NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 80 OF 2006

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.

R v DEVON COLLINS

Dr. Randolph Williams for the Appellant.

Mrs. Caroline P. Hay, Senior Deputy Director of Public Prosecutions (Ag.) and Loxly Ricketts, Crown Counsel for the Crown.

June 15, and July 30, 2009

SMITH, J.A.:

1. On the 30th September, 2005 Devon Collins (the appellant) was convicted in the St. James Circuit Court of the murder of Veronica Hall contrary to s. 2 (1) (d) (iii) of the Offences Against the Person Act. The particulars of the offence were that he on the 11th day of February, 2004 in the parish of St. James murdered Veronica Hall in the course or furtherance of arson in relation to a dwelling house. He was sentenced to life imprisonment with the direction that he should serve at least 40 years before becoming eligible for parole.

2. He was granted leave to appeal by the single judge with a view to the Court examining the learned trial judge's directions on the mental element of the offence of murder in the circumstances of the case.

The Prosecution Case

3. Sometime after 11:00 p.m. on January 23, 2004 Mr. Garrett McCallum was at home in Lilliput where he lived with his mother Veronica Hall (the deceased), an aunt and cousins. The house was made of board. It had four (4) bedrooms, two (2) kitchens and a verandah. McCallum and his mother shared a bedroom at the back, one of his cousins and her boyfriend shared one of the rooms, another cousin occupied the front room and his aunt occupied the fourth. The room the witness and his deceased mother occupied had two (2) doors and one window. One door was "nailed up". The other door provided the only exit and entrance to the room.

4. McCallum and the deceased retired to bed in the room which they shared. McCallum's bed was next to the door while the deceased's bed was on the other side of the room next to the window. This window had clear glass louvre blades. There were no curtains at the window. While in bed, McCallum heard a sound by the window like the splashing of water and smelled gasoline. He saw fire under the door. He jumped off his bed and tried to open the door. He could not – "the door was stuck" he said. He quickly went to the window. He looked through the window and saw the appellant whom he knew as

'Smokey' with a yellow jug. He described it as a five (5) gallon jug. 'Smokey', he said, was throwing liquid at the window. The flames rose higher as 'Smokey' threw the liquid, the witness said. By this time the deceased was awake, her clothes were on fire and she was screaming and running around. Her clothes were "wet with gas", the witness said.

5. McCallum kicked out the window through which he and the deceased jumped. His face and hands were severely burnt. The deceased rushed to a pipe, turned it on and went under it. He saw his aunt Valrita Hall on the verandah exiting the house. The rooms at the back of the house were on fire. Then the entire house was engulfed. McCallum and the deceased were taken to the hospital where the latter succumbed to the injuries a few weeks later. The cause of death was septicaemic shock secondary to infected burns.

6. On February 2, 2004 the appellant went to the Savanna-la-mar hospital. He was examined and found to have suffered second degree burns to the right arm and lower legs. The wounds were infected and as a result he was hospitalised for one (1) month. The cause of the wounds was consistent with flame burns inflicted approximately one (1) week before.

7. On February 11, 2004 a warrant was prepared for the arrest of the appellant for the offence of murder. He was arrested on March 18, 2004 and when cautioned by Detective Corporal Samuel Ellis the appellant stated that he burnt the house because he was upset.

8. The appellant is the father of two (2) of the deceased's children. The deceased and the appellant used to live together in Lilliput. A month before the incident on the 23rd of January, 2004, she left the appellant and went to live with her sister Valrita Hall who also lived in Lilliput.

9. McCallum testified that he knew the appellant for over twelve (12) years. He used to go to the appellant's house every day for dinner when his mother was living with him. On the night when the house was burnt down the place was well lit and he could see the appellant's face. The appellant had been to the house where he and his mother lived and had been inside the house.

The Defence

10. The appellant made an unsworn statement. He stated that he used to live in Lilliput but relocated to Darliston in Westmoreland because he feared that the police would take his children from him. He told the court that one day while he was cooking, the gas stove caught fire. He sustained burns to his hands and legs. His neighbours, he said, took him to the Savanna-la-mar hospital. He denied telling the police officer that he set the house on fire because he was upset. He denied burning down the house.

Grounds of Appeal

11. Dr. Randolph Williams sought and obtained leave to argue the following grounds of appeal:

1. In directing the jury to return a verdict of guilty of murder if they were satisfied that the appellant "ought to have known" the deceased was one of the persons in the house and "could have died as a result of his actions" the learned trial judge misdirected the jury. (Transcript p. 178 lines 5-16).

2. The learned trial judge's instruction to the jury on how to discover the intention of the appellant was inadequate and was a misdirection. (Transcript p. 176 lines 1-16).

3. The directions to the jury on identification were inadequate ...

4. The period of 40 years before eligibility for parole was manifestly excessive.

12. Grounds 1 and 2 were argued together. These grounds concern the mental element necessary to support a conviction for murder. Dr. Williams complained that the directions of the learned trial judge in this regard, were flawed. The impugned directions in ground 1 are at page 178 of the transcript:

> "But if you are satisfied that Miss Hall was killed by Mr. Collins in circumstances where he ought to have known she was one of the persons in the house and could have died as a result of his actions, then you would find him guilty of murder".

