HIGH COURT OF AUSTRALIA

GAUDRON, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

WILLIAM JOHN MURRAY APPELLANT

AND

THE QUEEN RESPONDENT

Murray v The Queen
[2002] HCA 26
20 June 2002
B11/2002

ORDER

1. Appeal allowed.

2. Set aside the order of the Court of Appeal of Queensland dated 24 August 1999 and, in lieu thereof, order that:

(a) the appellant's appeal to that Court be allowed;

(b) the appellant's conviction be quashed and a new trial be had.

On appeal from the Supreme Court of Queensland

Representation:

A J Rafter for the appellant (instructed by Dearden Lawyers)

L J Clare for the respondent (instructed by the Director of Public Prosecutions (Queensland))

CATCHWORDS

Murray v The Queen

Criminal law – Homicide – Unlawful killing – Murder – Deceased died from gun shot wounds to chest – Whether shooting was an unwilled act or an event occurring by accident – What is "the act causing death" – Whether trial judge erred in failing to direct jury about unwilled acts – Whether it is for the jury to decide what is "the act causing death" – Whether trial judge's failure to direct jury gave rise to a substantial miscarriage of justice so that a new trial should be ordered.

Onus of proof – Whether the trial judge erred in directions to jury about onus of proof – Whether trial judge's direction to jury was apt to mislead the jury about the decision which was to be made.

Words and phrases – "act" – "event" – "accident".

The Criminal Code (Q), s 23.

1 GAUDRON J. The facts are set out in other judgments. I shall repeat them only to the extent necessary to make clear my reasons for holding that the appeal should be allowed on the sole ground that the trial judge directed the jury in a manner that mis-stated the onus of proof.

2 According to the evidence-in-chief of the appellant concerning the events leading to the death of Tony Celap, the deceased became verbally abusive whereupon he, the appellant, took a loaded shotgun from under his bed and approached the deceased with the gun in his right hand. As the deceased started to rise from a chair, the appellant lifted the gun to waist height, the deceased's arm shot out and something hit the appellant on the head. The gun then went off. He said that he took the gun into the room where the deceased was sitting solely with the intention of frightening him so that he would leave the house.

3 In cross-examination, the appellant said that he might have cocked the gun but could not remember doing so. He admitted that he pointed the gun at the deceased and said that his finger "would have been somewhere around the trigger guard" and possibly on the trigger. He denied that he deliberately pulled the trigger.

4 The prosecution case was that the appellant discharged the gun intending to cause death or grievous bodily harm. However, the evidence of the appellant left open two possibilities: (1) that the gun discharged without any pressure being applied to the trigger; and (2) that pressure was applied to the trigger by reflex or automatic motor action when the deceased's arm shot out or when the appellant was struck on the head.

5 The trial judge instructed the jury with respect to accident, the subject of s 23(1)(b) of the *Criminal Code* (Q) ("the Code"), but did not instruct the jury with respect to unwilled act, the subject of s 23(1)(a). The first ground of this appeal raises the question whether directions should also have been given on that subject.

6 Section 23(1) of the Code provides:

> " Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for—
>
> (a) an act or omission that occurs independently of the exercise of the person's will; or
>
> (b) an event that occurs by accident."

7 As has been noted in other judgments, the focus of s 23(1)(a) is upon "an act or omission", whereas that of s 23(1)(b) is upon "an event". So far as concerns the offence of murder, the "act" to which s 23(1)(a) refers may

conveniently be described as the "act causing death"[1], whereas the "event" to which s 23(1)(b) refers is the death which results from that act[2]. However, to describe the "act" to which s 23(1)(a) refers as the "act causing death" is to say nothing of significance. In each case, the act must be identified.

8 It is well settled that the "act" to which s 23(1)(a) refers is the "bodily action which, either alone or in conjunction with some quality of the action, or consequence caused by it, or an accompanying state of mind, entails criminal responsibility"[3]. Thus, as pointed out by Windeyer J in *Timbu Kolian v The Queen*, there is a difference between merely pressing the trigger of a firearm ("dorsiflexion") and pressing the trigger of a firearm which is known to be loaded ("discharging the firearm")[4]. And in a case where death results from the use of a firearm, it is sometimes useful, as was the case in *R v Falconer*, to describe the act causing death as the discharging of the firearm.

9 To describe the act causing death in a firearms case as the discharging of the firearm is to conceal a number of difficulties. Thus, in *Vallance v The Queen*, Windeyer J said that "discharging a firearm is, of course, a complex act, involving loading the piece, cocking it, presenting it, pressing the trigger"[5]. Even so, it might, with equal accuracy, be described as pressing the trigger of a loaded and cocked gun.

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1 *Vallance v The Queen* (1961) 108 CLR 56 at 64 per Kitto J, 71-72 per Menzies J; *Kaporonovski v The Queen* (1973) 133 CLR 209 at 215 per McTiernan ACJ and Menzies J, 231 per Gibbs J, 241 per Stephen J; *R v Falconer* (1990) 171 CLR 30 at 38 per Mason CJ, Brennan and McHugh JJ; *R v Van Den Bemd* (1995) 1 Qd R 401 upheld on appeal in *R v Van Den Bemd* (1994) 179 CLR 137.

2 *Vallance v The Queen* (1961) 108 CLR 56 at 64 per Kitto J, 71-72 per Menzies J; *Kaporonovski v The Queen* (1973) 133 CLR 209 at 215 per McTiernan ACJ and Menzies J, 231 per Gibbs J, 241 per Stephen J; *R v Falconer* (1990) 171 CLR 30 at 38 per Mason CJ, Brennan and McHugh JJ; *R v Van Den Bemd* (1995) 1 Qd R 401 upheld on appeal in *R v Van Den Bemd* (1994) 179 CLR 137.

3 *R v Falconer* (1990) 171 CLR 30 at 38 per Mason CJ, Brennan and McHugh JJ as was stated by Kitto J in *Vallance v The Queen* (1961) 108 CLR 56 at 64 and 71-72 per Menzies J. See also *Kaporonovski v The Queen* (1973) 133 CLR 209 at 231 per Gibbs J, 241 per Stephen J.

4 (1968) 119 CLR 47 at 64.

5 (1961) 108 CLR 56 at 80.

10 The difficulties associated with identifying the act causing death in a firearms case may be seen in *Ryan v The Queen*[6], a fatal shooting case involving a charge of murder under the *Crimes Act* 1900 (NSW) but which, otherwise, bears strong similarity to the present case. The accused in that case pointed a loaded and cocked rifle at a service station attendant and, while still pointing the rifle with one hand, tried to tie the attendant up with the other. The attendant moved suddenly and the accused's finger pressed the trigger without, on the accused's account, any intention on his part. In that case Taylor and Owen JJ said:

> "the wounding and death [of the service station attendant] were caused by a combination of acts ... includ[ing] the loading and cocking of the rifle, the failure to apply the safety catch, the presentation of the rifle ... with the finger ... on the trigger in circumstances in which an attempt at resistance might well have been expected."[7]

Their Honours added that it was "impossible to isolate the act of pressing the trigger ... and argue that it, alone, caused the wounding and death"[8].

11 In *Ryan*, Windeyer J identified the act causing death as "the discharging of a loaded firearm when it was pointed towards the man who was killed"[9]. On the issue whether it was the act of the accused, his Honour expressed the view that phrases such as "reflex action" and "automatic reaction" have no application where a person "has put himself in a situation in which he has his finger on the trigger of a loaded rifle levelled at another man"[10]. His Honour explained that if the person concerned "then presses the trigger in immediate response to a sudden threat or apprehension of danger ... his doing so is ... a consequence probable and foreseeable ... and in that sense a voluntary act"[11]. His Honour added that "what was done might not have been done had the actor had time to think"[12] but

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6 (1967) 121 CLR 205.

7 (1967) 121 CLR 205 at 231.

8 (1967) 121 CLR 205 at 231.

9 (1967) 121 CLR 205 at 239.

10 (1967) 121 CLR 205 at 245.

11 (1967) 121 CLR 205 at 245.

12 (1967) 121 CLR 205 at 245.

questioned the notion that the act was involuntary "merely because the mind worked quickly and impulsively"[13].

12 When regard is had to the different approaches taken to identifying the act causing death in *Ryan*, the wisdom of what was said by Dixon CJ in *Vallance* becomes apparent. In *Vallance*, Dixon CJ expressed the view that "it is only by specific solutions of particular difficulties raised by the precise facts of given cases that the operation of such provisions as s 13 [of the Tasmanian *Criminal Code*] can be worked out judicially"[14].

13 There is another aspect to s 23(1)(a) of the Code that should be noted. Although it is accurate to speak in murder cases of the "act" referred to in s 23(1)(a) as the "act causing death", it is for the jury to determine what act or acts were done by the accused and whether they or any of them caused death. Thus, in *Ryan*, Barwick CJ expressed the view that, on the facts of that case, "the jury could choose the presentation of the gun in the circumstances [in which it was presented] or its subsequent discharge as the act causing death."[15] And on the view that the act causing death was the discharge of the gun, his Honour allowed that there were at least four possibilities, namely:

1 voluntary discharge with the intention of harming the deceased;

2 voluntary discharge with the intention only of frightening the deceased;

3 voluntary discharge in panic with no specific intention either to do harm or to frighten the deceased;

4 discharge by the pressing of the trigger in a reflex, convulsive movement.[16]

His Honour expressed the view, in relation to the fourth of those possibilities, that the accused's description of the killing as an "accident" was inconsistent with an admission that the gun was voluntarily discharged[17].

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13 (1967) 121 CLR 205 at 245-246.

14 (1961) 108 CLR 56 at 61. See also *Kaporonovski v The Queen* (1973) 133 CLR 209 at 220 per Walsh J.

15 (1967) 121 CLR 205 at 218.

16 (1967) 121 CLR 205 at 209.

17 (1967) 121 CLR 205 at 212.

14 Subject to two matters which will be dealt with shortly, I think the analysis by Barwick CJ in *Ryan* is legally and logically correct and that that analysis is applicable in this case. The first, as has already been noted, is that *Ryan* was concerned with a charge of murder under the *Crimes Act* 1900 (NSW). At the relevant time, s 18(1) of that Act defined murder to include an act causing death that was done with reckless indifference to human life or done in an attempt to commit or during or immediately after the commission of an act obviously dangerous to human life[18]. Thus, the act causing death could be identified by Taylor and Owen JJ as "the presentation of the [loaded and cocked] rifle ... with the finger of the [accused] on the trigger in circumstances in which an attempt at resistance might well have been expected"[19].

15 Unlike s 18(1) of the *Crimes Act* 1900 (NSW), as it stood at the time of the decision in *Ryan*, the definition of murder in s 302(1) of the Code[20] contains

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18 Section 18(1)(a) of the *Crimes Act* 1900 (NSW) was amended by s 5(a) of the *Crimes and Other Acts (Amendment) Act* No 50 of 1974 (NSW) by omitting from s 18(1)(a) the words "of an act obviously dangerous to life, or".

19 (1967) 121 CLR 205 at 231.

