Case No: 2000/01654/Z2; 2000/02349/Z2

Neutral Citation No: [2003] EWCA Crim 192
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM LUTON CROWN COURT
His Honour Judge RIVLIN QC

Royal Courts of Justice
Strand,
London, WC2A 2LL

Friday 7th February 2003

Before :

LORD JUSTICE RIX
MR JUSTICE CRANE
and
HHJ MADDISON
(sitting as a Judge of the Court of Appeal Criminal Division)

- -

Between :

REGINA	Respondent
- and -	
Darren John MATTHEWS Brian Dean ALLEYNE	Appellants

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Mr William Coker QC and Mr Amjad Malik for the Crown
Mr Stuart Stevens for Matthews
Mr Roderick Price for Alleyne

- -

Judgment
As Approved by the Court

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Lord Justice Rix :

1. On the evening of 10 June 1999 Jonathan Coles, an 18 year old A-level student went with friends, including Lyndsey Brannif whose birthday it was, to a club in Milton Keynes. In the course of events that followed their leaving the club at about 2 am on 11 June Jonathan lost his life by drowning as a result of being thrown from the crown of Tyringham Bridge into the River Ouse. It was an isolated beauty spot where, at any rate in day time, young people would swim, and some would jump off the bridge. Jonathan was 5'10" tall and of slim build. He was short-sighted and had lost his glasses when set upon and robbed by a group of youths who later kidnapped him and drove him to the bridge. He was fit, but could not swim and avoided the water.

2. This is the appeal of Brian Alleyne and Darren Matthews, two of the four youths who were later indicted for (inter alia) Jonathan's murder. Alleyne was born on 3 August 1978 and was 20 at the time of Jonathan's death. Matthews was born on 1 April 1982 and was 17. Their co-defendants were Dwayne Dawkins (then 20) and Jason Canepe (also 20). Alleyne, Matthews and Dawkins were convicted of robbery, kidnapping and murder. Canepe was acquitted of robbery and murder, having pleaded guilty to kidnapping and manslaughter.

3. The terrible events of that night began when Jonathan and his friends came out of the club to go back by taxi with Lyndsey to her home in Guifford Park. Jonathan was picked on, punched and chased onto a large grassy area nearby, where he was caught. Alleyne and Dawkins admitted to punching and kicking him on the ground, and both said Matthews was involved as well. During the attack Jonathan's bank card was stolen. Those three then got into

Canepe's car, which was parked nearby, and Canepe drove to the bank, where Matthews and Alleyne were shown on the CCTV trying to obtain money from the cash machine. They were unsuccessful, however, for Jonathan's account was empty. This made them angry.

4. By misfortune Jonathan, who had been separated from his friends and was in difficulties without his glasses, was trying to obtain help or a lift by flagging down a vehicle on the road when Canepe's car carrying the four youths came by. They stopped, and Jonathan was forced into the back seat, where traces of his blood were later found, between Matthews and Dawkins. At just after 3 am Canepe bought petrol at a garage: they then drove to Guifford Park in search of Jonathan's friends. Canepe parked a short distance from Lyndsey Brannif's house and stayed in the car with Jonathan, while the other three got out and, when a taxi arrived with Lyndsey and her friends, went over to them. Alleyne said they were looking for someone. When Lyndsey asked about Jonathan, Alleyne said "don't worry, we've sorted him" or possibly "yes, we've seen him". While Canepe was alone in the car with Jonathan he said to him: "I would love to let you go", but he was more concerned for himself. Before the others had got out of the car he had been told to keep Jonathan there with him, and Jonathan was told: "I know where you live and I know where your friends live." When Alleyne was subsequently arrested, his mobile telephone was found to have both Jonathan's and Lyndsey Brannif's numbers entered in it. Alleyne said that Canepe was sufficiently concerned to change the number plates of his car while parked up at Guifford Park. Canepe accepted that he was petrified people might see his number plates.

5. It was Alleyne's and Matthews' case that after leaving Guifford Park they were dropped off by the other two and knew nothing of subsequent events. There remains a ground of appeal on the part of Matthews that there was no case for him to answer at the half way stage, which we will deal with below. However, despite Alleyne's evidence that he had walked home and later ended up at Dawkins' flat, and despite Matthews' evidence that he had been dropped off at the top of his road and, supported in this by his mother's evidence, that he had spent the rest of the night at home, Dawkins and Canepe gave a detailed account of how events concerning all four of them ended in the tragedy at Tyringham Bridge. Since their case was that they were not at the bridge, Alleyne and Matthews could not assist the jury as to what had happened there. Subject to Matthews' rather half-hearted ground of no case to answer, he and Alleyne are compelled on this appeal to accept the account of Dawkins and Canepe, and to some considerable extent even rely on it.

6. Dawkins had pleaded guilty to kidnapping and manslaughter and had accepted his guilt on the robbery count during trial. In his evidence he said that after they had left Guifford Park Matthews had made the suggestion of taking Jonathan swimming. At first he described this as a light-hearted suggestion, but he came to acknowledge the seriousness of what was happening. Then they came to Tyringham Bridge, which he did not know. He could not swim. Alleyne, Matthews and he got out of the car with Jonathan; Canepe stayed in it. They manhandled Jonathan over to the crown of the bridge, where the drop into the water from the parapet is about 25 feet, although he said that it looked about 15 feet. Jonathan there said that he could not swim. "When Jonathan said he couldn't swim I felt it was a bit strange. I thought of myself and I knew what he was going through." However, he agreed that he played his part at the bridge, "to increase his terror". The other two put Jonathan, struggling, over the parapet. When Jonathan sought to cling on to the parapet, Matthews hit him on the back of his hands until his grasp was loosened and he fell into the middle of the river (which was about 64 feet wide at that point). Dawkins saw Jonathan surface and start doggy paddling towards the left bank. He got near to a log on the side of the bank and Alleyne and Matthews went down from the bridge to the bank there. Jonathan got about a foot from the log and was saying "Help". The other two stayed for a few seconds. He then returned to the car, which he reached about the same time as the other two. On the way back things were said such as "I hope he's made it" and "I wonder if he's made it", but he did not recall by whom.