13. Dr. Williams submitted that the learned judge in using the words "ought to have known" extended the mental element necessary for murder beyond intention to include recklessness about circumstances which may or may not result in death. Further, he submitted, the said directions were inadequate in that the test to determine guilt or innocence was expressed as whether a person "could have died" as a result of the appellant's actions.

14. The impugned directions in ground 2 are (p.176 lines 1-16):

> "You look at what it is alleged he did and ask yourselves whether as an ordinary responsible person, he must have known that death or really serious bodily harm would have resulted from his actions. If you find that he must have so known, then you may infer that he intended the result, and this would be satisfactory proof of the intention required to establish the charge of murder".

It is the contention of Dr. Williams that this direction is inadequate. He submitted that the jury should have been told that the intention to kill or cause serious bodily harm can be inferred, if, from all the evidence the jury is satisfied that the appellant was aware that death or serious bodily harm was a virtual certainty, a "sure thing". If, he submitted, the probability of death or serious bodily injury occurring was 50:50 or even less, the appellant may have been reckless whether death or serious injury would occur or not. And recklessness is not the mental element for the offence of murder, he stated. He argued that it cannot be said that the jury would have returned a verdict of guilty of murder if the correct direction had been given. Thus, there is a substantial miscarriage of justice, he concluded. Counsel for the appellant relied on **R v Briston Scarlett** SCCA No. 153/99 delivered April 6, 2001 and **R v Woollin** (1999) 1 AC 82.

15. Mrs. Caroline Hay, Senior Director of Public Prosecutions, submitted that the directions of the learned trial judge as a whole fell within the "golden rule" referred to by Lord Bridge of Harwich in **Moloney** [1985] A.C. 905 at 926 B as well as within the elaboration of the principle with reference to "probability" as

recommended by Lord Scarman in **Hancock and Shankland** [1986] 2 WLR 357 at 365D. She submitted that the instant case is the kind of case "where foresight of probable consequences must be canvassed with the jury as an element which should affect their conclusion on the issue of intent" – **Moloney** p. 927 B. Further, she said, this is also a case "where the probability of the result of the act is an important matter for the jury to consider" – **Hancock** p. 363 E.

16. Questions concerning the mental element necessary for the offence of murder have been the subject of many appeals to the House of Lords. **In Tyrone DaCosta Cadogan v The Queen,** Criminal Appeal No. 16 of 2005 delivered May 31, 2006 (Barbados Court of Appeal) Simmons, C.J. reviewed a series of cases tracing the history of mens rea for murder **from Director of Public Prosecutions v Smith** (1961) A.C. 290 to **R v Woollin** (1999) 1 AC 82.

17. After closely examining the decisions of the House in **Hyam v Director of Public Prosecutions** [1974] 2 All ER 41, **R v Moloney** (1985) 1 AC 905, **R v Hancock and Shankland** (1986) AC. 455, **R v Nedrick** [1986] 3 All ER 1 and **R v Woolin** [1998] 4 All ER 103 which refined and applied **Nedrick**, Simmon, C.J, extracted the following propositions (paragraph 40):

> (i) In the majority of cases, *particularly those where the defendant's actions amounted to a direct attack on the victim,* the direction on intention should be short and simple. The jury has to decide whether the defendant intended to kill or do serious bodily harm. In order to reach that decision the jury must pay regard to all the relevant circumstances including what the defendant said and did.

(ii) In keeping the direction short and simple, the trial judge should avoid elaboration or paraphrase of what is meant by intent and leave it to the jury to decide whether the defendant acted with the necessary intent.

(iii) *Foresight of consequences is evidence of the existence of intention and must be considered with all the evidence in the case.* When so considered, foresight of consequences may entitle a jury to draw inferences as to the necessary intent.

(iv) In the rare cases where the simple direction is not thought to be enough, the jury should be directed *that they are not entitled to find* the necessary intent for murder 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 he appreciated that such was the case.

(v) In all cases the jury should be told that their decision on the issue of intent must be reached upon a consideration of all the evidence including what the defendant said and/or did.

18. In my opinion the above propositions should provide valuable assistance to trial judges in respect of directions on intentions. As Lord Lane C.J. said in **R v Nedrick** [1986] 3 All ER 1, a distinction should be drawn between (i) cases involving a direct attack on a victim and (ii) those where a defendant does an act which is manifestly dangerous and someone dies though the defendant's primary desire may not have been to harm anyone. In regard to a direct attack propositions (i), (ii) and (v) would apply. In those cases where there is no direct evidence that the intention of the defendant was to kill or cause serious injury, propositions (iii), (iv) and (v) would be relevant. It is, of course, for the trial judge to determine whether or not a simple direction on intent is enough.