20 Section 302(1) of the Code provides:

> " Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say–
>
> (a) if the offender intends to cause the death of the person killed or that of some other person or if the offender intends to do to the person killed or to some other person some grievous bodily harm;
>
> (b) if death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life;
>
> (c) if the offender intends to do grievous bodily harm to some person for the purpose of facilitating the commission of a crime which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such crime;
>
> (d) if death is caused by administering any stupefying or overpowering thing for either of the purposes mentioned in paragraph (c);

(Footnote continues on next page)

no provision permitting a person to be convicted of murder simply for an act done with reckless indifference to human life or done in an attempt to commit or during or immediately after the commission of an act obviously dangerous to human life. Thus, if the act causing death in this case were to be identified as simply presenting the loaded shotgun, that might constitute manslaughter by negligent act[21], but it would not constitute murder[22].

16 The second matter that should be noted with respect to the analysis undertaken by Barwick CJ in *Ryan* concerns his Honour's acceptance of the

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(e) if death is caused by wilfully stopping the breath of any person for either of such purposes;

is guilty of '**murder**'."

21 Manslaughter is defined in s 303 of the Code as "[a] person who unlawfully kills another under such circumstances as not to constitute murder is guilty of '**manslaughter**'." Chapter 27 of the Code addresses Duties Relating to the Preservation of Human Life and includes the Duty of persons doing dangerous acts (s 288) and the Duty of persons in charge of dangerous things (s 289).

Section 288 provides:

" It is the duty of every person who, except in a case of necessity, undertakes to administer surgical or medical treatment to any other person, or to do any other lawful act which is or may be dangerous to human life or health, to have reasonable skill and to use reasonable care in doing such act, and the person is held to have caused any consequences which result to the life or health of any person by reason of any omission to observe or perform that duty."

Section 289 provides:

" It is the duty of every person who has in the person's charge or under the person's control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health, of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger, and the person is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty."

22 cf the situation where death results from the presentation of a loaded gun during the prosecution of an unlawful purpose. In this regard, see *Fitzgerald* (1999) 106 A Crim R 215.

possibility that, in that case, pressure was applied to the trigger by a reflex or automatic motor action. The question whether a reflex or automatic motor action is an involuntary or unwilled act is a question for the jury. And on that issue, there is much to be said for the view expressed by Windeyer J in *Ryan* that the pressing of a trigger in response to a sudden threat or apprehension of danger is a probable and foreseeable consequence of presenting a loaded gun and a jury might, on that account, find it to be a voluntary act.

17 Having regard to the definition of murder in s 302 of the Code and the consideration that the question whether the act causing death is or is not a willed act is a question for the jury to determine, the issues for consideration by the jury in this case fell into three categories. The first was whether the prosecution had excluded beyond reasonable doubt the possibility that the gun had discharged without pressure being applied to the trigger and, also, the possibility that it was discharged by an unwilled reflex or automatic motor action. And ordinarily that would have required appropriate directions with respect to the nature of an unwilled act, as well as with respect to accident.

18 The second area for the jury's consideration was intention. If, but only if, the prosecution excluded the possibilities identified above, the jury had to consider whether the prosecution had established beyond reasonable doubt that the appellant had discharged the shotgun with the intention of causing death or grievous bodily harm. If not so satisfied, the third question, namely, manslaughter would then have fallen for consideration. That question could arise either by reference to the voluntary discharge of the gun without an intention to kill or do grievous bodily harm or, if not satisfied that it was voluntarily discharged, on the basis of a negligent act constituted by the presentation of the loaded gun.

19 It is convenient now to turn to the directions given by the trial judge. Her Honour drew the jury's attention to the prosecution and defence cases and, on the question of murder, instructed the jury that it had "to decide which versions of those events ... [it would] accept". Her Honour then posed the question "[w]hat was [the appellant's] intent?". A little later her Honour instructed the jury that if "his intent was just to frighten him and drive him out of the house, then you should find that he is not guilty of murder". After giving directions on intoxication and accident, her Honour instructed the jury as follows: "[i]f you accept the accused's version of what happened that night in whole or in part, you are going to have to evaluate his conduct and decide whether it was conduct such as to amount to criminal negligence".

20 Although the trial judge's directions were not entirely explicit, it is clear that the jury was directed that if it accepted the appellant's version which, as earlier indicated, raised the possibility either that the gun discharged without the application of pressure to the trigger or that pressure had been applied by reflex

or automatic motor action, it should acquit him of murder and consider whether or not he was guilty of manslaughter on the basis of criminal negligence.

21 In framing the matters which the jury had to decide by reference to the appellant's version of events, the trial judge sufficiently raised the questions whether the gun discharged without the application of pressure to the trigger and whether it was discharged by the appellant in a reflex or automatic motor action, treating the latter possibility, in effect, as an unwilled act. There was thus no need for her Honour to direct the jury with respect to that issue. Accordingly, no miscarriage of justice was occasioned by the failure to give such directions and the argument for the appellant to the contrary must be rejected.

22 Before leaving the question of unwilled act, it is appropriate to observe that the directions given by the trial judge were, in one sense, unduly favourable to the appellant. They excluded from the jury's consideration the question whether, if the trigger was pressed as a result of a reflex or automatic motor action, that was an unwilled act. They also withdrew from the jury's consideration the possibility that the accused might be guilty of manslaughter on a basis other than criminal negligence.

23 Although the trial judge, in the early part of her directions, correctly instructed the jury with respect to the onus of proof, in the passages set out above, her Honour posed the question for the jury's determination with respect to murder as the question whether it accepted the prosecution's or the appellant's version of events. That was the central or critical direction in her Honour's summing up. And as the issue for the jury was not whether it should accept the appellant's version but whether the prosecution had negatived it as a reasonable possibility, that direction mis-stated the issue for determination in a way that relieved the prosecution of proving its case beyond reasonable doubt. Accordingly, the appeal should be allowed on that ground.

24 The appeal should be allowed, the order of the Court of Appeal of Queensland should be set aside and, in lieu thereof, it should be ordered that the appeal to that Court be allowed, the conviction quashed and a new trial ordered.

25 GUMMOW AND HAYNE JJ. The appellant was charged with the murder of Tony Celap at Yarraman in Queensland. Mr Celap died in the appellant's house as the result of shots discharged from a double-barrelled shotgun while the appellant was holding the gun. Both barrels were discharged but the weapon was faulty and prone to sympathetic discharge of the second barrel on the first barrel discharging. Further, the weapon could discharge if struck but there was no evidence at trial which suggested that it was struck before it discharged the shots which killed the deceased. There was evidence at the appellant's trial from which it was open to the jury to conclude that the appellant had, for a long time, harboured feelings of considerable animosity towards the deceased. The appellant was convicted of murder.

26 He appealed to the Court of Appeal of Queensland against his conviction. By majority (McMurdo P and Atkinson J; McPherson JA dissenting), the Court of Appeal dismissed his appeal[23].

27 Two issues arise on the appeal to this Court. First, should the Court of Appeal have held that there was a miscarriage of justice by reason of the trial judge not directing the jury about unwilled acts and events occurring by accident? Secondly, should the Court of Appeal have held that the trial judge's directions about onus of proof were inadequate?

28 The first of those issues is similar to the issue which arose under *The Criminal Code* (WA) in *Ugle v The Queen*[24], oral argument in which was heard immediately before oral argument in this matter. As in *Ugle*, to understand the way in which any issue about unwilled acts and events occurring by accident arises in this matter it is necessary to begin by considering the provisions of the *Criminal Code* (Q) ("the Queensland Code") which deal with homicide. Given the common origins of both Codes in the work of Sir Samuel Griffith which in turn drew on other criminal codes[25], it is to be recalled that the relevant provisions of the Queensland Code have many similarities with the equivalent provisions of *The Criminal Code* (WA), but they are not identical.

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23 *R v Murray* [1999] QCA 341.

24 [2002] HCA 25.

25 Most notably the work of Sir James Fitzjames Stephen which led to the Criminal Code (Indictable Offences) Bill 1879 ("the English Criminal Code Bill") which was an appendix to the Report of the Royal Commission appointed to consider the law relating to Indictable Offences (C 2345) but also the Italian Penal Code of 1888, and the Penal Code of the State of New York. See Queensland, Griffith, *Draft of a Code of Criminal Law*, 1897 at vii.

29 Chapter 28 of the Queensland Code deals with "Homicide–Suicide–Concealment of Birth". Section 291 provides that "[i]t is unlawful to kill any person unless such killing is authorised or justified or excused by law". Section 293 provides that "[e]xcept as hereinafter set forth, any person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that other person". Section 300 then provides that "[a]ny person who unlawfully kills another is guilty of a crime, which is called murder or manslaughter, according to the circumstances of the case". A person who unlawfully kills another "if the offender intends to cause the death of the person killed or that of some other person or if the offender intends to do to the person killed or to some other person some grievous bodily harm" is guilty of murder[26]. "A person who unlawfully kills another under such circumstances as not to constitute murder is guilty of 'manslaughter'"[27]. Section 304 of the Queensland Code deals with killing on provocation; ss 271 and 272 deal with self-defence against unprovoked and provoked assault. Other provisions[28] deal with acts done in defence of various forms of property.

30 Chapter 5 of the Queensland Code (ss 22-36) deals with the subject of "Criminal Responsibility". Section 23(1) provides:

> "(1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for–
>
> (a) an act or omission that occurs independently of the exercise of the person's will; or
>
> (b) an event that occurs by accident."

The appellant contends that there were issues at his trial about whether there had been an act or omission that occurred independently of his will or an event that had occurred by accident. To examine that contention it is necessary to consider some of the evidence that was given at the trial, particularly the evidence given by the appellant.

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26 s 302(1)(a).

27 s 303.

28 ss 274 to 278.

The facts

31 On the night the deceased died, he and the appellant were drinking in the bar of an hotel. The appellant bought drinks for them both and they stayed until closing time. The appellant and the deceased left the hotel together and went, by car, to the appellant's house. Less than half an hour after the hotel had closed, the appellant spoke to police by telephone and said that he had just shot a person. There was evidence from neighbours which, if the jury accepted it, suggested that the shooting occurred about five minutes after the appellant had come home with the deceased.

32 The deceased was sitting in a chair in the living room of the appellant's house when he was shot. According to the appellant, shortly after arriving home he went to the lavatory. While he was relieving himself the appellant heard the deceased, yelling to him from the living room, and offering to fight him. The appellant went to his bedroom and picked up his shotgun from under the bed. It was loaded. Holding the gun in his right hand, the appellant went into the living room. According to the appellant's account in his evidence-in-chief, as he approached the deceased, the latter:

> "sort of turned around to the side and about side on as he was getting up, and his arm shot out and hit me – something hit me in the head. I had the gun; as he was starting to get up, I lifted it, I think, and it was about waist height I'd say when I got hit in the head and the gun went off."

When asked by his trial counsel why he had taken the gun with him, the appellant said that he wanted the deceased to get out of the house, that he thought the sight of the gun would frighten the deceased, and that he would frighten the deceased with it and he would go.