7. Dawkins was asked why he had not intervened to stop Jonathan being thrown into the river, and he said "I wish that I had now". He agreed that, as a non-swimmer himself, he would get into difficulties and drown if dropped from the bridge, unless someone else saved him. But he said: "Drowning did not cross my mind at any stage. At the time I thought somehow that he would get across." He also said that he assumed that Jonathan had made it to safety, or had come very close to doing so, before he had returned to the car. The judge commented to the jury: "…you will remember his evidence, that the deeper and more searching the questions that were being asked the more unhappy and uncomfortable Dawkins was in answering them. He was obviously remembering the events at Tyringham Bridge."

8. In an extended passage in his summing up, the judge was careful to place before the jury Dawkin's defence as the only one of the four youths actually to give evidence of participation in the events on the bridge. Thus –

> "[Counsel] said that the facts of this case are chilling. The four men in the dock have done a dreadful thing. They have robbed, kidnapped, intimidated and ultimately killed Jonathan. They did step outside the ambit of civilised behaviour. But, he said, being clinical and objective about what happened and not allowing emotions to run away with you, this was a cruel and dangerous prank which went unintentionally and disastrously wrong.

"He said Dawkins is obviously horrified as to what happened. He did make grudging admissions. He is diffident, ashamed, and remorseful, and his attitude must be sharply contrasted with the attitude and demeanour of Alleyne and Matthews. It is, as [counsel] said, as if Dawkins really has turned Queen's evidence in this case to support the Crown's case. He said that the whole incident was dominated by Alleyne. Matthews was the one who unequally had knowledge of the bridge. Canepe was the compliant car driver, Dawkins was the man in the back seat who said very little, but there is insufficient evidence that Jonathan's death, however tragic, was a virtual certainty. Although, as [counsel] put it, he accepts that there was a substantial risk that once he was in the water he would drown, but, he said, that is different from there being a virtual certainty that he would.

"He said that Dawkins has pleaded guilty to manslaughter, but he did not have the intention to kill…Dawkins had never been there before. He was a complete non-swimmer himself. He had taken a lot to drink. It must have been very dark, it was not pitch black but it was difficult to tell the difference between, for example, a log and a submerged branch. The water was surprisingly deep, very still, quite a narrow strip of water. How could Dawkins have been expected to assimilate and appreciate all of these matters? He is the only person on trial who has described what has happened to Jonathan in real detail.

"Why did he not go to help? The answer to that is that he saw others going to help. He saw Jonathan making some progress. He saw him close to what he, perhaps wrongly believed, was a log…[Counsel] asked you to say that however awful the events of that evening and however serious the role played by Dawkins in those events that young man did not intend to kill, and he did not appreciate that others intended to kill."

9. We have set out the judge's account of that speech in some detail, because, on Alleyne's and Matthews' case of alibi and non-participation, it was the best plea that could be made on their behalf as well. In effect they shared, as far as they could, the benefit of Dawkins' defence, that there had been no intent to kill.

10. Canepe pleaded guilty to kidnapping and also to manslaughter, on the basis that even his presence in the car amounted to participation in an unlawful act, but he was acquitted of murder. His evidence was as follows. He too had never heard of Tyringham Bridge before. He was directed to it. He thought that the plan was to leave Jonathan there, after a ducking, and go home. He said that the mood in the car was one of teasing and joking. A telephone box was passed, which was pointed out to Jonathan as "where you will have to get to…to make a 'phone call". He heard nothing said about Jonathan not being a swimmer. He stopped the car on top of the bridge, but he stayed put. His lights were out, but it was on the verge of dawn. He saw the others manhandling Jonathan, heard laughing and joking, and a splash. Then he heard more splashing and Matthews shouting down from the river bank "Go on, go on, you're nearly there". When the other three rejoined him in the car, he asked where Jonathan was. Alleyne said "he is on a log at the edge of the river". There was more laughing and joking and talk about him walking home wet. Alleyne said to the others: "Don't say anything about it."

11. In cross-examination, however, he agreed that even on the way to Guifford Park the events were not just fun. "I began to detect menace in the voices of those in the car. There was talk about street robbery and Alleyne was saying that he was not going down for that". Jonathan was so scared during the stop at Guifford Park that he did not even have to be locked in the car. As for the events on the bridge: "It was not a laugh any more…My gut feeling was coming true. It had all flowed one thing had led to another, one bad thing followed by an even worse thing…We did gradually lose our sense of being civilised human beings and our feelings of human pity. We were prepared to do things to another human being that we would not have dreamt that we were capable of." However, he had never thought that Jonathan would die. His counsel put his case in this way: "Jason never heard Jonathan say that he could not swim. He thought that it was a sad and pathetic joke that he, Jonathan, would have to be walking home soaking wet, but that is as far as it goes."

12. Alleyne maintained that he had been dropped off before Canepe drove to Tyringham Bridge. In his case the Crown had put before the jury the evidence of his friend, Mark Strudwick, who spoke of a conversation with Alleyne at about 10 am later on the morning of these events. Alleyne had told him that he was worried someone had drowned; he knew how someone had drowned because he had been there, at Tyringham Bridge; he said that Jonathan had said that he could not swim before he drowned. This was before there was any public news that Jonathan was missing. Alleyne denied that conversation and said that Mark Strudwick's evidence was untrue. As the judge remarked in summing-up, Alleyne "was given the opportunity of saying that something else had happened, but he said, no, he knows absolutely nothing of that incident because he was not there and so cannot speak as to what happened." That was what the judge said: but the jury would also have heard the following passages in Alleyne's cross-examination by Mr Coker QC on behalf of the Crown:

"Q. Would you be prepared to jump off that bridge into the river? That is the question?

