on the intent necessary to establish the charge of capital murder. This is the direction that the judge gave:

> "I am now going to tell you what the law is. However, the law is that if the accused man, that is if you find that he was the person who threw the gasolene bomb as it has been described and you heard descriptively, if you find that it is the accused who threw that gasoline bomb and at the time that he threw it, he, Scarlett he knew that by the act of setting fire to the dwelling house, it was highly probable that death, it was highly probable that death, it was an occupant in that house, albeit, not Petal, not Benjamin would suffer death or grievous bodily harm, then it is open to you to infer that he had the necessary intention for the crime of murder. I am going to repeat this to you. If, the accused knew that by the act of setting fire to the dwelling house it was highly probable that death, it was highly probable that an occupant in that dwelling would have suffered death or grievous bodily harm, that is really serious bodily harm, then he, then it would be open to you

> to infer that he, Mr. Scarlett would have had the necessary intention to commit the murder".

Again at the very end of his summation in response to the invitation of Crown Counsel the judge said:

> "Okay, All I am going to say, I told you earlier, Mr. Foreman and members of the jury, that the law is that if he knew that by the act of setting fire to the dwelling house, it was highly probable that an occupant in that house would suffer death or grievous bodily harm, then it is open to you to infer that he had the necessary intention for murder and I went on to how you determine murder but if you were to find that he didn't have any requisite intent for murder, it is open for you to find him guilty of manslaughter. That is it."

That direction was plainly wrong. It was in terms identical with the faulty direction given by Ackner J (as he then was) in ***R v Hyam*** [1975] A.C. 55 and repeated by the trial judge in ***R v Nedrick*** [1986] 1 W.L.R 1025. In ***R v Hyam*** the facts were that the appellant had had a relationship with a man who became engaged to be married to another lady, Mrs. Booth. In the early hours of the day in question the appellant went to Mrs. Booth's house where she poured petrol through the letter box, stuffed newspaper through the box and lit it. She gave Mrs. Booth no warning but went home leaving the house burning. Mrs. Booth escaped from the house but her two daughters aged 17 years and 11 years were suffocated by the fumes of the fire. As a result, the appellant was charged with the murder of the two

girls. The appellant's defence was that she had set fire to the house only in order to scare Mrs. Booth into leaving the neighbourhood. Ackner J. directed the jury that the prosecution had to prove beyond reasonable doubt that the appellant had intended to kill or do serious bodily harm to Mrs. Booth, that if they were satisfied that when she set fire to the house she knew that it was highly probable that the fire would cause death or serious bodily harm then the prosecution had proved the necessary intent and that it did not matter if her motive had been only to frighten Mrs. Booth. He advised the jury to concentrate on the intent to do serious bodily harm rather than the intent to kill. The appellant was convicted of murder and her appeal against that conviction was subsequently dismissed by the Court of Appeal. She next appealed to the House of Lords where it was held, dismissing the appeal (Lord Diplock and Lord Kilbrandon dissenting) that a person who, without intending to endanger life, did an act knowing that it was probable that grievous, in the sense of serious, bodily harm would result was guilty of murder if death resulted. In ***Nedrick's*** case the facts bore a remarkable similarity to those in ***Hyam.*** In ***Nedrick*** the appellant was tried on a charge of murder. It was the case for the prosecution that the appellant poured paraffin through the letter box of a house and on the front door of the house and set it alight. The house caught fire which caused the death of a

child. The appellant confessed to starting the fire but said that he had not wanted anyone to die. His defence consisted of a denial of either starting the fire or making any such admission. The appellant was convicted of murder after the trial judge directed the jury in these terms:

> "It is not necessary to prove an intention to kill; the Crown's case is made out if they prove an intention to cause serious injury— that is sufficient... There is, however, an alternative state of mind which you will have to consider. If when the accused performed the act of setting fire to the house, he knew that it was highly probable that the act would result in serious bodily injury to somebody inside the house, even though he did not desire it- desire to bring that result about – he is guilty of murder. If you desire to bring that result about- he is guilty of murder. If you are sure that he did the unlawful and deliberate act, and, if you are sure that that was his state of mind, then, again, the prosecution's case in the alternative of murder would be established".

On appeal to the Court of Appeal against the appellant's conviction on the question of the intent necessary to establish a charge of murder it was held, allowing the appeal, that, in the light of authorities published subsequently, the direction of the trial judge was clearly wrong. Those authorities were ***Reg v. Moloney*** [1985] A.C. 905;[1985] 2 W.L.R. 648; [1985] 1 All E.R. 1025, H.L. (E.) and ***Reg. V***

Hancock [1986] A.C 455;[1986] 2 W.L.R. 357; [1986] 1 All E.R. 641, H.L. (E). In giving the judgment of the Court in ***Nedrick's*** case Lord Lane C.J. formulated for the future guidance of trial judges a model direction which was re-stated and applied with approval in the recent case of ***Reg. V Woollin*** [1999] 1 A.C. 82. The headnote to ***Woollin*** provides a helpful summary of the facts and *ratio decidendi* of that case. It reads:

> "The appellant lost his temper and threw his three month-old son on to a hard surface. The child sustained a fractured skull and died, and the appellant was charged with murder. The judge directed the jury that they could not infer that the appellant had intended to do the child really serious harm unless they were quite sure that serious harm had been a virtual certainty from what he was doing and he had appreciated that that was the case. Subsequently, however, he told them that if they were quite satisfied that the appellant must have realized and appreciated when he had thrown the child that there was a substantial risk that he would cause serious injury to the child it would be open to them to find that he had intended to cause injury and they should find that the offence of murder was proved. The appellant was convicted, and the Court of Appeal (Criminal Division) dismissed his appeal against conviction.
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> On his appeal:-
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> **Held,** allowing the appeal, quashing the conviction of murder and substituting a conviction of manslaughter, that where a defendant was charged with murder and the simple direction that it was for the jury to decide whether the defendant had intended to kill or do serious bodily harm was not enough the jury should be directed that they

were not entitled to find the necessary intention for a conviction of murder unless they felt sure that death or serious bodily harm had been a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant had appreciated that such was the case, the decision being one for them to be reached on a consideration of all the evidence; that the use of the phrase ' a virtual certainty' was not confined to cases where the evidence of intent was limited to admitted actions of the accused and their consequences; and that the use by the trial judge of the phrase 'substantial risk' had enlarged the scope of the mental element required for murder and been a material misdirection".

In his judgment Lord Steyn said at p.96:

"In my view Lord Lane, C.J.'s judgment in ***Nedrick*** provided valuable assistance to trial judges. The model direction is by now a tried-and-tested formula. Trial judges ought to continue to use it. On matters of detail I have three observations, which can best be understood if I set out again the relevant part of Lord Lane's judgment. It was:

'(A) When determining whether the defendant had the necessary intent, it may therefore be helpful for a jury to ask themselves two questions. (1) How probable was the consequence which resulted from the defendant's voluntary act? (2) Did he forsee that consequence? If he did not appreciate that death or serious harm was likely to result from his act, he cannot have intended to bring it about. If he did, but thought that the risk to which he was exposing the person killed was only slight, then it may be easy for the jury to conclude that he did not intend to bring about that result. On the other hand, if the jury are satisfied that at the material time the defendant recognized that death or serious harm would be virtually certain (barring some unforeseen intervention) to result from his

> voluntary act, then that is a fact from which they may find it easy to infer that he intended to kill or do serious bodily harm, even though he may not have had any desire to achieve that result... (B) where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to infer the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case. (C) Where a man realizes that it is for all practical purposes inevitable that his actions will result in death or serious harm, the inference may be irresistible that he intended that result, however little he may have desired or wished it to happen. The decision is one for the jury to be reached upon a consideration of all the evidence". (Lettering added).

> First, I am persuaded by the speech of my noble and learned friend, Lord Hope of Craighead, that it is unlikely, if ever, to be helpful to direct the jury in terms of the two questions set out in (A). I agree that these questions may detract from the clarity of the critical direction in (B). Secondly, in their writings previously cited Glanville Williams, Professor Smith and Andrew Ashworth observed that the use of the words "to infer" in (B) may detract from the clarity of the model direction. I agree. I would substitute the words "to find". Thirdly, the first sentence of (C) does not form part of the model direction. But it would always be right for the judge to say, as Lord Lane C.J. put it, that the decision is for the jury upon a consideration of all the evidence in the case".

Accordingly, the model direction for current use is correctly formulated in the following extract from the All England Reports Annual Review 1998 at p. 122:

> "Where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to find the necessary intention unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case. The decision is one for the jury to be reached on a consideration of all the evidence".

Of course, it is the trial judge who is at all times best placed to determine whether a simple direction on intent will suffice, or whether something more in the nature of a ***Nedrick*** direction as refined in ***Woollin*** is required by the circumstances of the particular case.

In the present case the trial judge had, early in his summation, quite correctly given the simple direction as to the intent necessary in proof of murder, but this was incapable of curing the erroneous direction subsequently given and twice repeated, on the last occasion immediately before the jury retired. It was a material misdirection. So was the flawed direction in ***Woollin*** which prompted Lord Steyn to observe at p. 95 of his judgment:

> "A misdirection cannot by any means always be cured by the fact that the judge at an earlier or later stage gave a correct direction. After all, how is a jury to choose between a correct and an incorrect direction on a point of law? If a misdirection is to be corrected, it must be done in the plainest terms."

It is to be hoped that in future, in directing juries in cases of this nature, trial judges will heed the guidelines to which attention has been drawn in this judgment.

Finally, in view of the manner of disposal of the present appeal we consider it unnecessary, nay undesirable, to comment on any of the other grounds of appeal which were filed and argued on behalf of the appellant.