33 The appellant maintained this version of events in cross-examination but, in addition, acknowledged that he might have cocked the gun at the time he pointed it at the deceased. Indeed, in answer to the question "You might have intended to point it at him cocked?" he answered "Yes, I believe I did, yes." When asked where his finger was, he said "[i]t would have been somewhere around the trigger guard" and that it "[c]ould well have been" on the trigger. Nonetheless, he said he could not give an answer on why the gun went off. He denied pulling the trigger deliberately.

34 When, after police were called, the appellant was examined by a doctor, he was found to have a small puncture wound on his forehead, a scratch on his nose and an abrasion on the right chest. It may be supposed that at least the injury to the forehead was not inconsistent with the appellant's account that he was struck on the head by something thrown by the deceased but it may be

doubted that the evidence at trial permitted any definite conclusion about what caused his injuries.

The trial judge's directions

35 In her directions to the jury, the trial judge told them that the prosecution had to prove that the appellant intended to kill or do grievous bodily harm. "The question [her Honour said] is whether he had that intent at the time of the act which caused [the deceased's] death." This, she said, was a different question from motive.

36 Leaving aside for the moment the questions about burden of proof that are presented by her Honour's repeated references to the jury "accepting" the appellant's evidence, and her Honour's casting questions for the jury as a choice between alternatives, the general tenor of her Honour's directions can be understood as presenting three issues for the jury's consideration. The first issue to be decided by the jury was said to be whether the appellant had acted to frighten the deceased and drive him out of the house, or had intended to kill or do grievous bodily harm. The second issue was whether the deceased's death was accidental. Her Honour said:

> "The Criminal Code provides that subject to the express provisions of the Code relating to negligent acts and omissions, a person is not criminally responsible for an event which occurs by accident. What this means is that, subject to the law of criminal negligence, and I will come to that in a moment, the Crown has to establish that the accused intended that the event should occur or saw it as a possible outcome or that an ordinary person in the position of the accused would reasonably have foreseen the event as a possible outcome. When I say a possible outcome, I mean something more than something that is remote or speculative.
>
> Now, if the Crown does not establish either of these, then the event was accidental and subject to the law of criminal negligence, the accused is not criminally responsible for it."

The third issue put to the jury was described as relating to criminal negligence. Reference was made in the charge to the provision of the Queensland Code (s 289) obliging persons in charge of dangerous things to use reasonable care and take reasonable precautions to avoid danger to the life, safety and health of others. The jury was told that if satisfied that the accused had acted with criminal negligence, a verdict of manslaughter should be returned. (The relationship between provisions like s 289, homicide provisions, and provisions concerning

unwilled acts and accidental events, was considered in *Callaghan v The Queen*[29] and in *Ugle v The Queen*[30], both cases arising under *The Criminal Code* (WA).)

37 In considering the sufficiency of the directions given at the appellant's trial it is as well to begin by recalling the well-known statement in *Alford v Magee*[31] that a trial judge is "charged with, and bound to accept, the responsibility (1) of deciding what are the real issues in the particular case, and (2) of telling the jury, in the light of the law, what those issues are." The jury is to be instructed on so much of the law as they need to know to decide *those* issues.

38 Reduced to its essentials, the first complaint of the appellant in this case is that the trial judge should have told the jury that there was an issue about whether the prosecution had proved that this was not a case where there had been an act or omission that occurred independently of the exercise of the appellant's will. The expression of the issue is awkward. It is useful to examine why we have expressed the issue in this way and to begin that examination with some matters of history.

39 Unlike *The Indian Penal Code* of 1861, the English Criminal Code Bill did not deal with what s 80 of *The Indian Penal Code* described as things "done by accident or misfortune". Rather, the English Criminal Code Bill provided in s 19 (so far as now relevant) that:

> "All rules and principles of the common law which render any circumstances a justification or excuse for any act or a defence to any charge, shall remain in force and be applicable to any defence to a charge under this Act, except in so far as they are thereby altered or are inconsistent therewith."

That was entirely consistent with what, until *Woolmington v The Director of Public Prosecutions*[32], had long been understood to be the common law rule about who bore the burden of proving that a death, alleged to be murder, had been caused by accident. That rule was described in *Foster's Crown Law*[33] as being:

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29 (1952) 87 CLR 115.

30 [2002] HCA 25.

31 (1952) 85 CLR 437 at 466.

32 [1935] AC 462.

33 (1762) at 255.

> "In every charge of murder, the fact of killing being first proved, *all the circumstances of accident*, necessity, or infirmity *are to be satisfactorily proved by the prisoner*, unless they arise out of the evidence produced against him: for the law presumeth the fact to have been founded in malice, until the contrary appeareth. And very right it is that the law should so presume. The defendant in this instance standeth upon just the same foot that every other defendant doth: *the matters tending to justify, excuse, or alleviate, must appear in evidence before he can avail himself of them*." (emphasis added)

And as Viscount Sankey LC noted in *Woolmington*[34], the first part of this passage appeared in nearly every textbook or abridgment written on the subject thereafter[35].

40 When Sir Samuel Griffith came to prepare the Queensland Code which was first enacted in 1899 it is, then, not surprising that what now is s 23(1) was cast in terms consistent with the accused bearing the burden of establishing that there was an unwilled act or an accidental event. It seems clear, however, that Sir Samuel Griffith saw s 23(1) as replacing the common law about mens rea[36]. However this may be, after *Woolmington* (itself a case where the accused suggested that the weapon he carried had discharged accidentally) it was clear, contrary to what had been understood to be the common law, that on a trial for murder the prosecution bears the burden of proving that the death resulted from a willed act (or as it is often put in the non-code States, a conscious and voluntary act) of the accused[37]. As Dixon J said in *R v Mullen*[38]:

> "It is true that in [the Code's] text there may be traced a belief on the part of the framers that the rule of law was otherwise, a belief which was very generally held. But the *Code* does not appear to me either to formulate or necessarily to imply a principle that upon an indictment of murder the

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34 [1935] AC 462 at 474.

35 Stephen, *A Digest of the Criminal Law*, 7th ed (1926) at 235; Archbold, *Criminal Pleading, Evidence and Practice*, 29th ed (1934) at 873; Russell, *A Treatise on Crimes and Misdemeanours*, 8th ed (1923), vol 1 at 615; *Halsbury's Laws of England*, 2nd ed, vol 9 at 426-427.

36 *Widgee Shire Council v Bonney* (1907) 4 CLR 977 at 981-982.

37 *R v Mullen* (1938) 59 CLR 124.

38 (1938) 59 CLR 124 at 136.

> prisoner must satisfy the jury either on the issue of accident or of provocation."

This being so, since *Mullen*, it has been clear that, in a prosecution for an offence against the Queensland Code, if the evidence raises a question about an unwilled act or an accidental event, it is for the prosecution to prove beyond reasonable doubt that s 23(1) does not apply.

Unwilled acts

41 As Windeyer J said in *Ryan v The Queen*[39], "[t]hat an act is only punishable as a crime when it is the voluntary act of the accused is a statement satisfying in its simplicity." But as his Honour rightly pointed out[40], the answer to the question "[w]hat is a voluntary act" is far from simple: "partly because of ambiguities in the word 'voluntary' and its supposed synonyms, partly because of imprecise, but inveterate, distinctions which have long dominated men's ideas concerning the working of the human mind". As in *Ryan*, so too in this case[41]:

> "[t]he conduct which caused the death was … a complex of acts all done by [the appellant] – loading the [firearm], cocking it, presenting it, pressing the trigger. But it was the final act, pressing the trigger of the loaded and levelled [firearm], which made the conduct lethal."

Like *Ryan*, the appellant, being fully conscious, had put himself in a situation in which he had his finger on (or at least near) the trigger of a loaded firearm and which he levelled at another. In these circumstances, was there an issue for the jury about whether there was an unwilled act, or an event occurring by accident, that was an issue separate from the issue about the intention with which the appellant acted? The trial judge gave directions about accident and about intention, but gave no direction about unwilled acts.

Unwilled acts and events occurring by accident

42 As is noted in *Ugle*[42], a distinction is drawn between the "act", with which the first or unwilled act limb of s 23(1) deals, and the "event", with which the second or accident limb deals. For the reasons given in *Ugle*, the "act" to which

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39 (1967) 121 CLR 205 at 244.

40 (1967) 121 CLR 205 at 244.

41 (1967) 121 CLR 205 at 245 per Windeyer J.

42 [2002] HCA 25 at [25]-[26].

the first limb of s 23(1) refers in this case is the "death-causing act … not the death itself"[43].

43 By contrast, the "event" was the death of the deceased. Could it be said that the death of the deceased was an event that occurred by accident – a question which requires consideration of whether the death was such an unlikely occurrence that a reasonable person could not reasonably have foreseen it[44]. In this case there can have been no live issue about this. That is, there can have been no live issue at the trial that the fatal consequences of firing both barrels of a shotgun at the deceased could have been unlikely or unforeseen. Despite the trial judge being asked by the prosecution to direct the jury about accident, it was, therefore, unnecessary to do so in this case.

44 It is as well to say, however, that had a direction on the subject been appropriate, it would have been necessary to go further than her Honour did: at least to the extent of further identifying for the jury the "event" which had to be considered, by distinguishing between "act" and "event". As it was, her Honour spoke only of the "event" as being the death of the deceased. Although strictly accurate, that description, in the context in which it was used, was apt to mislead for want of contrast with the meaning of "act". It follows that to tell the jury, first, that a person is not criminally responsible for an act which occurs by accident and then to say that the prosecution must

> "establish that the accused intended that the event should occur or saw it as a possible outcome or that an ordinary person in the position of the accused would reasonably have foreseen the event as a possible outcome"

left the jury insufficiently instructed about how these propositions of law about accidental events were to be applied to the facts of this case.

45 This deficiency in the charge did not work to the detriment of the appellant. If anything, it placed too high a burden on the prosecution, but counsel for the prosecution at trial made no complaint about it despite having asked the trial judge to charge the jury on the subject. In any event, in this Court, principal attention was focused in argument on the first or unwilled act limb of s 23(1).

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43 *R v Falconer* (1990) 171 CLR 30 at 38 per Mason CJ, Brennan and McHugh JJ, 81 per Gaudron J. See also *Vallance v The Queen* (1961) 108 CLR 56; *Mamote-Kulang v The Queen* (1964) 111 CLR 62; *Timbu Kolian v The Queen* (1968) 119 CLR 47; *Kaporonovski v The Queen* (1973) 133 CLR 209.

44 *R v Van Den Bemd* (1994) 179 CLR 137.

46 At trial, that first limb received next to no attention. Trial counsel for the prosecution submitted (in effect) that only the second limb of s 23(1) applied and trial counsel for the appellant did not demur, either when the matter was raised before the judge began her charge or later, by way of exception to what had been said. Nor did trial counsel for the appellant raise the subject in his address to the jury, focusing instead upon other aspects of the case. Ordinarily, that course of events at trial should be enough to demonstrate that an unwilled act was not an issue in the trial. If it had been, counsel would be expected to address the jury about it and both counsel would be bound to draw the trial judge's attention to relevant authorities touching the issue.

47 It is as well, however, to go on to explain why there was no issue about the operation of the first limb of s 23(1). In order to do so, it is necessary to identify the relevant "act".