The Judge's Directions on Intention

19. I must now turn to the impugned directions of the learned trial judge. It is necessary, I think, to set out in extenso the relevant directions. At pages 175 to 178 of the transcript the learned judge is recorded as saying:

> "Also, the Crown has to prove that this accused intended either to kill the deceased or inflict really serious bodily harm to her. This intention has to be proved like any other fact. Intention is not capable of positive proof. The only practical way of proving a person's intention is to infer it by what is alleged to have been said or done. In the absence of evidence to the contrary, you are entitled to regard the accused man as a responsible man, that is to say an ordinary responsible person capable of reasoning. In order to discover his intention therefore, in the absence of an expressed intention, you look at what it is alleged he did and ask yourself whether as an ordinary responsible person, he must have known that death or really serious bodily harm would have resulted from his actions. If you find that he must have so known, then you may infer that he intended the result, and this would be satisfactory proof of the intention required to establish the charge of murder.
>
> Now, in this case it is particularly important that you consider the whole question of intention, because intention here must go beyond an intention to cause damage to the property, to set the fire to damage the house. You must be satisfied that the accused man also intended to kill the deceased or to cause really serious bodily harm to anyone in the house at the time.
>
> So, after you consider whether or not he did in fact set the fire, you need to decide for yourselves what was his intention at the time of setting the fire. If you are not satisfied that his intention was to kill or cause really serious bodily harm, that would mean he would not be

> guilty of murder but guilty of manslaughter, because although he did not intend to kill, this was a result of his act so if you are not satisfied that he intended to kill or cause really serious harm to anyone inside that house, whether or not he ought to have known that persons would be inside that house at that hour of the night and if he sets a fire surrounding the entire house if he was supposed to have known that somebody in getting injuries would have died. If you are not satisfied, if you are not sure, you should find him not guilty to murder but guilty to manslaughter.
>
> If you are not sure it was he that set fire to the house at all, if you are not sure he was there, if you believe he was not there, that would mean he is not guilty of anything at all. So, to consider these various ways, first you consider whether or not it was him who set that fire and what did he intend at the time. If he intended merely to set fire and death would have unfortunately resulted from his act, then it is manslaughter, not murder. But if you are satisfied that Miss Hall was killed by Mr. Collins in circumstances where he ought to have known she was one of the persons in the house and could have died as a result of his actions, then you would find him guilty of murder".

20. After giving the above directions, the learned trial judge proceeded to review the evidence. During her review of the police officer's evidence, the learned trial judge reminded the jury of his evidence that after the appellant was cautioned the appellant said: "Why me did burn down the house, ah vex me did vex why me burn down the house". Then she revisited the matter of intention at p. 211:

> "In those words, the Crown is saying that the accused is admitting to have set fire to the house because he was vexed. Which means that you have to consider whether or not from those words there was any intention to kill or cause serious bodily harm. If you

> believe he used those words, you ask yourselves: What was the intention? You also consider whether or not he did, in fact, intend the ultimate event of killing Miss Hall. The accused denied using those words at all".

21. At the end of her review of the appellant's unsworn statement the learned judge cautioned the jury that they must be sure that McCallum was not mistaken in his identification of the appellant. Then she asked rhetorically (p. 216):

> "What did he intend, if it was in fact him? Did he intend to kill or cause grievous bodily harm to anyone? If you don't believe this, you find him guilty of manslaughter, not murder".

22. Finally at the end of her summing-up (p. 219) the learned judge told the jury:

> "It is only when you are satisfied so that you feel sure that it was him that did set fire and that he did intend to cause death or grievous bodily harm, which in fact resulted, then and only then if you are satisfied that you feel sure can you return a verdict of guilty".

Analysis of the Submissions and the Law

23. The first question is whether the learned judge by using the words "ought to have known' extended the mental element necessary for murder beyond intention to include recklessness about circumstances which may or may not result in death. It is clear that the impugned words were used by the learned trial judge with a view to assisting the jury in their quest to ascertain whether or not the appellant was aware that the deceased was in her room at the material

time. Earlier the judge had told the jury that "intention here must go beyond an intention to cause damage to the property, to set fire to damage the house. You must be satisfied that the accused man also intended to kill the deceased or cause really serious bodily harm to anyone in the house at the time".

The jury would have understood by this direction that if they found that in all the circumstances the appellant ought to have known that someone was in the house then that finding of fact would assist them inferentially in determining what was the appellant's intention at the time.

24. I agree with Mrs. Hay's submission that the words "ought to have known" in the context in which they were used refer to what the appellant could have foreseen based on the evidence before them. Earlier at page 176 the learned judge told the jury that in order to discover his intention they were entitled to assume that he was an ordinary, responsible person and should look at what he did and ask themselves whether as an ordinary responsible person he must have known that death or really serious bodily harm would have resulted from his actions. Then she continued: "If you find that he must have so known, then you may infer that he intended the result and this would be satisfactory proof of the intention required to establish the charge of murder". Further at page 177 she told them:

> "So if you are not satisfied that he intended to kill or cause really serious harm to anyone inside the house, whether or not he ought to have known that persons would be inside that house at that hour of the night

> and if he sets a fire surrounding the entire house if he was supposed to have known that somebody in getting injuries would have died, if you are satisfied, if you are sure, you should find him not guilty of murder but guilty of manslaughter".