A. (Pause) Nope.

Q. Why not

A. Because it looks too high…

Q. …And you would not like the look of that, would you?

A. No.

Q. Because when you hit the water, you would go right under, would you not?

A. I suppose so. Probably, yeah. More than likely.

Q. More than likely. But, supposing you could not swim, Mr Alleyne, You would be even less likely to want to jump off that bridge, would you not?

A. Theoretically-speaking, yes…

Q. …We are, of course, speaking theoretically, and I am only asking you to help us as someone who was not there, but now knows as much about it as the Jury does. It would be an act…Well, how would you describe it? To push someone who could not swim off that bridge at night?

A. I would describe it as an act of stupidity…

Q. I am asking you why that would be stupid?

A. Because it would.

Q. Why?

A. It just would be if the person couldn't swim.

Q. Because?

A. Couldn't swim.

Q. Because?

A. Potentially…might get into difficulties.

Q. And what does that mean?

A. Well, I think we all knows what that means.

Q. Well, you can tell us.

A. A person could get into difficulties. I'm not going to elaborate on that…

Q. What would they be finding difficult?

A. If they couldn't swim, obviously to swim.

Q. What they would be finding difficult is staying alive, is it not?
A. (Pause) I can't answer that question.

Q. Well, someone who cannot swim in water, who is out of his depth, will end up going under the water, will he not?

A. Not…not…what's the word…specifically.

Q. (Pause) If someone cannot swim and is out of his depth in that river, he is going to drown, is he not?

A. (Pause) Cannot answer that question.

Q. Unless someone is prepared to rescue him.

A. I cannot answer that question."

13. A little later there was also this passage:

"Q. Mr Alleyne, let me give you this one last chance. (Pause) Did Jonathan drown by accident?

A. How would I know?

Q. Did Jonathan drown by accident?

A. I've just answered the question. I do not know.

Q. If Jonathan drowned by accident and you were there, what reason would you have not to tell the Jury about it?

A. Well, I don't…I can't answer that question, can I?

Q. You meant to drown Jonathan, did you not?

A. I've just said to you I was not there. I do not know how he drowned. So, how can I mean to drown him?

Q. You are such a coward that you would rather drown Jonathan than face up to what you have done to him. That is the truth, is it not?

A. That's not the truth at all. I wouldn't kill somebody. (Pause) I'm not even a violent person. My actions were totally out of character that night, and I regret some of the things I done. I wouldn't intentionally kill somebody."

14. The judge again summed up counsel's final speech on behalf of this defendant. There was no motive for killing Jonathan. As for the events at the bridge, the jury had no evidence independent of the admissions of Dawkins and Canepe: but they had told lies and pleaded guilty merely "to appease the prosecution, to take a little ship to safety". As for Mark Strudwick, he was a cannabis addict, he was confused and his evidence was unreliable.

15. Matthews also said that he was not at the bridge. In his case the Crown had the evidence of another friend, Andrew Jolly, who spoke of a conversation with a worried Matthews the night after the events who told him that "someone's died" and went on to say that he had been at the bridge when a lad had fallen into the river: he had not been involved in throwing him in, but when asked why the lad had not been rescued, had said "they were all scared". Matthews recalled the meeting with Andrew Jolly, but denied the conversation. He said he had swum at the bridge but never jumped off it. He was asked:

"Q. Why would you not jump off that bridge?

A. (Pause) Don't know. It's high. Quite a high bridge.

Q. Well, what is wrong with that? You are a competent swimmer.

A. (Pause) I'm a swimmer, but I didn't say I'd jump off the bridge. It doesn't mean cos you're a swimmer…It doesn't mean you'll jump off the bridge.

Q. Or, because you, even as a swimmer, would think it is too dangerous?

A. Not necessarily that. I just never jumped off the bridge. I don't know why I never jumped off the bridge. I just never jumps off it.

Q. Suppose you had a mate, but you knew he couldn't swim…If he knew he could not swim?

A. Well, he wouldn't jump off the bridge if he knew he could not swim.

Q. (Pause) Why not?

A. It's just something you wouldn't do. If you couldn't swim, you would not jump off a bridge.

Q. Why not?

A. Because, I mean, you'd get into difficulties, and if you were sensible enough, you wouldn't… you wouldn't even think about jumping off a bridge if you couldn't swim."

16. Matthews too was given a last chance to say that Jonathan died by accident; but he said he did not know, for he was not there. His counsel supported the submission that the Crown's case as to motive was not proved.

17. What was the Crown's case as to motive? It was that the youths had determined to silence Jonathan, by drowning him, to prevent him identifying them as his robbers. Thus it was that on the question of intention, the prosecution put its case squarely on an intention to kill. The judge said this:

"The offence of murder is committed when a person kills another with intent to kill him, or to cause him grievous bodily harm, that is really serious bodily harm. Here the charge of murder is

based upon an intent to kill and not cause grievous bodily harm. The prosecution have said from first to last these defendants intended to kill Jonathan Coles. They do not say they intended to cause him, or merely to cause him grievous bodily harm, so you can forget about grievous bodily harm."

18. Thus, in dealing with Dawkins and the count of murder, the judge put the respective positions of prosecution and defence like this:

> "The prosecution says that he was part of the team which threw Coles off the bridge. He knew he could not swim. He knew he would drown if nobody did anything to save him. He and the others must have known that he was drowning, but they just left him to his fate, and that can only be because that is what they intended to happen to him and he is guilty of murder. He says that he…did escort him to the bridge. He did not then lift him on to the parapet. He accepts that he then did nothing to help him, but he believed that Alleyne and Matthews had gone down to the river bank to see if he was alright, and by the time they drove off he thought that he probably was alright. He much regrets what happened to Jonathan Coles. It is difficult to say that now, but, he says, he means it and he never intended to kill him and is, therefore, guilty of manslaughter and not murder."