48 Consideration of the several cases in this Court in which questions about unwilled acts have been examined[45] reveal some of the difficulties that, if not implicit in the concept of unwilled acts, at least are likely to arise in dealing with that concept. Prominent among those difficulties is understanding what is the relevant "act", or in this case, the relevant "death-causing act"[46]. Although it may now be regarded as clear that in this case, as in *Falconer*, the death-causing act was the discharging of the loaded shotgun[47], why is that the relevant "act" and what exactly does it encompass?

49 In deciding what is the relevant act, it is important to avoid an overly refined analysis. The more narrowly defined is that "act", the more likely it is that there will be thought to be some question about whether the accused willed that act. Or, to put the same point another way, the more precise the identification of a particular physical movement as the "death-causing act", the more likely it is that it will be harder to discern a conscious decision by the actor to make that precise and particular physical movement. As H L A Hart pointed

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45 *Vallance* (1961) 108 CLR 56; *Mamote-Kulang* (1964) 111 CLR 62; *Timbu Kolian* (1968) 119 CLR 47; *Ryan v The Queen* (1967) 121 CLR 205; *Falconer* (1990) 171 CLR 30.

46 *Falconer* (1990) 171 CLR 30 at 38.

47 (1990) 171 CLR 30 at 39.

out[48] more than 40 years ago, a theory which splits an ordinary action into three constituents – a desire for muscular contractions, followed by the contractions, followed by foreseen consequences – is a theory based on a division quite at variance with ordinary experience and the way in which someone's own actions appear to that person. As Hart said[49], "The simple but important truth is that when we deliberate and think about actions, we do so not in terms of muscular movements but in the ordinary terminology of actions."

50 The difficulty of over-refinement can be exemplified by comparison of this case with the facts in *Ryan*. In *Ryan*, Windeyer J characterised what had happened as Ryan pressing the trigger[50] "in immediate response to a sudden threat or apprehension of danger". In this case, the appellant said that the weapon discharged immediately upon his being struck by something the deceased threw at him. There seems little, if any, relevant distinction between the two descriptions. Of both it may be said that[51]:

> "The latent time [between threat, or assault, and firing the weapon was in each case] no doubt barely appreciable, and what was done might not have been done had the actor had time to think."

But to identify the "act" as confined to that which was the immediate physical movement, a dorsiflexion of the finger[52], made in response to a perceived threat, or in this case the alleged blow, so confines the time for choice by the actor as to invite the conclusion that the actor did the particular act without thought, and therefore without willing it. That is altogether too narrow a view of what is the relevant "act" which, in this case, would divorce the contraction of the finger from the admittedly deliberate pointing of a loaded and cocked weapon at the deceased and its discharge. So to confine the understanding of the relevant "act" would be to adopt an approach that over-refines the application of the criminal law, introducing nice distinctions that are not based upon substantial differences.

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48 "Acts of Will and Responsibility", in Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, (1968) 90 at 101. (The article was first published in 1960.)

49 "Acts of Will and Responsibility", in Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, (1968) 90 at 102.

50 (1967) 121 CLR 205 at 245.

51 *Ryan* (1967) 121 CLR 205 at 245.

52 *Timbu Kolian* (1968) 119 CLR 47 at 64 per Windeyer J.

51 That is why the "act" to which s 23(1) refers is not restricted to the appellant's contracting his trigger finger. But what is encompassed by saying that it is the appellant's discharging the loaded gun that must be willed? It now seems clear from *Falconer*[53] that the "element of intention" which Windeyer J (in both *Mamote-Kulang v The Queen*[54] and *Timbu Kolian v The Queen*[55]) said should be added to the notion of will may not always be helpful, but there is much force in the views expressed by Windeyer J in *Ryan*[56] to the effect that the language of "will" and "intellect", "unintentional" and "inadvertent", is necessarily imprecise. As Barwick CJ said in *Timbu Kolian*[57], "we lack a sufficiently flexible and at the same time precise vocabulary in this area of discourse". In the end, it must be accepted that the distinctions with which the cases grapple may be founded upon overly simple understandings of the way in which human beings act which are understandings that are not easily applied to cases at the margin.

52 In a case like the present, we do not think it useful to examine the problem by reference to presumptions that an act done by a person who is apparently conscious is willed or done voluntarily[58]. Approaching the problem in that way may reveal which party must raise the issue to have it considered – the so-called evidentiary burden of proof. It may even help the tribunal of fact to decide what inferences can, or should, be drawn from evidence that the accused was conscious at the time of the act in question. But it is not an approach which tells the tribunal of fact how or when that tribunal may reach a conclusion contrary to the starting point provided by the presumption.

53 Rather than adopting approaches such as these, it is necessary to focus upon the relevant "act". Once it is recognised that the act is the act of discharging the loaded shotgun it can be seen that the act comprises a number of movements by the appellant that can be identified as separate movements. He loaded the gun; he cocked it; he presented it; he fired it. Some of these steps may be steps to which the appellant would say that he had turned his mind; others may not have been accompanied by conscious thought. It is by no means unknown for someone to carry out a task (like, for example, loading a weapon)

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53 (1990) 171 CLR 30 at 39.

54 (1964) 111 CLR 62 at 81.

55 (1968) 119 CLR 47 at 64.

56 (1967) 121 CLR 205 at 244.

57 (1968) 119 CLR 47 at 53.

58 *Timbu Kolian* (1968) 119 CLR 47 at 53 per Barwick CJ.

without thinking about it, if it is a task the person has undertaken repeatedly. In some circumstances, the trained marksman may respond to a threat by firing at the source of that threat as soon as the threat is perceived, and may do so without hesitating to think. But in neither example could it be said that the act (of loading or firing the weapon) was an unwilled act. Similarly, once it is recognised that the relevant act in this case is the act of discharging the loaded shotgun, it can be seen that whether or not particular elements of that composite set of movements (load, cock, present, fire) were the subject of conscious consideration by the appellant, there is no basis for concluding that the set of movements, *taken as a whole*, was not willed. There was no suggestion of disease or natural mental infirmity; there was no suggestion of sleep walking, epilepsy, concussion, hypoglycaemia or dissociative state[59].

54 In *Ugle* there was, on the evidence, a live question about whether the accused had struck the deceased with a knife or whether it was the deceased who had struck the knife which the appellant was holding. In this case, there was no issue of that kind. In this case, unlike *Falconer*, there was no question of automatism[60]. In this case, unlike *Woolmington*, the appellant did not suggest that the weapon discharged when he was drawing it to show the victim how he, the appellant, intended to commit suicide[61]. Rather, there was an issue about whether the appellant, presenting a loaded and cocked shotgun at the deceased, intended to kill him or do him grievous bodily harm. If, as the appellant said, he was struck by something thrown by the deceased and, as a result, he started, and in doing so pulled the trigger, his "act" did not occur independently of his will.

55 Thus, in this case, the central issue for the jury in considering the charge of murder was did the appellant intend to fire the weapon or merely present it to frighten the deceased? That is, the question was whether, in acting as he did, the appellant intended to kill or do grievous bodily harm, or had the prosecution not excluded the possibility that, as the appellant said, he had intended only to present the weapon in order to frighten the deceased. That was the subject matter of the issue which the trial judge identified for the jury. If persuaded to the requisite standard of proof that the appellant intended to kill or do grievous bodily harm to the deceased, the jury would have been correct in returning a verdict of guilty of murder. Was the jury properly instructed about the burden of proof?

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59 *Falconer* (1990) 171 CLR 30 at 61 per Deane and Dawson JJ.

60 cf *Falconer* (1990) 171 CLR 30 at 35.

61 *Woolmington v The Director of Public Prosecutions* [1935] AC 462 at 472.

Burden of proof

56 Having referred the jury to conflicting evidence that had been given at the trial about the appellant's conduct on the night of the shooting, the trial judge said:

> "Now, you are going to have to decide which versions of those events and conversations you accept and in deciding that it may help you to reach your ultimate conclusion on the question of intent. What was his [the appellant's] intent? Was it just to frighten [the deceased] and drive him out of the house rather than to kill him or to cause him grievous bodily harm? *If you find that his intent was just to frighten him and drive him out of the house, then you should find that he is not guilty of murder*. Relevant to this will be whether you accept the [appellant's] evidence that [the deceased] was yelling out to him while he was using the toilet, whether you accept his evidence that he was concerned for his own safety." (emphasis added)

In the course of her directions, her Honour made several other references to the jury accepting the appellant's evidence or version of events.

57 Although at the start of her directions about murder her Honour told the jury that it was for the prosecution to prove that the appellant had intended to kill or do grievous bodily harm, the references she made, particularly in the passage of the directions set out earlier, to the jury *accepting* the accused's evidence or version of events were apt to mislead the jury about the decision they had to make. The choice for the jury was not to prefer one version of events over another. The question was whether the prosecution had proved the relevant elements of the offence beyond reasonable doubt. This required no comparison between alternatives other than being persuaded and not being persuaded beyond reasonable doubt of the guilt of the appellant.

58 The order of the Court of Appeal of Queensland should be set aside and in lieu it should be ordered that the appeal to that Court is allowed, the conviction quashed, and a new trial had.

59 KIRBY J. Two questions were argued in this appeal from a judgment of the Court of Appeal of Queensland[62]. The first concerned suggested defects in, and omissions from, the trial judge's directions to a jury about the application to the evidence of s 23 of the *Criminal Code* of Queensland ("the Code"). The second concerned suggested defects in the judge's directions about the burden of proof.

60 In the Court of Appeal, McPherson JA dissented from the majority opinion. He concluded[63] that two passages in the trial judge's charge to the jury incorrectly suggested the imposition of a burden of proof of certain matters upon the accused. It failed to take into account the possibility that the jury might conclude that the prosecution had failed to prove its case according to the burden cast upon it by the law.

61 In this Court, a majority would now dispose of this appeal on this second argument[64]. I would not. This makes it essential for me to decide the first argument. It involves a principle, not without difficulty and importance, which, in any event, should be determined by the Court, given that there must be a retrial.

The facts and statutory provisions

62 *A strong prosecution case*: The facts relevant to my opinion are set out in the reasons of other members of the Court[65]. So are the applicable provisions of the Code[66]. I will not repeat them.

63 Clearly, the prosecution had a very strong case of murder to present against Mr William Murray ("the appellant"). It established a foundation in the evidence that he had a motive to kill the deceased. The latter had broken into his home five years earlier, when a juvenile. He had allegedly taunted him at the time. This had occasioned threats on the part of the appellant, voiced to a

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62 *R v Murray* [1999] QCA 341 (McMurdo P and Atkinson J; McPherson JA dissenting) ("Reasons of the Court of Appeal").

63 See reasons of McPherson JA cited by Callinan J at [132].

64 Reasons of Gaudron J at [21]-[23]; reasons of Gummow and Hayne JJ at [56]-[57]; reasons of Callinan J at [154].

65 Reasons of Gummow and Hayne JJ at [31]-[34]; reasons of Callinan J at [104]-[132].

66 Reasons of Gaudron J at [6]; reasons of Gummow and Hayne JJ at [30]; reasons of Callinan J at [137-[140].

policeman and a neighbour, that he would do violence to the deceased. According to the prosecutor at the trial, the deceased's evidence of exculpation was "a pack of lies". Far from the death of the deceased being unintended or an accident, the prosecution case was that the appellant had lured the deceased to his home in order to kill him or to do grievous bodily harm to him. If that case were accepted by the jury, it was a clear instance of murder as defined by the Code[67].