In my view, it is clear from the directions taken as a whole that what the learned judge was in effect telling the jury in simple and assimilable terms was that knowledge or foresight of consequences was evidence of the existence of intention and must be considered with all the evidence in the case. The jury was made to understand in ordinary language that when so considered, foresight of consequences may entitle them to draw inferences as to the necessary intent.

25. The next question is whether, as Dr. Williams contended, by using the words "could have died" the learned judge was expressing the test to determine guilt or innocence in respect of murder as a result of the appellant's actions. Again, these words must be examined in the context in which they were used. The learned judge, as we have seen, was telling the jury how they should approach their task of ascertaining the intention of the appellant at the material time. She directed them that if they found that he intended merely to set fire and death unfortunately resulted from his act, then he would be guilty of manslaughter and not murder. But if they found that he "ought to have known" that the deceased was in the house and "could have died" as a result of his action then that would be murder. It is clear to my mind that the learned judge was directing the jury and that the jury would understand that if they are

satisfied that the appellant foresaw the consequence of his action and did appreciate at the time that death or serious harm would result from his action then they were entitled to conclude that he intended to kill or cause serious harm and convict him of murder.

26. The authorities make it clear that there is no requirement for a trial judge to give what is known in England as the **Woollin** direction in all cases. I should think that there is no magic in the phrase "virtual certainty". A judge is expected to tailor his summing-up to fit the circumstances of the particular case.

In **Hancock and Shankland**, Lord Scarman said:

> "The best guidance that can be given to a trial judge is to stick to his traditional function, i.e. to limit his direction to the applicable rule (or rules) of law to emphasise the incidence and burden of proof, to remind the jury that they are the judges of fact and against that background of law to discuss the particular questions of fact which the jury have to decide, indicating the inferences which they may draw if they think it proper from the facts which they find established". – p 469.

27. In the instant case the prosecution led evidence that:

- the appellant and the deceased used to live together as man and wife;
- together they had two children;
- about a month before the incident the deceased left the appellant and went to live at her sister's house;

- the appellant knew where the deceased had gone to live, and had been inside the room the deceased shared with her son, the witness McCallum;

- the last time before the incident the appellant was seen at the deceased's house, the beds in her room were in the same position as they were at the time of the fire;

- the appellant was seen at the house after 11:00 p.m. when the deceased had retired to bed throwing liquid at the door and through the window at the side of the room where the deceased's bed was;

- the 'liquid' which had the smell of gas, saturated the clothes that the deceased was wearing;

- soon thereafter the deceased was on fire and succumbed to burn injuries;

- the appellant when cautioned said " a vex me did vex why me burn down the house";

At trial the appellant denied burning down the house and making the statement attributed to him.

28. One of the questions the jury had to consider in determining the appellant's intention is whether he knew that the deceased or any other person was in the house at the time. This is, of course, assuming that the jury were satisfied that it was he who threw the flammable substance on the door and through the window. In my view it was permissible for the judge to direct the jury that in light of the evidence if they concluded that the appellant "ought to have known" that the deceased was in her room and "could have died" as a result of his action they could find him guilty of murder. The learned judge made it abundantly clear to the jury that they had to decide whether the appellant

intended to kill or do serious bodily harm and that in order to reach that decision they must take into account all the relevant circumstances including what the appellant did and or said.

29. It seems to me that this is not one of the rare cases that Lord Lane C.J. had in mind when he introduced the concept of "virtual certainty" in **Nedrick** which was applied in **Woollin**. In the former case, **Nedrick** poured paraffin through the letterbox of a house belonging to a woman against whom he had a grudge. He set fire to the paraffin. The woman's child died in the fire. **Nedrick's** defence was that he did not intend to cause the death of anyone. He only wanted to frighten the woman. The judge directed the jury that if **Nedrick** knew that it was highly probable that his act would result in serious bodily harm to someone in the house, he was guilty of murder. **Nedrick** was convicted of murder. On appeal the Court held that in regard to the mental element in murder the jury were merely required to determine whether, having regard to all the circumstances including what the defendant said and did, he intended to kill or cause grievous bodily harm. The trial judge's direction was wrong in that it equated foresight of consequences with intent whereas foresight could only be evidence of the intention and must be considered with all the evidence of the case.

30. In **Woollin** which refined and applied **Nedrick**, the appellant **Woollin** lost his temper and threw his three-month-old son onto a hard surface. The young

boy died as a result of a fractured skull. **Woollin** was charged with murder. The Crown did not contend that **Woollin** desired to kill his son or to cause him serious injury. The issue was whether the appellant nevertheless had the intention to cause serious harm. **Woolin** denied that he had any such intention. The judge summed up in accordance with the following guidance given by Lord Lane C.J. in **Nedrick**:

> "Where the charge is murder and in the rare cases where the simple direction (that it is for the jury simply to decide whether the defendant intended to kill or do serious bodily harm) 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".