19. Again, we cite that summation, because it best reflects the potential defence of Alleyne and Matthews if, contrary to their evidence, the jury were sure that they had been participants in the events at the bridge. That potential defence was also reflected in the judge's summaries of their cases on intention. Thus, as to Alleyne the judge said:

> "[Counsel] says that even if you are sure that he was there at Tyringham the prosecution have wholly failed to establish any motive for murder, and if that had really been his intention they could have gone about it in a way so as to really ensure that he would die."

20. As to Matthews the judge said:

> "[Counsel] submitted even if you accept that Matthews was there at Tyringham the question of his intention is, as he put it, a devilishly tricky one, the law requiring the most exacting standards before you could find him guilty of murder."

21. In these circumstances, where Dawkins expressly, and Alleyne and Matthews by their potential alternative defence, said that Jonathan's death was unintended and accidental, it was agreed between counsel and the judge that the jury should be directed on the issue of intent to kill both by reference to the prosecution's primary case, that the defendants' purpose was to silence Jonathan, and also by reference to its fall-back position that the defendants at least appreciated, at the time Jonathan was thrown from the bridge, that his death was a virtual certainty. So it was that the judge placed before the jury, with the prior agreement of all counsel, the following written direction (which he repeated in the course of his summing up) on the intent necessary for murder:

> "Considering the cases of all four defendants separately, are you sure:
>
> …That at the time Jonathan Coles was thrown off the bridge he then intended to kill him, or was a party to this act with others knowing or realising that it was then their intention to kill him?
>
> With regard to proving an *'intent to kill'* the prosecution will only succeed in proving this intent either:
>
> (i) By making you sure that this specific intention was actually in the mind/s of the defendants, or
>
> (ii) (a) By making you sure that Jonathan Coles' death was a virtual certainty (barring some attempt to save him), and
>
> (b) The defendant whose case you are considering appreciated at the time Jonathan was thrown off the bridge that this was the case, and he then had no intentions of saving him, and knew or realised that the others did not intend to save him either."

22. The judge went on to say:

> "The prosecution say that the defendants did actually intend to kill, but at least in the case of a non swimmer who was thrown off the middle of a bridge into a river as wide as this was drowning was a virtual certainty, and the defendants appreciated that, and in the absence of any desire, or attempt, to save him, and if they also realised that the others were not going to save him too they must have had the intentions of killing him."

23. This direction was regarded as incorporating what has become known as the *Nedrick* or *Woollin* direction, after the cases of *R v. Nedrick* [1986] 1 WLR 1025 and *R v. Woollin* [1999] 1 AC 82. The classic form of that direction, repeated in the JSB model direction, 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 *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."

24. We have emphasised the word *find* in that direction, because the original direction of Lord Lane CJ in *Nedrick* contained the word "infer". The only change made by the House of Lords in *Woollin* was to substitute *find* for *infer* (see Lord Steyn at 96H and Lord Hope of Craighead at 97D).

25. The essential ground of appeal argued on behalf of both Alleyne and Matthews is that the judge's direction on intent was a misdirection, and that in consequence their convictions for murder are unsafe. This ground did not originally figure in the appellants' applications for leave to appeal, but was introduced at a late stage, with the leave of this court, after the court had itself raised a query regarding it. There is also a separate ground of appeal, which was originally the main ground and merges into the unsafety aspect of the first ground, to the effect that the convictions are unsafe on a "lurking doubt" basis. Matthews alone has a further ground to the effect that the judge should have acceded to his submission at half time that there was no case to answer on the charge of murder against him.

26. It is logical to take that ground of Matthews' appeal first, albeit it was barely argued. At the half way stage all four defendants raised the argument that there was no case on murder to go to the jury. There was evidence against each of the four that he was present at the bridge when Jonathan was thrown into the river. In the case of Dawkins and Canepe, their presence was on their own admission in their interviews. In the case of Alleyne and Matthews, it was proved by the evidence of Mark Strudwick and Andrew Jolly respectively. As to Matthews the judge said this:

> "The conversation which the Crown say took place between this defendant and Andrew Jolly is challenged, but Jolly gave direct evidence that Matthews was there. It was in a way of a similar nature to the evidence given by Strudwick against Alleyne. Again, Jolly was, in my judgment, a credible witness. His evidence is supported by circumstantial evidence. It must be for the jury to decide whether they believe it, or not."

27. Thus much on presence and participation. As for intent to kill, the judge had already faced that aspect of the argument in dealing with Dawkins, recognising that at least some of what he said would apply to the others as well. Dawkins had not denied presence or participation at his interviews, so that in his case the critical issue was that of intent. He had also admitted at interview that Jonathan had said at the bridge that he could not swim. Although that in itself was not evidence against the others, the judge said that it was open to the jury to conclude that once Jonathan realised the intention was to throw him into the water, he would inevitably have said that he could not swim. Each of the defendants was therefore prima facie fixed with that knowledge. In those circumstances, the judge reasoned as follows:

> "There is, in my view, evidence against Dawkins and I believe all the defendants that they went home knowing that something terrible had happened to Jonathan. What could that have been unless he had drowned? They immediately joined in a conspiracy of silence and lies to prevent detection. I consider that there is, at this stage of the trial, evidence to pass the simple test. May I say should the question arise, also to call for an answer on this *Nedrick* test, that Dawkins was a party to murder."