64 Correctly, the trial judge instructed the jury that a long term motive and immediate intention were not necessarily the same[68]. Nonetheless, the immediate circumstances surrounding the death of the deceased also constituted a strong prosecution case. The appellant had been paying for the deceased's drinks at a hotel for some time before inviting him to his home. The inference was available that the deceased was affected by the alcohol that he had consumed. The appellant had a loaded gun under his bed. He agreed that he might have cocked it immediately before its discharge. Certainly, he pointed the gun in the direction of the deceased. The deceased was found slumped dead in a chair. The holes of the pellets that had extruded from the back of his body were consistent with the deceased having being shot whilst in a sitting position. So was the presence of an undisturbed beer bottle in his hand[69]. The shooting occurred about five minutes after the appellant had entered his home with the deceased. There was no suggestion that the appellant was acting automatically, unconsciously or under physical or psychological forces that would make his depression of the trigger of the gun an involuntary act for such reasons[70]. The prosecution was entitled to rely on the presumption that an act done by a person, apparently conscious, is taken, in law, to be willed or done voluntarily by that person[71]. The jury's verdict of guilty of murder was not, therefore, entirely surprising.

65 However, under our law a conviction after such a verdict is liable to be set aside, relevantly, if it follows a trial in which the judge has given the jury a material misdirection about the law. Such a misdirection will be material if it

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67 The Code s 302(1)(a). See reasons of Callinan J at [138].

68 See the Code, s 23(3).

69 cf reasons of Callinan J at [122].

70 *R v Falconer* (1990) 171 CLR 30 at 61; cf reasons of Gummow and Hayne JJ at [53].

71 *Timbu Kolian v The Queen* (1968) 119 CLR 47 at 53.

might have deprived the accused of a chance of acquittal of the charge (or of conviction only of some lesser offence)[72].

66 Accordingly, it is necessary to consider the evidence at the trial that afforded the foundation upon which the appellant argued that there was a view of the facts, properly open, that might have been accepted by the jury, had they been correctly instructed about the law.

67 *The defence case*: Essentially, the appellant's case was that he had not intended to kill the deceased and that what had happened was, in effect, an "accident or misfortune"[73]. The appellant gave evidence at his trial. In support of his defence he pointed to a number of considerations. Amongst these was the fact that the shooting had occurred in his home. Given the background of declared animosity, so readily provable, the appellant was entitled to argue that anyone intending to kill the deceased, acting rationally, would have chosen a different venue for the act. Necessarily, the shooting in his home attracted the immediate notice of neighbours. It was reported to police by the appellant himself within a matter of minutes.

68 In his evidence, the appellant denied that he had deliberately pulled the trigger so as to cause the gun to discharge into the deceased. However, he could not explain why the gun had discharged. He told police that, on arrival at his home, the deceased had called out and threatened him when he went to the toilet; that this had caused him to procure the gun from under his bed; and that his intention at that time, in pointing the gun in the direction of the deceased, was to frighten him so as to cause him to leave.

69 The appellant also stated that he had been struck on the head shortly before the shooting. It was the police, not the appellant, who pointed to a wound to the middle of the appellant's forehead. This wound was later confirmed by medical examination. When this wound, and the blood emanating from it, were pointed out by police, the appellant said that he did not know what the police were talking about. However, the wound was consistent with the appellant's evidence that he had been struck on the head by something thrown by the deceased. The gun itself was a vintage firearm. The appellant said that he had never before fired it. In police experiments, the gun had a tendency to discharge irregularly when struck.

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72 *Mraz v The Queen* (1955) 93 CLR 493 at 514; *Festa v The Queen* (2001) 76 ALJR 291 at 330 [228]-[229]; 185 ALR 394 at 447-448; cf *Conway v The Queen* (2002) 76 ALJR 358 at 371 [63], 379 [104]; 186 ALR 328 at 345, 357.

73 cf *Indian Penal Code* 1861, s 80: reasons of Gummow and Hayne JJ at [39].

70 The foregoing facts presented the outline of a case arguably consistent with the innocence of the appellant of the charge of murder (although possibly consistent with a conviction of manslaughter on the footing that he was guilty of killing the deceased unlawfully but without the intent to cause his death or grievous bodily harm to him[74]). The appellant's case, as presented at the trial, therefore made it most important that the jury should receive accurate instruction about the law, with appropriate references to the applicable requirements of the Code and to the evidence that bore on its application to this case.

The suggested error on burden of proof

71 *Considering judicial instructions in context*: Before turning to s 23 of the Code, which is determinative of the appeal for me, it is necessary to explain why I am unconvinced that the trial judge erred in the instruction that she gave the jury on the burden of proof in a way warranting the intervention of this Court. The passages in her Honour's charge which are complained about are set out in the reasons of my colleagues[75]. I will not repeat them.

72 I agree that, with the benefit of time and of the wisdom of hindsight, the passages complained of could have been improved. However, it is a cardinal principle of appellate scrutiny of judicial instructions to a jury that regard must be had to:

(1) The character of the communication. It obliges a real contact by the judge with the collective mind of the jury fresh from having heard the evidence. It does not call for a convoluted legal essay whose only merit is that it might protect the judge from appellate reversal[76]; and

(2) The entirety of the communication. Particular passages in the instructions must be read and understood in the light of –

(a) the issues actually fought at the trial;

(b) the addresses to the jury by trial counsel that immediately preceded the judge's instructions;

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74 The Code, s 303. The provision is set out in the reasons of Callinan J at [139].

75 Reasons of Gaudron J at [19]; reasons of Gummow and Hayne JJ at [35]-[36]; reasons of Callinan J at [125]-[127], [132].

76 *Zoneff v The Queen* (2000) 200 CLR 234 at 263 [73].

(c) any consideration and discussion between the judge and counsel prior to the instructions as to their content; and

(d) the entire content of the instructions, taken as a whole. It is a basic mistake to isolate any judicial (or other) utterances and to consider them out of context[77]. But it is especially mistaken to take parts of a judicial communication with a jury in a criminal trial in isolation from the context[78].

73 Neither counsel at the trial objected to the judge's directions to the jury on the issue that now succeeds. They were present and heard the judge's instructions as they were delivered after the conclusion of their addresses. Neither of them noticed any error or called for redirection on the point. Nor was it the subject of a ground of appeal to the Court of Appeal. Nor was it argued on the return of that appeal[79]. Whilst, as the majority correctly acknowledged in the Court of Appeal, these defaults were not fatal to reliance on an error if it was detected before decision and was one that occasioned a miscarriage of justice[80], they are reasons to pause before embracing that conclusion. Most especially, they oblige this Court to review the propounded defects in the context of the entire summing up.

74 *The instructions caused no misdirection*: When this approach is taken, it is proper to note that there were repeated, strong, clear and correct instructions to the jury about the burden of proof resting on the Crown. I will not set them all out for mine is a minority opinion. But the trial judge told the jury that the appellant "does not have to prove a thing"; that if they were left in any reasonable doubt about "an element or elements of the charge" they must acquit; that if there was "a reasonable possibility consistent with innocence" it was their duty to acquit; that the fact that the accused had given evidence did not mean that the burden of proof shifted to him; and that if they were not satisfied of all elements of the charge of murder, "the only honest verdict is not guilty"[81].

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77 cf *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271-272, 291.

78 *R v Kanaveilomani* [1995] 2 Qd R 642 at 648, 651-652.

79 See Reasons of the Court of Appeal [1999] QCA 341 at [6] per McMurdo P and Atkinson J.

80 Reasons of the Court of Appeal [1999] QCA 341 at [6]; cf *Gipp v The Queen* (1998) 194 CLR 106 at 126 [58], 154 [136]-[137].

81 Directions to the jury of the trial judge (Wilson J).

75 The foregoing were strong directions. They were repeated at various points throughout the charge. They represented a major theme of the judge's instructions on the law. The short passages now belatedly complained about must be evaluated as they would have been understood in that context.

76 Approached in that way, I am unconvinced that a material error has occurred on this issue requiring intervention of this Court to prevent a miscarriage of justice. I regard the identified words as transient infelicities. I acknowledge that judicial directions on the burden and standard of proof are crucial. They go to the very heart of the accusatorial character of criminal trials before juries, as they are conducted in this country[82]. However, as I read the trial judge's instructions to the jury, her Honour's reference to "accepting the accused's evidence" or version of events, taken in context, was merely a direction of the jury's mind to the evidence that bore on the issue of whether the prosecution had established the intent to kill, being the issue that the judge was then addressing. This Court has said that it is important, sometimes essential, that judges should relate their instructions on the law to the evidence and issues in the trial. This is what I take her Honour to have been doing. Viewed in context, there was not such an error as requires, or authorises, the intervention of this Court on that score[83].

77 It follows that I would reject the appellant's second argument. This requires me to address his first argument concerning s 23 of the Code. Given that this Court is not a general court of criminal appeal and that it is the construction of s 23 of the Code that is the point of legal significance in the case, my conclusion is not a surprising one. As, in any event, the appellant must be retried it is essential to resolve the arguments about s 23. I therefore turn to that provision.

Common ground on s 23 of the Code

78 I take the following points to represent common ground:

(1) The applicable legislative provision appears in a code. This is a special kind of legislation. It does not merely collect and restate the pre-existing

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82 *Liberato v The Queen* (1985) 159 CLR 507 at 515, 519; *RPS v The Queen* (2000) 199 CLR 620 at 630-633 [22]-[30]; *KRM v The Queen* (2001) 75 ALJR 550 at 571 [105]; 178 ALR 385 at 413; cf *R v Whittingham* (1988) 49 SASR 67 at 71 per King CJ.

83 cf *Zoneff v The Queen* (2000) 200 CLR 234 at 269 [90].

common law. Its purpose is to provide a fresh start and thereby to introduce greater clarity of expression and sharpness of concepts[84]. The code provisions, appearing in expressions of ordinary English language, should not be glossed with notions of excessive subtlety or philosophical profundity. They should be capable of being explained to a jury, according to their own terms, which (at least in the present connection) are relatively simple in their expression[85];

(2) Although in the earlier common law it was said that it was for the accused to prove matters tending to justify, excuse or alleviate himself of guilt[86], it is clear that s 23 of the Code replaced this understanding of the law[87]. It is not for the accused to establish, relevantly, want of the necessary will or accident. Where, in the case of a charge under the Code a question arises as to whether the relevant acts were unwilled or the event accidental, it is for the prosecution to prove beyond reasonable doubt that s 23(1) of the Code does not apply[88];

(3) It is important to note the apparently deliberate distinction between the "act or omission" referred to in s 23(1)(a) of the Code and the "event" referred to in s 23(1)(b). It is a distinction easy to miss. In the present case, it does not appear to have been fully appreciated by the trial judge nor called by her to the notice of the jury[89]. The relevant "acts" in the present case as referred to in s 23(1)(a) included, ultimately, whatever the appellant did to cause the gun to discharge. The relevant "event" was the entire occasion resulting in the death of the deceased[90]. Where s 23 applies, these distinctions must be drawn to the notice of the jury if the jury are to be accurately instructed on its application;

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84 *Brennan v The King* (1936) 55 CLR 253 at 263 per Dixon and Evatt JJ; *Boughey v The Queen* (1986) 161 CLR 10 at 30; *R v Barlow* (1997) 188 CLR 1 at 31-33; *Charlie v The Queen* (1999) 199 CLR 387 at 393-394 [14].