But towards the end of his summing up, the judge introduced the concept of substantial risk. He told the jury that if they were satisfied that the appellant must have realized and appreciated when he threw the child that there was a substantial risk that he would cause serious injury to the child then it would be open to them to find that the appellant intended to cause injury to the child and should convict him of murder. **Woollin** was convicted of murder. On appeal the principal ground was that by using the words substantial risk the judge incorrectly enlarged the mental element of murder. The Court of Appeal rejected this contention and in dismissing the appeal observed that:

> "... although the use of the phrase 'a virtual certainty' may be desirable and may be necessary, it is only

> necessary where the evidence of intent is limited to the admitted actions of the accused and the consequences of those actions. It is not obligatory to use the phrase or one that means the same thing in cases such as the present where there is other evidence for the jury to consider".

31. On further appeal the House of Lords, held that the judge should not have departed from **Nedrick** and that by using the phrase "substantial risk" the judge blurred the line between intention and recklessness and hence between murder and manslaughter. The conviction for murder was quashed and a conviction for manslaughter substituted.

Lord Steyn, with whose speech all the other Law Lords agreed, said at page 8 of the judgment: "It may be appropriate to give a direction in accordance with **Nedrick** in any case in which the defendant may not have desired the result of his act. But I accept the trial judge is best placed to decide what direction is required by the circumstances of the case".

32. In **R v Briston Scarlett** SCCA No. 153/99 delivered April 6, 2001 it was alleged that the defendant deliberately set fire to a house thereby causing the death of one of the occupants. When he was cautioned by the police Scarlett said; "mi never mean to hurt anybody". In directing the jury on the requisite intention the judge told the jury that if they found that Scarlett "knew that by the act of setting fire to the dwelling house, it was highly probable" that an occupant of the house would suffer death or grievous bodily harm then it was open to them to find that he had the necessary intent.

This Court held that the use of the "highly probable" test was a material misdirection. The Court observed that the **Nedrick** direction as refined in **Woollin** should be used when required by the circumstances. It is important to note that the Court was of the view that a simple direction as to the intent necessary would have been sufficient. A new trial was ordered.

33. In the **Nedrick** and **Scarlett** cases, the trial judges directed the juries in terms of the "highly probable" test. In **Woollin** the trial judge used the "substantial risk" test. In the instant case the trial judge used no such words. She told the jury time and time again that they had to decide whether the defendant intended to kill or do serious bodily harm. This simple direction was appropriate in the circumstances of this case. The use of the words complained of, in my view, would not have deflected the jury from their task of determining whether on the evidence before them, they were sure that the appellant intended to kill or cause grievous bodily harm.

In my opinion this ground should fail.

Ground 3

34. The complaint in this ground is that the repeated directions of the learned trial judge as to whether the jury could believe the sole eyewitness tended to focus the mind of the jury on credibility instead of on the quality of identification evidence and the risk of mistaken identity.

35. It was not disputed that the sole eyewitness Mr. Garrett McCallum knew the appellant for over twelve (12) years. He visited his mother at the appellant's

home on many occasions. On the night when the deceased was burnt, the witness observed the appellant through a clear glass window. The appellant was about 12-15 feet away. His view of the appellant was not obstructed in any way. The appellant, he said, was standing on a step "directly in front of the window, beside the window". When asked how far from the window, the witness pointed out a distance which was estimated by the Court to be about six (6) inches. When asked if he would agree that "it happened quickly", the witness replied "not that quick". He had earlier said that he observed the appellant for about one and a half (1½) minutes.

36. The learned judge after giving the jury the full Turnbull warning directed them thus (pp.179-180):

> "You should therefore examine carefully the circumstances in which the identification was made. How long did the witness have the person he believed to have been the defendant under observation? At what distance? In what light? Did anything interfere with the observation? Had the witness ever seen the person before? If so, how often were the occasions? ..."

In reviewing the evidence the learned trial judge pointed out the evidence relevant to the issue of identification. She reminded them of weaknesses in the identification evidence. She told the jury that persons do look alike and that people do make mistakes in recognizing close friends and relatives. Over and over again she cautioned them to approach the evidence of visual identification carefully because of the possibility of mistake.

37. In relation to factors which might weaken the identification the learned trial judge reminded the jury of the witness' statement that he was "a little bit frightened". Then she told them (p.188):

> "So this is indeed the area you have to consider as regard to the identification evidence. Was he so frightened that he could not have seen or indeed could not have recognized or identified who it was outside there that night? How did this fright affect his ability to see who was out there?"

After reminding the jury of other aspects of the identification evidence, the learned trial judge said (p.192):

> "So it is a matter for you to consider whether what happened to him could prevent him from being able to see who was outside there that night".

The last words of the judge to the jury were (p.219):

> "Remember the warnings I have given as to caution, that is, the care you need to apply when you are considering the evidence as it concerns identification and then return with your verdict".

38. I cannot agree with Dr. Williams that the emphasis in the directions tended to focus the mind of the jury on credibility instead of on the quality of the identification evidence and the risk of mistake. Indeed the sentence which bore the brunt of Dr. Williams' criticism in his submissions on this ground was made in the context of the identification issue. The learned judge after describing the fateful incident as testified to by young McCallum said (p.198):

> "He said he looked out and saw this person doing this act he told us of. He said he recognized the person. He identified the person as Mr. Collins. Is he mistaken in

> all the circumstances? Did he see who was out there that night at all? Is it in fact, Devon Collins he saw?"