28. On behalf of Matthews, Mr Stuart Stevens, who was not his counsel at trial, submitted nevertheless that Jolly's evidence was unsatisfactory: Matthews was going out with Jolly's former girlfriend and so, it is inferred, had cause to dislike Matthews; Jolly was drunk at the time of the alleged conversation; in his witness statement Jolly had said that Matthews had admitted presence but not participation, whereas at trial Jolly had "upgraded" his evidence so as to have Matthews saying that "something bad had happened…someone's died…he had fallen in the river". In our judgment there is nothing of substance in these submissions. Jolly said that although he was "probably quite jealous" about a mate going out with an ex-girlfriend, they had talked about it and remained good friends. He was drunk "but not flat on my back". As for "upgrading" his evidence at trial, we do not understand him to have said that Matthews admitted participation in addition to presence. On the contrary, Jolly said that the lad had "fallen" into the river and that Matthews said that he was not involved in that. But we agree with the judge that the jury were entitled to infer participation from what Jolly said of the conversation as a whole, as well as from the other evidence that existed at that stage of Matthews' participation in the events of that night as a whole. That leaves the question of evidence of intent. We agree with the judge that once the evidence had got as far as Matthews' presence at and participation in Jonathan's fall from the bridge, with the jury entitled to infer that Matthews had heard Jonathan say that he could not swim, it was for the jury to decide whether or not they were sure of an intent to kill. After all, Jolly had also said that

when he had asked Matthews why any of them could not save Jonathan, he had merely answered "they were all scared". We therefore reject Matthews' first ground of appeal.

29. We turn next to the ground regarding what is said to be a misdirection. Two criticisms are here made on behalf of both Alleyne and Matthews. The first is that the alternatives presented to the jury in the judge's either/or directions (i) and (ii) might, by implication, lead the jury to think that they could convict of murder (on alternative (ii)) even if they had already rejected (under alternative (i)) a "specific intention [to kill] actually in the mind/s of the defendants". The second is that alternative (ii) which contains the judge's amended form of a *Woollin* direction is put as a substantive rule of law ("will only succeed in proving this intent…by making you sure that" etc) rather than as a rule of evidence.

30. We will consider this second criticism first, as it is the more general one. Indeed Mr Coker was inclined to concede that there had been a misdirection if, contrary to his primary submission, the speech of Lord Steyn in *Woollin* is to be interpreted as laying down a mere rule of evidence. He submits, however, that acting deliberately with an appreciation of a virtual certainty of death *is* an intention to kill, and not merely evidence from which intent to kill can be inferred. In this connection he relies on the following matters.

31. In his speech in *Woollin* Lord Steyn reviewed the earlier cases which had considered what state of mind must be found to exist for a conviction of murder where the defendant denied an intent to kill or commit grievous bodily harm, put forward a different intent or purpose for his actions, and yet did so in circumstances which made it difficult to understand how death or grievous bodily harm was not foreseen or appreciated as highly probable or indeed (barring unforeseen interventions) almost inevitable. In *DPP v. Smith* [1961] AC 290 the defendant in the course of attempting to avoid arrest had killed a policeman by driving off with the policeman clinging to the car. The House of Lords ruled both that it was sufficient that death or grievous bodily harm was "foreseen" as "likely", and that a defendant foresaw what a reasonable person in his position would have foreseen. The first rule put the threshold for the mental element of murder at a low level, and the second rule introduced an objective test of foresight. Parliament reversed the second rule by section 8 of the Criminal Justice Act 1967, which provides that –

> "A court or jury, in determining whether a person has committed an offence,
>
> (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being the natural and probable result of those actions; but
>
> (b) shall decide whether he did intend or foresee that result by reference to all the evidence drawing such inferences from the evidence as appears proper in the circumstances."

32. In *R v. Hyams* [1975] AC 55 the defendant burnt down the house of her rival in love, killing two of her three children. She claimed that she had merely intended to frighten her rival. The trial judge directed the jury that if they were satisfied that at the time Mrs Hyams "knew" that it was "highly probable" that her actions would cause death or grievous bodily harm, then the prosecution would have proved the necessary intent. The House of Lords upheld her conviction by a bare majority, but, as Lord Steyn pointed out, the majority differed as to whether the right test was highly probable, probable, or merely a serious risk.

33. In *R v. Moloney* [1985] AC 905 the defendant fired a shotgun from a range of six feet, killing his stepfather. He was on the best of terms with his stepfather, but the two in drink had challenged one another to a contest of arms. Moloney said that he had not aimed the gun when he pulled the trigger, and had not intended to kill: "It was just a lark." The judge had directed the jury that a man intends the consequences of his voluntary act when he either desires them (whether he foresees them or not) or foresees them (whether he desires them or not). The jury convicted, but the House of Lords quashed the conviction on the ground that the real defence had never been properly left to the jury. It also laid down new guidelines on what constituted the necessary mental element in murder. The leading speech was given by Lord Bridge of Harwich. He said that the "golden rule" was that the judge should avoid any elaboration or paraphrase of what is meant by intent unless something further was strictly necessary to avoid misunderstanding. In such circumstances "clarity and simplicity" were of paramount importance. He rejected any rule of substantive law that foresight of probabilities, of whatever degree, amounted to the necessary intent (at 927H/928D), but went on to allow that foresight of consequences belonged "not to the substantive law, but to the law of evidence" (at 928F). His solution was that in the rare cases where it was necessary to direct a jury by reference to foresight of consequences, they should be asked first, whether death or grievous bodily harm was the natural consequence of the defendant's voluntary act, and secondly, whether the defendant had foreseen that consequence as being a natural consequence of that act. "The jury should then be told that if they answer yes to both questions it is a proper inference for them to draw that he intended that consequence" (at 929G).

34. Whereas Lord Bridge had made it plain that the jury were to consider foresight of natural consequences as a matter of evidence from which they could infer the necessary intent, he was perhaps less clear as to what it was that would permit the "proper" inference of intent. In his guideline directions he spoke of foresight of natural consequences, but earlier in his speech he had spoken in two places of a very high test indeed. He said that the facts of previous decisions suggested that the probability of consequences taken to have been foreseen "must be little short of

overwhelming before it will suffice to establish the necessary intent" (at 925H). And, in the context of distinguishing motive and intent, he gave the example of a man who boards a plane for Manchester, not wishing to go there but seeking to avoid pursuit and knowing that to be its destination: "By boarding the Manchester plane, the man conclusively demonstrates his intention to go there, because it is a moral certainty that that is where he will arrive" (at 926E/F). In the light of his further analysis about the difference between rules of substantive law and of evidence we do not think that Lord Bridge was there seeking to say that a jury was bound to find that a defendant intends the morally certain results of his voluntary acts: but his example does suggest that the closer one gets to knowledge of certain consequences, the closer one is to what a lawyer, if not a juryman, would think of as an irresistible inference of intention. In *Woollin* Lord Steyn emphasised both those passages at 91B/D.