85 cf *Zoneff v The Queen* (2000) 200 CLR 234 at 260 [65], 261-262 [67]-[68].

86 *Foster's Crown Law* (1762) at 255 cited by Gummow and Hayne JJ at [40].

87 Reasons of Gummow and Hayne JJ at [40].

88 *R v Mullen* (1938) 59 CLR 124: see reasons of Gummow and Hayne JJ at [40].

89 Reasons of Gummow and Hayne JJ at [42]-[44]; reasons of Callinan J at [149]-[150].

90 Reasons of Gummow and Hayne JJ at [51].

(4) On past authority of this Court, a question has arisen as to whether s 23(1)(a) has any application at all where the accused is charged with murder. That question was not resolved by the recent decision of the Court in *Charlie v The Queen*[91]. That case concerned s 31 of the *Criminal Code* of the Northern Territory. There are textual differences from the Queensland Code[92] and it is necessary to resolve the applicable rule without assistance from the decision in *Charlie*. The instructions that a trial judge *must* give to a jury depend mostly on the determination of the real issues in the trial. The judge is not required to give a disquisition on the law that unnecessarily goes beyond those issues[93]. In a properly conducted trial, such issues will be defined, substantially, by the way the parties have elected to conduct their respective cases; and

(5) Nonetheless, there is one relevant exception to this primary rule concerning the judge's duty to instruct the jury on the law[94]. This concerns the judge's duty in criminal cases to provide instructions to the jury concerning any defence (even one not raised by either party or indeed disclaimed by the parties) that fairly arises on the evidence and therefore needs to be considered by the jury in reaching a true verdict[95].

79 In this Court, under the obligation referred to in the last sub-paragraph, the appellant argued that the trial judge was bound to instruct the jury concerning the application of s 23 of the Code. No such application had been made on behalf of the appellant either during the conduct of the trial or for redirection following the judge's charge. The prosecutor raised the "defence" of accident under s 23(1)(b), calling to attention the earlier decision of the Court of Appeal in *Guise*[96]. The

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91 (1999) 199 CLR 387.

92 Reasons of Callinan J at [144].

93 *Alford v Magee* (1952) 85 CLR 437 at 466 citing with approval "Sir Leo Cussen's great guiding rule".

94 The stimulus for the Australian statements concerning this exception appears to have been *Bullard v The Queen* [1957] AC 635 at 642, per Lord Tucker.

95 *Parker v The Queen* (1964) 111 CLR 665 at 681; [1964] AC 1369 at 1392; *Da Costa v The Queen* (1968) 118 CLR 186 at 213; *Pemble v The Queen* (1971) 124 CLR 107 at 117-118, 132-133; *Van Den Hoek v The Queen* (1986) 161 CLR 158 at 161-162; *Stingel v The Queen* (1990) 171 CLR 312 at 333; cf reasons of Callinan J at [151].

96 (1998) 101 A Crim R 143 at 151.

trial judge then gave the jury a short direction concerning accident. It was imperfect[97].

80 Differing opinions are expressed in this Court as to the applicability of accident in this case[98]. For the moment I will put that question to one side. Certainly, in this Court, the submissions of the parties were addressed principally to the application of s 23(1)(a) relating to unwilled acts[99]. I agree with the comment of Callinan J that, on that question (and indeed on the application of s 23(1) generally), the trial judge did not receive appropriate assistance[100].

81 Before I leave these matters of common ground it is as well to add that the appeal was argued within the usual assumptions about the mind–body dualism[101]. Scholars may criticise this as "implausibly mechanistic" and as making presumptions about human conduct that are "robotic" and unreal[102]. However, the provisions of the Code require such assumptions to be applied to the connection between a person's will and that person's conduct. I will not therefore pause to ask whether such assumptions are sustained by psychological research or philosophical analysis[103].

Directions on unwilled acts

82 *Application of the Code, s 23(1)(a)*: It is proper to acknowledge that doubts have been expressed in earlier cases as to whether, in the nature of the components of murder under the Code, s 23(1)(a) could have any application. The central reason for such doubts is that, for murder under s 302(1)(a) of the Code, reference to acts "independently of the exercise of the person's will" is seen by some to contradict the necessity of establishing "intention" as an express

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97 As noted by McPherson JA in the Reasons of the Court of Appeal at [18].

98 Reasons of Gummow and Hayne JJ at [54]; cf reasons of Callinan J at [146].

99 Reasons of Callinan J at [146]-[148].

100 Reasons of Callinan J at [147].

101 Waller and Williams, *Criminal Law: Text and Cases*, 9th ed (2001) at 7.

102 Naffine, Owens and Williams, "The Intention Project" in Naffine, Owens and Williams, *Intention in Law and Philosophy* (2001) 1 at 7.

103 cf Mason, "Intention in the Law of Murder" in Naffine, Owens and Williams, *Intention in Law and Philosophy* (2001) 107 at 113-117.

ingredient of the offence. Such doubts were stated in *R v Mullen*[104] both by Latham CJ[105] and by Dixon J[106].

83 The same opinion has been reflected in opinions of judges of the Queensland Court of Appeal, very experienced in the meaning and application of the Code[107]. Obviously, considerable respect must be paid to these opinions. However, I agree with Callinan J[108] that, neither as a matter of legal authority nor as a matter of the proper understanding of the language of the Code, is s 23(1)(a) ousted in the case of a charge of murder brought under s 302(1)(a) of the Code[109].

84 First, the opinions of Latham CJ and Dixon J in *Mullen* were not part of a rule established by that decision. They are not, therefore, binding in this case.

85 Secondly, it is difficult, as a matter of principle, to accept the proposition that s 23(1)(a) has no application to a charge of murder simply because that offence postulates intention as an element. The provisions of that paragraph are, in their terms, applicable to a great number and variety of offences mentioned in the Code for most of which the existence of the requisite intent is an essential legal ingredient. It seems unlikely that a general provision, stated at the outset of the Code, would be inapplicable to all of those offences simply because intent on the part of the accused is an ingredient of each offence.

86 Once the necessity to read s 23(1)(a) with the multitude of offences provided by the Code (including that stated in s 302(1)(a)) is acknowledged, it is crucial to respect the relevant delineation of functions that must be observed in a trial by jury. In such a trial, the applicable law is explained by the judge but factual disputes are reserved to the jury. In the present case, it was necessary for the prosecution to establish the existence at the relevant time of the intention to cause the death of the person killed, mentioned in s 302(1)(a). Appropriate instructions were given by the judge on that issue. But if, on the facts, s 23(1)(a)

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104 (1938) 59 CLR 124.

105 (1938) 59 CLR 124 at 128.

106 (1938) 59 CLR 124 at 137.

107 *Guise* (1998) 101 A Crim R 143 at 151.

108 Reasons of Callinan J at [148].

109 Nor does it appear to have been the purpose of the Code as conceived by its drafter: see note by Sir Samuel Griffith on cl 25 (later s 23) in *Draft of a Code of Criminal Law Prepared for the Government of Queensland* (1897) at viii.

arguably applied, it was the accused's right to have that paragraph's provisions, in their particularity, explained to the jury as the Code contemplates. It might be said that par (a) gives added emphasis to the issue of the will of the accused that is already reflected to some degree in the definition of the offence of murder. But by directing the collective mind of the jury specifically to the exemption from criminal responsibility for specified "acts" or "omissions", s 23(1)(a) reiterates and reinforces the obligation of the prosecution to prove beyond reasonable doubt the "act or omission" upon which it relies. It requires the prosecution to negative the proposition that any such "act or omission" occurred independently of the exercise of the accused's will.

87 In a sense, the ingredient of intention, included in the definition of murder in s 302(1)(a) of the Code, identifies the prosecution's obligations broadly or globally. On the other hand, the excuse from criminal responsibility stated in s 23(1)(a) focuses the mind of the decision-maker more narrowly and specifically on the "acts or omissions" that resulted in the offence. Both the provisions appear in the Code. The accused is entitled to whatever benefits, in the conclusions of the jury, may be derived from each[110]. In some cases, depending on the evidence, there will be no additional relevance of s 23(1)(a) of the Code. But in the present case, where the factual dispute concerned the last "act" that caused the death of the deceased (the pulling of the trigger or whatever other "act" caused the appellant's gun to discharge) it was necessary for the trial judge to leave the provisions of s 23(1)(a) to the jury. She was bound to do so because the provision was clearly relevant to the factual case that the appellant was presenting for the jury's consideration and which the prosecution had labelled "a pack of lies".

88 The appellant did not contest the "acts" anterior to the final (or "death-causing") act that caused his gun to discharge. But what he did posit was the real possibility that the final and ultimately death-causing "act" had occurred independently of his will. That possibility was arguably consistent with the appellant's being struck on the forehead in a way that might have caused the trigger of the gun to have been depressed involuntarily. If that were the conclusion of the jury, on the facts, it would (subject to consideration of criminal negligence) have been open to the jury to decide that the appellant was not criminally responsible for the "act" in question because the ultimately fatal "act" had occurred "independently of the exercise of [the appellant's] will".

89 I agree with Gaudron J that the identification of what was the relevant "act" and whether it was willed or not were questions for the jury[111]. They were

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110 cf *R v Van Den Bemd* (1994) 179 CLR 137 at 139.

111 Reasons of Gaudron J at [16].

not questions of law for the judge. Even if the final "act" was a reflex action, it only took on its fatal character because of earlier acts of the appellant dangerous to human life. Thus, I agree with Gaudron J that if the jury came to the conclusion that the ultimate "act" that led to the depression of the trigger of the loaded gun pointed at the deceased could be described as a "reflex" act, it was still a question for the jury whether that act was properly to be viewed as having occurred "independently of the exercise of the [appellant's] will."

90 A conclusion that s 23(1)(a) arguably applied to the evidence in the case gives rise to the necessity to instruct the jury on the provisions of the Code relating to negligent acts and omissions[112]. As it is common ground that the trial judge did not give the jury instruction about the application of s 23(1)(a) and as, in my view, such instruction was obligatory in the circumstances, the trial departed from the requirements of the law.

91 *Inapplicability of the proviso*: The Director of Public Prosecutions argued that, if this conclusion were reached, no miscarriage of justice had actually occurred and that, accordingly, the "proviso" should be applied to uphold the appellant's conviction[113]. I disagree. I have already conceded that the evidence against the appellant was very strong. A jury might well regard the niceties inherent in the appellant's contentions as artificial and completely unpersuasive. But what is ultimately involved here is not an evaluation of the evidence by this Court. It is a consideration of the consequence of the failure of the trial judge accurately to instruct the jury whose function it was to reach a conclusion on the point. Moreover, the exemption concerned was pertinent to the way in which the appellant gave his evidence and conducted his defence.