Immediately after the above passage comes the impugned sentence:

> "The matter that you have to decide is whether you believe Mr. McCallum".

This sentence in its context could not have the effect suggested by counsel for the appellant.

I should also mention that the issue of McCallum's credibility was raised by the defence when it was suggested to him that someone had made a complaint against him concerning a pig and that the appellant had beaten him. In all the circumstances the direction of the judge in this regard is unexceptionable.

Ground 4

39. Counsel for the appellant submitted that the period of incarceration before eligibility for parole is manifestly excessive. The offence of which the appellant was convicted is one which made him liable to be sentenced to death. The judge recognized his conduct "to be a cold and callous act" but thought that "as horrific as it was" it was not one of the rarest of the rare cases". Thus, she did not impose the death penalty.

40. The statutory minimum sentence for this offence before eligibility for parole is 20 years imprisonment. In **Roderick Fisher v R** SCCA No 49 of 2006 delivered November 3, 2008 this Court in adopting the approach in **R v Howse** (2006) I NZLR 433 concerning the task of deciding the length of time to be added to the minimum pre-parole period said at paragraph 11:

> "There seems to be merit in this approach as it starts with the premise that a person is entitled to apply for parole after a minimum period. The next step is then to decide how much this period should be increased by, based on the degree of culpability. The degree of culpability would of course be determined by the circumstances of the crime. The circumstances of the crime would include ... aggravating and mitigating factors ..."

41. So then we should start with the premise that the appellant who was sentenced to life imprisonment is entitled to apply for parole after 20 years. In other words there is a minimum pre-parole period of 20 years. The next question is how many years should be added to this period "in order to achieve the necessary additional punishment, denunciation and deterrence".

This Court accepted as correct the view that in this exercise regard should be had to the following:

(1) The circumstances of the offence which would include aggravating and mitigating factors;

(2) The number of persons who participated in the commission of the crime;

(3) The time and place of the offence;

(4) The number of victims;

(5) The character and propensities of the offender – see David Ebanks SCCA 43/2006 oral judgment delivered 11th November, 2008 which approved the approach of Campbell, J. in **R v Ian Gordon**.

42. The crime in question took place late at night when the victim had retired to bed. There were at least six (6) persons in the house. The witness McCallum

who shared room with his deceased mother was severely burnt. The appellant showed no remorse. When he was interviewed by the probation officer he gave a different story from the one he gave in Court as to how he came by the burn injuries.

43. In **Roderick Fisher v R** (supra) this Court examined other cases where the Court had to determine the appropriate pre-parole minimum sentence. The Court concluded that "to order that the appellant spend at least forty (40) years before parole would not be discrepant with the overall trend of pre-parole periods imposed in recent times."

However, on the facts of this case, in my view, the addition of ten (10) years to the minimum statutory period would be appropriate.

Conclusion

44. For the above reasons, I would dismiss the appeal against conviction and sentence save that I would vary the period to be served before becoming eligible for parole from 40 to 30 years. The sentence should commence from the date of conviction, 21st April, 2006.

DUKHARAN, J.A.:

45. I agree with my brother Smith, J.A. that the appeal should be dismissed against conviction and sentences. I too, would vary the period to be served before being eligible for parole, from forty to thirty years. However I wish to add

a few comments, particularly as it relates to the issue of intention in murder cases.

46. In the circumstance of this case a simple direction as to the requisite mental element on intention would have sufficed. There is no requirement for trial judges to give the **Woolin** direction in all cases. The circumstances of each case must be looked at differently. As Lord Scarman said at page 469 in **Hancock and Shankland** (1986) A.C. 455:

> "The best guidance that can be given to a trial judge is to stick to his traditional function, i.e. to limit his direction to the applicable rule (or rules) of law to emphasise the incidence and burden of proof, to remind the jury that they are the judges of fact and against that background of law to discuss the particular questions of fact which the jury have to decide ..."

47. The evidence in the instant case is that the deceased was at one time the appellant's common-law wife and they had two (2) children. Before the incident the appellant was seen at the deceased's house. He knew the positions of the beds in the deceased room. He was seen after the deceased retired to bed throwing liquid at the door and through the window where the deceased bed was. The door and window were the only means of escape. The deceased was severely burnt and subsequently died of burnt injuries.

48. I also hold the view that the words used by the trial judge that the appellant "ought to have known" in the context in which they were used refer to what the appellant could have foreseen based on the evidence before the

jury. The learned judge told the jury that they had to decide whether the appellant intended to kill or inflict serious bodily harm and that they should take into account all the relevant circumstances in what the appellant did and said.

49. The use of the words complained of, in my view, would not have had the effect of extending the mental element necessary for murder. The jury were directed that they had to decide whether or not the appellant intended to kill or cause serious bodily harm.

COOKE, J.A. (Dissenting)

50. This is a dissenting judgment as I differ from the majority as to whether the learned trial judge correctly directed the jury as to the requisite mental element which must be established before, in the circumstances of this case, they would be entitled to return a verdict of guilty of murder. It is my view that she did not so do.