35. In *R v. Hancock* [1986] 1 AC 455 the defendants, who were striking miners, pushed a concrete block from a motorway bridge intending, as they said, for it to fall into the middle lane and thus to frighten a miner who was going to work in a taxi travelling in the nearside lane. It hit the taxi's windscreen and killed the driver. The trial judge directed the jury by reference to Lord Bridge's guideline questions in *Moloney*. The jury convicted. This court allowed the appeal, saying that the judge ought to have explained that "natural consequence" meant highly likely. The House of Lords dismissed the Crown's appeal and disapproved of Lord Bridge's guideline directions as potentially misleading. Lord Scarman said (at 92B) that the jury should be told that the greater the probability of a consequence the more likely it is that the consequence was foreseen and that if that consequence was foreseen the greater the probability is that the consequence was also intended: "But juries also require to be reminded that the decision is theirs to be reached upon a consideration of all the evidence."

36. In *R v. Nedrick* [1986] 1 WLR 1025 the facts were almost identical to those in *Hyams*. Lord Lane CJ, in the passage already quoted above, framed his direction in terms of appreciation of a virtual certainty. Both before and after the critical direction he also spoke of a jury's likely inferences. Thus at 1028C he said that if a defendant thought that the risk to which he was exposing the victim was only slight, then it was easy for the jury to conclude that death or injury was not intended, whereas if death or serious injury was recognised as virtually certain, then the jury "may find it easy to infer" the necessary intention. Again at 1028G he said that if a man realises that it is "to all practical purposes inevitable" that his actions will result in death or serious injury, then "the inference may be irresistible" that he intended the result. It is plain, therefore, that Lord Lane, like Lord Bridge, continued to think of his direction as being in the realm of a rule of evidence, not of substantive law.

37. In *R v. Woollin* the defendant in a fit of temper threw his three-month-old child on to a hard surface. The child died and the father was convicted of murder. The judge at first gave the jury a *Nedrick* direction. At the end of his summing up, however, he modified his direction and spoke in terms of appreciation of "a substantial risk". This court dismissed the appeal, but the House of Lords quashed the conviction. The Crown sought to uphold it on the ground that the *Nedrick* test of appreciation of a virtual certainty was an unnecessarily high threshold and prevented the jury from considering all the evidence in the case. However, the House approved Lord Lane's test, subject to the change of the word "infer" to "find". This was in the interests of clarity (at 96H, 97D). Lord Steyn pointed out that the *Nedrick* test had been widely welcomed by distinguished academic writers, had caused no practical difficulties over the previous twelve years, was simple and clear, and was similar to the threshold of being aware "that it will occur in the ordinary course of events" in (clause 18(b) of) the Law Commission's draft Criminal Code. Lord Steyn concluded (at 95F):

> "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."

38. Lord Hope also emphasised the "great importance" of a direction which is both clear and simple, and could be expressed in as few words as possible (at 97C).

39. Mr Coker for the Crown on this appeal submits that in *Woollin* the House of Lords has finally moved away from a rule of evidence to a rule of substantive law. In this connection he drew attention to a sentence in Lord Steyn's speech at 93F where he says, immediately after setting out Lord Lane's observations in *Nedrick*, that –

> "The effect of the critical direction is that a result foreseen as virtually certain is an intended result."

40. He also relies on what Professor Sir John Smith has to say in his note on *Woollin* [1998] Crim L R 890 and in *Smith & Hogan*, Criminal Law, 10th edition, at 70ff. Thus in the former, Professor Smith said this:

> "A jury might still fairly ask "We are all quite sure that D knew that it was virtually certain that his act would cause death. You tell us we are entitled to find that he intended it. Are we bound to find that? Some of us want to and some do not. How should we decide?" The implication appears to be that, even now, they are not so bound. But why not? At one point Lord Steyn says of *Nedrick* "The effect of the critical direction is that a result foreseen as virtually certain is an intended result." If that is right, the only question for the jury is, "Did the defendant foresee the result as

> virtually certain?" If he did, he intended it. That, it is submitted is what the law should be; and it now seems that we have at last moved substantially in that direction. The *Nedrick* formula, however, even as modified ("entitled to find"), involves some ambiguity with the hint of the existence of some ineffable, undefinable, notion of intent, locked in the breasts of the jurors."

41. Moreover, in the latter treatise (at 72) Professor Smith cites Lord Lane speaking in the debate on the report of the House of Lords Select Committee on Murder (HL Paper, 78-I, 1989) as follows:

> "in *Nedrick* the court was obliged to phrase matters as it did because of earlier decisions in your Lordships' House by which it was bound. We had to tread very gingerly indeed in order not to tread on your Lordships' toes. As a result, *Nedrick* was not as clear as it should have been. However, I agree with the conclusions of the committee that 'intention' should be defined in the terms set out in paragraph 195 of the report on page 50. That seems to me to express clearly what in *Nedrick* we failed properly to explain."

42. The definition referred to, as *Smith & Hogan* goes on to explain, is that stated in clause 18(b) of the Draft Code (itself referred to by Lord Steyn in *Woollin*) as follows:

> "A person acts 'intentionally' with respect to…a result when he acts either in order to bring it about or being aware that it will occur in the ordinary course of events."