92 Addressing the attention of the jury to the provisions of s 23(1)(a) had certain advantages for the appellant beyond those deriving from the accurate instruction which the trial judge gave to them about the need to be satisfied beyond reasonable doubt of the intent necessary to find the appellant guilty of murder. Properly addressed, s 23(1)(a) would have sharply focused the jury's attention on the question that the appellant's conduct of his case posed. This was whether the prosecution had proved beyond reasonable doubt that the final "act" that caused the death of the deceased was done in the exercise of the appellant's will. Or whether the prosecution had failed to negative the real possibility that

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112 eg s 289: see reasons of Callinan J at [137].

113 The Code, ss 668E(1) and (1A); *Wilde v The Queen* (1988) 164 CLR 365 at 373; *KBT v The Queen* (1997) 191 CLR 417 at 423-424, 433; *Festa v The Queen* (2001) 76 ALJR 291 at 325-326 [197]-[204], 329 [222]-[225]; 185 ALR 394 at 440-442, 446-447.

the discharge of the gun was the result of an act unaccompanied by the requisite will. In terms of the evidence, the question was whether the prosecution had failed, for example, to negative the real possibility that the gun ultimately discharged in some way consequent upon the appellant having being struck in the middle of the forehead by something thrown at him by the deceased in such a fashion as to cause the gun to discharge, although the only intention of the appellant in procuring the gun and pointing it at the deceased had been to frighten the deceased away.

93 *Conclusion: The trial miscarried*: In the circumstances of this trial, and the way the evidence was adduced, I am not satisfied that the prosecution has shown that the misdirection that I have found deprived the appellant of no real chance of acquittal[114]. The appellant's conviction was not inevitable. It follows that the conviction must be set aside and a new trial ordered.

Directions on "accident"

94 *Meaning of "event" and "accident"*: The foregoing is sufficient to dispose of the appeal. However, as the appellant must be retried, and as questions may arise in the retrial concerning the "defence" of accident, I will also state my views on that matter[115].

95 The logic of my reasoning in respect of the application of s 23(1)(a), as a general provision of the Code, applies equally to s 23(1)(b) with respect to those matters of fact, presented by the evidence, that attract the application of par (b).

96 The distinction between the "act or omission" referred to in par (a) and the "event" referred to in par (b) has already been noticed[116]. It is a distinction not without difficulty[117]. The distinction indicates that par (a) is addressed to more particular conduct and par (b) to the outcome of the alleged conduct that would otherwise render a person criminally responsible. In the present case, it was

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114 *Mraz v The Queen* (1955) 93 CLR 493 at 514; *Domican v The Queen* (1992) 173 CLR 555 at 565-567; *Festa v The Queen* (2001) 76 ALJR 291 at 326 [203], 330 [228]; 185 ALR 394 at 442, 447-448.

115 *R v Chong Mun Chai* [2002] HCA 12 at [3] applying *Jones v The Queen* (1989) 166 CLR 409 at 411, 415; cf *Osland v The Queen* (1998) 197 CLR 316 at 333 [41].

116 Reasons of Gummow and Hayne JJ at [42]; cf *R v Van Den Bemd* (1994) 179 CLR 137 at 143.

117 *Ugle v The Queen* [2002] HCA 25 at [26] per Gummow and Hayne JJ.

common ground that the "event" concerned was the death of the deceased viewed in the context in which it had come about.

97 *The "event" was arguably accidental*: Was it arguable that, in this case, the death of the deceased had occurred by accident? In the reasons of Gummow and Hayne JJ the opinion is expressed that it was not and that, therefore, it was unnecessary in this case for the judge to direct the jury on the application of par (b)[118]. With respect, I disagree. A lot of legal consequences can attach to the preposition "by" when used in a statutory context. Often, that little word will attract a great deal of consideration about the causative relationship between an undoubted event and the antecedent conduct[119]. So, in my opinion, it is in the application of the Code to a case such as the present. Was the "event" of the death of the deceased arguably caused "by" accident?

98 It may not be doubted that the death of the deceased was causally related to certain deliberate conduct on the part of the appellant. He invited the deceased home, notwithstanding their earlier conflict. He provided him with continuous alcohol over some time. He approached him with a gun that he knew was loaded. He accepted that he might have cocked the gun ready for firing and that he might have put his finger on the trigger. He agreed that he pointed the gun in the direction of the deceased. The deceased was seated. All of these were acts which, without more, were incompatible with a conclusion that the ensuing death had arguably occurred "by accident".

99 But if the jury accepted that the death occurred by the discharge of the gun caused by the appellant's being startled or hit and so handling the gun as to result in its discharge in the direction of the deceased, it would be open to the jury to conclude (subject to the provisions of the Code relating to negligent acts and omissions) that the death of the deceased had, in the circumstances, occurred "*by* accident". At least it would be open to the jury to so conclude if they decided that the Crown had not negatived as a real possibility that the death was caused by an unintended act on the part of the appellant when all that he wanted to do, by procuring and pointing the gun, was to frighten the deceased and cause him to leave his home. Consistently with what I have said in relation to s 23(1)(a) the

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118 Reasons of Gummow and Hayne JJ at [43].

119 See eg *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 525; *Marks v GIO Australia Holdings* (1998) 196 CLR 494 at 531; *Environment Agency v Empress Car Co Ltd* [1999] 2 AC 22 at 30-32. In *Wardley*, at 525, the Court said: "'By' is a curious word to use. … But the word clearly expresses the notion of causation without defining or elucidating it."

question is not one for the judge. It is for the jury, assisted by an explanation from the judge as to the provisions of par (b).

100 *The issue was for the jury*: The words "by accident" are not terms of art. Whilst decades of case law gathered around the word "accident" in workers' compensation statutes[120], when appearing in the Code it was obviously intended to be left to juries to understand and to apply as an ordinary expression of the English language. So understood, an "accident" is something that happens unexpectedly, without design or by chance[121]. If the jury were to accept as a real possibility that the appellant secured, pointed and cocked the gun only to frighten and remove the deceased from his home but ultimately discharged it accidentally when he was startled or struck by something thrown at his forehead, all of the antecedent conduct would not make inapplicable a conclusion that the "event", viewed as a whole, was one that had occurred "by accident". It was for the jury, not judges, to say what the "event" was in the circumstances. Upon that matter, therefore, the appellant was entitled to have the verdict of the jury. So much followed from the appellant's express denial that he had deliberately pulled the trigger, the way the case was conducted at the trial and the language of the paragraph.

101 The judge did not direct the jury in this way, although some instruction was given by her concerning the provisions of s 23(1)(b). Subject to the manner in which any second trial is conducted and the evidence that is there adduced, the appellant would be entitled to have the jury instructed on both paragraphs of s 23(1) of the Code.

Orders

102 The appeal should be allowed. I agree in the other orders proposed by Gaudron J.

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120 eg *Weston v Great Boulder Gold Mines Ltd* (1964) 112 CLR 30.

121 *Macquarie Encyclopaedic Dictionary* (1990) at 5.

103 CALLINAN J. This is an appeal against a conviction for murder. It raises a question as to the meaning and application of s 23 of the *Criminal Code* of Queensland 1899 ("the Code"). It and *Ugle v The Queen*[122], which raises the same question with respect to a similar provision in the Western Australian *Criminal Code*, were heard consecutively.

Facts and previous proceedings

104 The deceased, Tony Celap, aged 21 years, was shot at the appellant's residence at Yarraman on 18 August 1997. Death from wounds to the left side of his chest ensued.

105 The appellant had harboured a long-standing animosity towards the deceased. It arose out of a breaking and entering of his residence in May 1992. Tony Celap, then aged 16 and another youth, Collins had broken into the home, stolen property from it and had vandalized it. During a re-enactment of the house-breaking in the presence of Sgt Wilson, the appellant who was then in an agitated state had said "If I catch you little pricks out on the street, I will kill you." Later, at the police station, the appellant remained agitated and was asked to go home. Despite that request he remained outside the police station and when the officers were leaving accompanied by the two boys, he approached them and asked Sgt Wills if he could have five minutes alone with them. The deceased and Collins were subsequently dealt with in the Children's Court.

106 The appellant in the intervening years expressed his anger at Celap two or three times to a neighbour, Mrs Venz. He repeated, "One day I will get him for it."

107 On 18 August 1997, the appellant and Celap were sitting next to each other at the Imperial Hotel in Yarraman. At about 7.00 pm, Celap ran out of money and said that he was going home. The appellant offered to buy him a beer which Celap accepted. The appellant continued purchasing beer until closing time at 9.00 pm when he and Celap left together.

108 Neighbours heard the arrival of the appellant's vehicle at his home at 9.10 pm. At 9.15 pm, they heard the sound of a "muffled thud", or a "bang" from the direction of the appellant's residence.

109 The appellant made an emergency telephone call from his residence at 9.26 pm. He spoke to Snr Const Barnes at the Dalby Police Station and told him, "I have just shot a person."

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122 [2002] HCA 25.

110 The neighbour, Mr Venz was woken by the appellant who was calling his name and knocking on the door. The appellant said to Mr Venz, "I've shot someone in my house." According to Mr Venz, the appellant said more than once that he was in "deep shit".

111 Mr Venz accompanied the appellant back to his house. He saw the deceased slumped in a chair. He said that the deceased had a beer bottle in his left hand. It was common ground between the Crown and the defence at the trial that the bottle was actually in his right hand.

112 Sgt Irwin and Snr Const Bindon who were stationed at the Yarraman Police Station went to the appellant's residence. They saw a large wound to the deceased's chest and on his left forearm. Snr Const Bindon noticed a trickle of blood on the appellant's forehead which had dripped down the middle of his nose. There were also droplets of blood on the appellant's shirt and on a tobacco packet in his pocket. Snr Const Bindon asked the appellant if it was his blood. He replied, "I don't know what you are talking about."

113 The appellant was conveyed by ambulance to the surgery of Dr Bruce Carr where he was examined. Dr Carr noticed a "central little puncture type of wound in the middle of his forehead", but was unable to comment on the depth of the wound because he could not explore it. He also noticed there was a scratch, two millimetres in length on his nose, and a linear abrasion of the posterior aspect of the right chest.

114 Following the medical examination, the appellant returned to his residence with the ambulance officer and Snr Const Bindon. The appellant said to the police officer then,

> "It is not f***ing good, is it, Mick? What is going to happen now? He is a s*** that bloke, a c***. He has broken into my house before. I told you I would ring you when the s*** goes down and I wouldn't put you in it. I did ring you didn't I? I told you that I would ring you and keep you out of it?"

115 A pathologist described the injuries to the deceased's left upper forearm. He said they were consistent with a stretching out of the limb by the deceased at the time he was shot. There was a cluster of approximately 11 gunshot pellet entry wounds in the left chest. There were six exit wounds in the back of the body. The trajectory of the pellets was from left to right and slightly upwards.