51. The appellant was, on the 30th September 2005, convicted in the St. James Circuit Court on an indictment which charged him with murdering Veronica Hall in the course or furtherance of arson to a dwelling house. The deceased lived in that dwelling house. The learned trial judge ordered that the appellant would not be eligible for parole before he had served forty years.

52. The deceased bore the appellant two children and up to a month before the incident, had lived with him at his home. That relationship had soured and

the deceased went to live with her sister. Her sister's house was a short distance from that of the appellant. The deceased along with her son O'Neil McCallum occupied a room to the rear of her sister's four apartment board house. McCallum, who at the time of the incident appeared to be not yet an adult, was not the child of the appellant. The location of the room occupied by the deceased was known to the appellant. At the relevant time the deceased sister's house accommodated six persons.

53. The prosecution's case was based on (a) the visual identification evidence as to the person who set the house on fire (b) an admission by the appellant that he did set the house on fire and (c) inferences to be drawn from the fact that the appellant went to the hospital in Savanna-La-Mar with burns.

54. The evidence of visual identification came from O'Neil McCallum. There can be no dispute that the appellant and McCallum were very well known to each other and were in each other's company on a very regular basis. On the 23rd January 2004 at about 11:00 p.m. he returned to his home in Lilliput in St. James. His mother, the deceased, let him into the room they occupied and he retired to bed. While in bed and before he fell asleep, he heard sounds outside "like water". Then he detected the "scent of gas" and "fire start coming under the door bottom". At this stage, he got up off the bed and tried to pull the door but that was stuck. (This was the only door to the room). He then went to a glass window, through which he saw the appellant whom he called "Smokey" with a yellow five gallon jug throwing its contents on the board of his room. McCallum

said he was able to recognize the appellant "in the guidance of the light." This light was from a light bulb hung down at the kitchen which was about some four feet from his room. He saw the appellant for about a minute and a half and he observed him from his face down to his waist. McCallum further said the fire flames also provided lighting. This witness then kicked out the window and escaped outside leaving his screaming mother behind. The latter followed him outside. He received burns to his face, back, hand and his ears. These do not appear to have been serious. He and his mother were taken to the Cornwall Regional Hospital. He was treated and sent home. The deceased was admitted and she succumbed on the 11th February 2004. The pathologist who conducted the postmortem was of the opinion that her death was due to septicaemic shock secondary to infected burns involving approximately 60 to 65 percent of the total body surface caused by fire or flames.

55. There was evidence that on the 18th March 2004 when the appellant was charged at Montego Bay, he said "a vex mi did vex why mi bun dung di house."

56. On the 2nd February 2004 the appellant was admitted to the Savanna-La-Mar Hospital. He had 20 percent burns to his right arm and both lower limbs. These burns were infected to the extent that maggots were coming out of the wounds. It was the opinion of the doctor who examined the appellant that the wounds were consistent with flame burns and estimated that those burn injuries could have occurred "approximately a week" before admission to the hospital.

It was the appellant's contention that the burns were occasioned by a stove which caught fire. His defence was that of an alibi.

57. The evidence adduced by the prosecution in respect of arson by the appellant can properly be described as abundant. The deceased sister's home in Lilliput St. James was engulfed in flames at the hand of the appellant. There can be no doubt that the flames from the conflagration caused the death of the deceased, but was it murder? The heart of this appeal is whether or not, the learned trial judge correctly instructed the jury as to the proper approach to be adhered to in determining if the appellant was guilty of murder.

58. It is clear that the mental element of murder is concerned with the subjective question of what was in the mind of the person accused of murder. See **Woollin v. R** [1998] 4 All ER 103 at page 108 **Woollin** has been embraced and followed by this court: See **R v. Briston Scarlett** SCCA. No 153/99, delivered April 6 2001. The guidance given by their Lordship's House is decisive in the resolution of this appeal. In **Woollin**, all the relevant authorities including decisions of the House were reviewed and the conclusion was that the model direction enunciated by Lane, CJ in **Nedrick** [1986] 1WLR 1025 (at 1028f) provided valuable assistance to trial judges. This had become a tried and tested formula and trial judges should continue to use it. (See p 105) The tried and tested formula with one minor alteration is as follows:

> "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 unforseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case".

The jury was to come to its decision upon a consideration of all the evidence in the case. Of course, "the simple direction" calls for no more than asking the jury to determine whether or not the accused had either the intention to kill or to cause really serious bodily harm. This then was the law when the learned trial judge embarked on her summing up in this case.