43. In our judgment, however, the law has not yet reached a *definition* of intent in murder in terms of appreciation of a virtual certainty. Lord Lane was speaking not of what was decided in *Nedrick* (or in the other cases which preceded it) nor of what was thereafter to be decided in *Woollin*, but of what the law in his opinion should be, as represented by the clause 18(b) definition. Similarly, although the law has progressively moved closer to what Professor Smith has been advocating (see his commentaries in the Criminal Law Review on the various cases discussed above), we do not regard *Woollin* as yet reaching or laying down a substantive rule of law. On the contrary, it is clear from the discussion in *Woollin* as a whole that *Nedrick* was derived from the existing law, at that time ending in *Moloney* and *Hancock*, and that the critical direction in *Nedrick* was approved, subject to the change of one word.

44. In these circumstances we think that the judge did go further than the law as it stands at present permitted him to go in redrafting the *Nedrick/Woollin* direction into a form where, as Mr Coker accepts (although we have some doubt about this), the jury were directed to find the necessary intent proved provided they were satisfied in the case of any defendant that there was appreciation of the virtual certainty of death. This is to be contrasted with the form of the approved direction which is in terms of "not entitled to find the necessary intention, unless…"

45. Having said that, however, we think that, once what is required is an appreciation of virtual certainty of death, and not some lesser foresight of merely probable consequences, there is very little to choose between a rule of evidence and one of substantive law. It is probably this thought that led Lord Steyn to say that a result foreseen as virtually certain is an intended result. Lord Bridge had reflected the same thought when he had said, in *Moloney* at 920C, that if the defendant there had had present to his mind, when he pulled the trigger, that his gun was pointing at his stepfather's head at a distance of six feet and "its inevitable consequence", then

> "the inference was inescapable, using words in their ordinary, everyday meaning, that he intended to kill his stepfather."

Lord Lane had also spoken in *Nedrick* of an irresistible inference.

46. We also think that on the particular facts of this case, reflected in the judge's directions, the question of the appellants' intentions to save Jonathan from drowning highlight the irresistible nature of the inference or finding of intent to kill, once the jury were sure both that the defendants appreciated the virtual certainty of death "(barring some attempt to save him)" and that at the time of throwing Jonathan from the bridge they then "had no intentions of saving him". If the jury were sure that the appellants appreciated the virtual certainty of Jonathan's death when they threw him from the bridge and also that they then had no intention of saving him from such death, it is impossible to see how the jury could not have found that the appellants intended Jonathan to die.

47. We turn then to the first criticism made of the judge's direction on intent to kill, namely that the jury might be led to think that they could convict a defendant under alternative (ii) even if they had not been sure under alternative (i) of "this specific intention…actually in the mind/s" of the defendants. It would perhaps have been better to frame alternative (i) specifically in terms of the Crown's primary case that the defendants' purpose or desire had been to kill, to silence, Jonathan. The contrast highlighted by the alternatives would then have been between an intent to kill proved by a finding that the appellants had purposed or desired Jonathan's death and an intent to kill proved by a finding that the appellants appreciated the virtual certainty of his death, whether they purposed or desired it or not.

However, we think that the jury could not possibly have misunderstood the alternative cases put before them. The first represented the Crown's primary case, the second its fall-back position, itself a response to the defendants' case, at any rate express in the defences of Dawkins and Canepe, that this was merely a terrible prank which had gone disastrously wrong, that they simply had not appreciated the virtual certainty of death.

48. Thus, throughout the direction under consideration, and throughout his summing-up the judge constantly repeated the refrain of the offence of murder's need for an intent, here the intent to kill. The judge told the jury that the offence of murder "is committed when a person kills another with intent to kill". He emphasised that the prosecution had said from first to last that the defendants intended to kill. He directed them that they had to be sure that at the time Jonathan was thrown from the bridge each defendant "then intended to kill him" (or was party to a joint enterprise with others, knowing or realising that it was then their intention to kill him). He then directed the jury that the prosecution would only succeed in proving "this intent" in one of the two alternative ways discussed. He went on to quote prosecution counsel:

> "Mr Coker said: "However, wicked, however cruel, or nauseating, their conduct may have been they are only guilty of murder if they intended to kill Jonathan." I agree with that and, indeed that is the law."

49. Counsel for the appellants criticised the words "at least" in the judge's formulation cited at para 22 above: but that merely reflects the prosecution's admittedly fall-back alternative.

50. Finally, we turn to the appellants' last ground of appeal, which is that the verdicts are unsafe on a "lurking doubt" basis, viz that this court should "feel a reasoned and substantial unease about the finding of guilt" (*R v. Wellington* (1991) Crim L R 543). We consider that ground in circumstances where, as stated above, we think that on the prosecution's concession that the judge's form of *Nedrick/Woollin* direction amounted to a rule of substantive law, it constituted, on our understanding of the present state of the authorities, a misdirection, albeit one that was immaterial. In case, however, we are wrong in that view of immateriality, we will have particular regard to the appellants' submissions regarding safety.

51. Those submissions covered the following ground. First, it was said that there was a danger that the jury had been over adversely influenced by the appellants' cruel and inhuman treatment of their victim. However, the judge warned the jury not to try the case on sympathy, and commented that all counsel had contributed to an attempt "to keep the temperature of this case down to a level where you can make that cool and objective assessment". The jury's acquittal of Canepe on the charge of murder demonstrates that the jury exercised that discrimination. Since he admitted manslaughter on the basis of participation, his acquittal must have been on the basis that the jury were not satisfied that he shared the requisite knowledge for an intent to kill. His case that Jonathan had not spoken in the car of his being a non-swimmer was either accepted by the jury or caused them sufficient doubt.

52. Secondly, it was said that in the light of the prosecution's emphasis upon an intent to kill, the judge should not have diluted the need for the prosecution to satisfy the jury on what was said to be the motive for that intent, namely a desire to silence Jonathan, to prevent him complaining of his robbery; and that the judge should have warned the jury that if they were not satisfied as to that motive, then they should exercise particular caution in arriving at some alternative mens rea. The judge said that "the prosecution never has to prove motive", that the defence point "why should anyone do this?" was a perfectly reasonable point, but one that need not be uppermost in the jury's minds and that "your inability to answer the question [does not] necessarily [provide] the key to this case". However, we think that these were fair and well-balanced comments by the judge. Seeing the importance placed by the prosecution on the motive to silence Jonathan, the judge's comments were if anything helpful to the defence, in as much as he contemplated that the jury might not be sure on this aspect of the prosecution case. As for the alternative basis for an intent to kill to be found in an appreciation of the virtual certainty of death, this was if anything promoted as the correct test by the defence's case that this was a prank which went wrong, as is clear from what the judge said in his ruling on the submissions of no case to answer.

53. Thirdly, it was suggested that on either view of the basis for an intent to kill, the prosecution case was less than compelling. A desire to silence Jonathan was unrealistic, since it assumed undertaking a far worse crime to avoid detection in a lesser crime when, following the meeting with Lyndsey Brannif and her friends at Guifford Park, the defendants could not sensibly have thought to escape that detection. As for the alternative basis of appreciation of a virtual certainty of death, the prosecution case made no allowance for a sceptical disbelief in Jonathan's protestation that he could not swim, or for the placid nature of the river at a popular swimming place, or for panic as an explanation for the appellants' failure to effect a rescue, or for the evidence that the appellants went down to the river bank to see if Jonathan was going to be all right, as he so nearly was. Even Alleyne's admission to Mark Strudwick that he was worried "that someone had drowned" was more expressive of unintended consequences than anything else.

54. In our judgment, however, this was the essential area for the jury to determine as finders of fact, and it would be wrong for this court to intervene save where, as was said in *Wellington*, there is a reasoned and substantial unease about their verdicts. We do not know which of the two alternative bases for finding an intent to kill the jury were satisfied about. It could have been both. It could have varied from defendant to defendant. Canepe was acquitted of robbery (because the Crown offered no evidence against him on that count) as well as murder, and thus may be thought in any event to have participated less strongly in the alleged motive to silence Jonathan. Alleyne, on the other hand, said that "he was not going down" for the robbery. Canepe said that he had begun to detect menace in the voices at that earlier stage. There is the stark fact that, when Jonathan was thrown into the water, there was no attempt to rescue him, not even when these appellants went down to the river-bank, if Dawkins and Canepe are right about that, and Jonathan was so obviously in desperate need of assistance, but nevertheless was left to drown. (His body was found close to an overhanging branch (not a log) by the riverbank, but that was only five days later.) It is difficult to conclude other than that when the appellants left Tyringham Bridge in the car they knew that Jonathan had drowned. Moreover, these appellants had the benefit, through Dawkins' and Canepe's evidence and their explicit defences that what had happened was a prank gone wrong, of evidence and a defence that they were not willing to put forward themselves. They were each given the opportunity of saying that Jonathan's death was an unintended accident, but did not take it. The jury were in the best position to evaluate their evidence when cross-examined, on the hypothesis that they had been present, about what they would have appreciated of the consequences of throwing a non-swimmer into the river from the bridge. There was no direct evidence that the failure to rescue occurred through panic, but the jury were reminded of Jolly's evidence that Matthews had told him that the victim was not rescued because they were scared. As for not believing Jonathan when he said that he was a non-swimmer, only Dawkins gave evidence that Jonathan said that: but Dawkins did not say that he did not believe him. In addition, Mark Strudwick said that Alleyne told him that the victim had said he could not swim: but he did not also say that Alleyne told him that he had not believed him.

55. In this context, it was also submitted that the judge placed too much emphasis on the appellants' failure to rescue Jonathan: but it was a striking feature of the case, relevant to the question of intent, and of particular importance in circumstances where the defence was that it had it all been a prank gone wrong.

56. It was submitted that the judge should have directed the jury on the distinction between recklessness and the *Nedrick/Woollin* formula. However, there is no support at all in *Woollin* for such an additional direction. On the contrary: in *Nedrick* Lord Lane had pointed up the distinction between a defendant who foresees death or serious injury but thinks that the risk is slight with the defendant who foresees death or serious injury as a virtual certainty: see the passage from Lord Lane's judgment marked as "(A)" in Lord Steyn's speech in *Woollin* at 96C/D. But Lord Steyn said that that passage should not be used, as it may detract from the clarity of the "critical direction" (at 96G); and Lord Hope spoke to similar effect (at 97E). Under that critical direction the jury are told that they have to be sure that a defendant "appreciated" that death or serious injury was a virtual certainty. That excludes the case of true recklessness, where the defendant does not consider consequences at all. We agree with Mr Coker's submission that a direction about recklessness was unnecessary and would have been confusing.

57. It was submitted that the pathological evidence of diffused bruising deep in the muscles over Jonathan's right shoulder could be explained as having occurred while he was hanging on to the parapet of the bridge, and that if so, this could have prejudiced his chances of saving himself. However, that consequence was not put to the experts, nor made the subject matter of a submission to the jury.

58. It was submitted that in circumstances where the appellants had told lies and raised false alibis, the jury may have held this against them and that in the event their credibility was undermined. However, the judge repeatedly told the jury, in respect to each defendant, that they should pay no attention to lies on the charge of murder, since the charge of manslaughter was a sufficient explanation for the telling of any such lies. As for credibility, that is for the jury. In the case of these two appellants, it is hard to think that they had any credibility at all. They had of course nothing to say about the events at the bridge, but even so they had the benefit, such as it was, of what Dawkins and Canepe had to say about those events. Dawkins was also convicted of murder.

59. In sum, we do not consider that there is a lurking doubt, nor do we feel a reasoned and substantial unease. On the contrary we regard the verdicts as safe. In the circumstances these appeals must be dismissed.