59. The learned trial judge directed the jury in the following terms at pages 175 – 178 of the transcript: -

> "Also, the crown has to prove that this accused intended earlier to kill the deceased or inflict really serious bodily harm to her. This intention has to be proved like any other fact. Intention is not capable of positive proof. The only practical way of providing a person's intention is to infer it by what is alleged to have been said or done. In the absence of evidence to the contrary, you are entitled to regard the accused man as a responsible man, that is to say an ordinary responsible person capable of reasoning. In order to discover his intention therefore, in the absence of an expressed intention, you look at what it is alleged he did and ask yourself whether as an ordinary responsible person, he must have known that death or really serious bodily harm would have resulted from his actions. If you find that he must have so known, then you may infer that he intended the result, and this would be satisfactory proof of the intention required to establish the charge of murder.
>
> Now, in this case it is particularly important that you consider the whole question of intention, because

> intention here must go beyond an intention to cause damage to the property, to set the fire to damage the house. You must be satisfied that the accused man also intended to kill the deceased or to cause really serious bodily harm to anyone in the house at the time.
>
> So, after you consider whether or not he did in fact set the fire, you need to decide for yourselves what was his intention at the time of setting the fire. If you are not satisfied that his intention was to kill or cause really serious bodily harm, that would mean he would not be guilty of murder but guilty of manslaughter, because although he did not intend to kill, this was a result of his act so if you are not satisfied that he intended to kill or cause really serious harm to anyone inside that house, whether or not he ought to have known that persons would be inside that house at that hour of the night and if he sets a fire surrounding the entire house if he was supposed to have known that somebody in getting injuries would have died. If you are not satisfied, if you are not sure, you should find him not guilty to murder but guilty to manslaughter.
>
> If you are not sure it was he that set fire to the house at all, if you are not sure he was there, if you believe he was not there, that means he is not guilty of anything at all. So, to consider these various ways, first you consider whether or not it was him who set that fire and what did he intend at the time. If he intended merely to set fire and and (sic) death would have unfortunately resulted from his act, then it is manslaughter, not murder. But if you are satisfied that Miss Hall was killed by Mr. Collins in circumstances where he ought to have known she was one of the persons in the house and could have died as a result of his actions, then you would find him guilty of murder."

60. These excerpted passages reveal that the learned trial judge did give "the simple direction" as to the requisite mental element required to be established by prosecution. In fact she did so more than once. However, in ascertaining the mental element, the jury was directed to the effect that if the

accused as an ordinary responsible person must have known that death or really serious bodily harm would have resulted from his actions, then the appellant would be deemed to have had the requisite intent. This is incorrect. This direction undermines the subjective consideration. The essential question is not what would have been in the mind of "an ordinary responsible person" but what was in the appellant's mind at the time he set fire to the house. In **Director of Public Prosecutions v. Smith** [1961] A.C. 290, the House held inter alia, that an accused was deemed to have forseen the risk a reasonable person in his position would have forseen. This formulation was subject to much criticism and was reversed by section 8 of the English Criminal Justice Act of 1967, the relevant part of which stated that:

> "A court or jury in determining whether a person has committed an offence
>
> (a) ...
>
> (b) shall decide whether he did intend or foresee that result by reference to all the evidence drawing inferences from the evidence as appears proper in the circumstances"

Lord Steyn in his speech in **Woollin**, in commenting on the decision in **Smith** said at p 108:

> "In retrospect it is now clear that the criminal law was set on a wrong course."

Although there is no comparable legislation in Jamaica to that of section 8 of the English Criminal Justice Act, there can be no doubt that in murder, a crime of specific intent, the criterion to be employed is the subjective test.

Accordingly, the learned trial judge was in error in respect of her directions in this regard.

61. In concluding her directions on intent, the learned trial judge set out two factors for the jury's consideration:

> "(i) whether the appellant "ought to have known the deceased was one of the persons in the house" and
>
> (ii) the deceased "could have died as a result of his actions."

If the answers to those questions were in the affirmative, then the jury would be entitled to find the appellant guilty. Here, the learned trial judge departed from "the simple direction" as to intent. Her directions would now fall in those "rare cases" in which she considered that "the simple direction is not enough." As such, those concluding directions are not in harmony with the guidance given in **Woollin** which has been previously stated above. Therefore, the learned trial judge was in error.

62. In the circumstances of this case, it would have been difficult to fault the learned trial judge if a proper simple direction was given: -

> "(a) The relationship between the deceased and the appellant had soured and the former had moved out from his house about one month prior to his setting the house on fire.
>
> (b) The appellant was aware of the room which the deceased occupied.

(c) It was on the board walls of this room that he threw the liquid that had the 'scent' of gas.

(d) It was this room which was first set ablaze."

However, the learned trial judge apparently felt that the simple direction was not enough and it may well be that therein lies the genesis of her errors. In the final analysis, the directions on intent ran afoul of the law.

63. Without much enthusiasm, some criticism was leveled at the directions of the learned trial judge on the issue of visual identification. These criticisms are unfounded. In the first place, this was not a case where the case for the prosecution rested solely or substantially on visual identification. There was other evidence, not least, the admission by the appellant. In any event, what has compendiously been termed the **Turnbull** guidelines were followed.

64. For the reasons given above, this conviction should be quashed and the sentence set aside. In all the circumstances, a verdict of manslaughter should be substituted. An appropriate sentence is one of twenty-five years imprisonment, commencing from 21st April, 2006.

SMITH, J.A.

ORDER

By majority (Cooke, J.A. dissenting) appeal against conviction dismissed. Sentence varied; appellant to be eligible for parole after serving thirty years imprisonment. Sentence to commence from 21st April, 2006.