116 The shotgun with which the deceased was shot was a very old weapon. When it was put to Sgt Graham in cross-examination that the weapon was "60, 70 or 80 years old", he said that he would not be surprised if that were the case. Sgt Graham said that because of a defect in the gun it was prone to "sympathetic discharge": that is, if both hammers were cocked and one barrel discharged, the

recoil might cause the other barrel to discharge. On a "drop test" which involved the dropping of the firearm on to a rubber mat from a height of between 45 and 55 centimetres, it was not prone to discharge. A further test involved the striking of the weapon with a leather mallet. It was prone to discharge when it was so struck underneath or around the barrel.

117 The appellant gave evidence at his trial in relation to the break-in of his home in 1992. He said that when the youths were indicating to the police where they had been, Celap starting laughing at him. The appellant said that he had asked Celap if he thought it was funny, to which Celap had responded "Yeah". The appellant then asked if Celap wanted a "smack in the head" and Celap again replied "Yeah". The appellant said that Celap then turned to Sgt Wills and said "Old bastard, he's pissed". The appellant admitted that he had then asked the sergeant if he could have a few minutes alone with Celap.

118 The appellant's evidence continued, that on 18 August 1997, he arrived at the Imperial Hotel between 2.30 pm to 2.45 pm. Celap came to the hotel between 4.00 pm and 5.00 pm and sat on a stool beside him at the bar. At about 7.00 pm to 7.30 pm, the appellant said that he began to buy beer for Celap as the latter was "broke". They continued drinking together until closing time when they drove to the appellant's home a short distance away where they began to drink together in one of its rooms.

119 The appellant left the room. While he was out of it he could clearly hear Celap calling out that he (Celap) remembered the place, and that he was going to "bash" the appellant. The appellant said that he thought he had responded by saying, "I was shitty but I haven't got any drama now. I thought we'd fixed it up." To this Celap responded "I'm bigger now, c***. Get out here and have a go."

120 The appellant then went to his bedroom and took the shotgun from under the bed. Although he had purchased it in 1980/1981, he had never actually fired it.

121 The appellant said that the firearm was loaded but he was unable to say whether it was cocked. The appellant said that he walked up the hallway and into the room in which he had left Celap. Celap started to rise from his chair. He was turned to one side. Celap's arm shot out in a "backhand … throwing type of movement" and something struck the appellant's head. The appellant said that as Celap started to get up, he (the appellant) lifted the gun; it was at about waist height when the appellant was struck in the head and the gun discharged.

122 This account, it may be observed, does not sit comfortably with two other matters: the exit holes in the back of the deceased's body which were collinear with holes in the back of the chair in which the deceased had been sitting and

from which the appellant claimed he had half-risen; and that the bottle of beer was undisturbed.

123 The appellant's explanation for taking up the gun was that it had been his belief that the sight of it would frighten Celap into leaving. He did however concede three matters: that he may have cocked the gun; that he may have intended to point it at Celap as it was when it discharged; and, that his finger would have been in the vicinity of the trigger guard, indeed, that it could well have been on the trigger at that time. The appellant denied that he had deliberately pulled the trigger but he could not explain why the gun discharged.

124 The appellant was charged with murder. He was tried in the Supreme Court of Queensland by Wilson J with a jury. The prosecutor, in his closing address submitted that the appellant's version of the facts was a "pack of lies" and that the appellant had lured Celap to his house and had deliberately set out to kill him. There was a discussion between counsel and her Honour before she summed up to the jury. During it, the Crown prosecutor conceded that a defence under s 23 was open. He referred her Honour to *Guise*[123]. Later the prosecutor said:

> "MR BULLOCK: I submit your Honour should do that, [direct with respect to s 23] although I can't see much logic in it. Simply in Guise's case it appears to be said that your Honour should do it, although Mr Justice Pincus says he doesn't think it is necessary. It would have to be along these lines, I suppose, that if the jury was of the view that the Crown couldn't exclude that the death in this case was unforeseen and unforeseeable by the accused -
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> HER HONOUR: It's an ordinary person in the position of the accused. That's the test, isn't it?"

125 Counsel and her Honour were speaking of the second limb of s 23(1) of the Code. Her Honour's summing up included this:

> "The Criminal Code provides that subject to the express provisions of the Code relating to negligent acts and omissions, a person is not criminally responsible for an event which occurs by accident. What this means is that, subject to the law of criminal negligence, and I will come to that in a moment, the Crown has to establish that the accused intended that the event should occur or saw it as a possible outcome or that an ordinary person in the position of the accused would reasonably have foreseen the

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123 (1998) 101 A Crim R 143.

> event as a possible outcome. When I say a possible outcome, I mean something more than something that is remote or speculative.
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> Now, if the Crown does not establish either of these, then the event was accidental and subject to the law of criminal negligence, the accused is not criminally responsible for it."

126 Later her Honour referred to the obligation stated in s 289 of the Code, of persons in charge of dangerous things, to use reasonable care and to take reasonable precautions to avoid danger to the health and safety of others.

127 Her Honour summed up on the issue of intention in this way:

> "Turning to the charge of murder, the Crown has to prove that the accused intended to kill or to do grievous bodily harm. The question is whether he had that intent at the time of the act which caused Celap's death."

At another point her Honour said:

> "What was his intent? Was it just to frighten Celap and drive him out of the house rather than to kill him or to cause him grievous bodily harm? If you find that his intent was just to frighten him and drive him out of the house, then you should find him not guilty of murder."

128 The appellant made no request for any redirections with respect to the possible application of s 23 of the Code.

129 McPherson JA, in the Court of Appeal, summarized and repeated some other passages in her Honour's summing up[124]:

> "…[A]t another point in the summing up, her Honour referred to murder as well as manslaughter in the context of an event which occurs by accident. This was evidently a reference to s 23(1)(b) of the *Criminal Code*, and, in relation to murder under s 302(1)(b), it was a potential source of confusion. Authority now confirms that s 23(1)(b), or its approximate equivalent s 31 in the Northern Territory *Criminal Code*, has no application to a charge of murder which, as in the case of s 302(1)(a), requires proof by the Crown that the offender intends 'to cause' death or grievous bodily harm. See *Charlie v The Queen*[125]. It follows that if either death or grievous bodily harm is in fact intended, it cannot qualify

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124 *R v Murray* [1999] QCA 341 at [15]-[16].

125 (1999) 199 CLR 387.

as an 'accident' for the purpose of s 23(1)(b) of the Code. See *R v Taiters*[126].

But this error, if that is what it was, in her Honour's summing up was retrieved when, some time after retiring, the jury returned with a request that the learned trial judge 'restate and further clarify for us the definitions of murder and manslaughter and in particular what is meant by "intent" … '. In response to that request, her Honour explained:

> 'The big distinction between murder and manslaughter is that, with murder, there has to be an intent in this – in a case such as this, an intent to kill the person or to cause the person grievous bodily harm … Now the intent has to be an intent at the time the act is committed, so that on the night in question when they got back to the house, did he then intend to kill or to cause grievous bodily harm.'"

130 The appellant was convicted of murder. His appeal to the Court of Appeal of Queensland (McMurdo P, McPherson JA and Atkinson J) was based on the ground that there had been a failure by the trial judge to give a direction to the jury with respect to s 23(1)(a) of the Code. It emerged however that her Honour may have misdirected the jury with respect to the Crown's obligation to prove intention beyond a reasonable doubt. The respondent conceded on the hearing of the appeal that the omission to direct the jury on the application of s 23 of the Code rendered the summing up inadequate, but argued that the appeal should nevertheless be dismissed because the proviso contained in s 668E(1A) should be applied: that a substantial miscarriage of justice had not actually occurred.

131 In their joint reasons for judgment, McMurdo P and Atkinson J concluded that although the jury should have been directed in accordance with s 23(1)(a), the failure to do so had not deprived the appellant of a chance of acquittal. McPherson JA (dissenting but not on this point) said that the issue at the trial was whether the killing was deliberate. His Honour concluded that the trial judge was not required to refer the jury to s 23(1)(a) expressly, "provided that the essential question of fact for their decision was fully and fairly presented to them, with an appropriate direction as to the burden of proof."

132 I will set out what McPherson JA said regarding the other basis for a retrial because I respectfully agree with his Honour's reasons and conclusion about it[127].

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126 [1997] 1 Qd R 333 at 336.

127 *R v Murray* [1999] QCA 341 at [23]-[25].

"The problem is, however, that her Honour went on, in the second of the two passages already set out … to ask:

> 'What was his intent? Was it just to frighten Celap [and] drive him out of the house rather than to kill him or to cause him grievous bodily harm? If you find that his intent was just to frighten him and drive him out of the house, then you should find him not guilty.'

The defect in this formulation is that it invited the jury to acquit if (and, by inference only if) they made an affirmative finding that the appellant's intention was to frighten Celap and drive him out of the house. So to direct the jury was incorrect because in law it was sufficient to attract a verdict of acquittal that the appellant's testimony, considered alone or with other evidence at the trial, raised in the minds of the jury a reasonable doubt about his intention at the time the shotgun discharged. It was not necessary for the jury to go so far as to find affirmatively that his intention was, as he had testified, simply to frighten Celap.

There are other passages in the summing up in which a similar defect is apparent. In dealing with the question of criminal negligence under s 289, her Honour said:

> 'If you accept the accused's version of what happened that night, in whole or in part, you are going to have to evaluate his conduct and decide whether it was conduct such as to amount to criminal negligence.'

And then again:

> 'One factor which you may consider in deciding upon whether you accept the accused's evidence is how much, if any, did the accused really know about the faults in the gun?'

Although specifically concerned with the issue of manslaughter, a direction in this form could only have served to confirm in the minds of the jury the impression that they were expected to choose between accepting the evidence of the appellant, in which event, they were to acquit; or, alternatively, accepting the case for the prosecution, in which event they would be entitled to convict. That was, with respect, wrong in law because it failed to accommodate a third possibility, which was that, even if they were not prepared to accept his evidence wholly or in part, it and other evidence, including that of Sgt Graham, might nevertheless suffice to raise a reasonable doubt whether he had the necessary intent to kill or do grievous bodily harm. If the appellant's evidence, even if not accepted wholly or in part, raised a reasonable doubt whether his intention was only to frighten Celap, it might also have raised a doubt whether he in fact possessed the intention to kill or do grievous bodily harm. Factually,

the two questions were not mutually exclusive, and in relation to both of them the prosecution carried the onus, as to the first, of eliminating any reasonable doubt, and, as to the second, of proving beyond reasonable doubt that the appellant had the intention required under s 302(1)(a). The direction, in the way it was presented to the jury, went at least part of the way to transferring to the appellant the onus of proving that his intention was as limited as he had testified it was, which was contrary to the decision in *Mullen v The King*[128]; and on appeal[129].

It is therefore not possible to say that the appellant was not deprived at his trial of an opportunity of acquittal that he might otherwise have had. Because the summing up involved an error about something as fundamental as the burden of proof, the appeal is not one in which it is proper to apply s 668E(1A) in order to sustain the verdict. The result is that the appeal must be allowed, and the conviction and verdict set aside. There must be an order for a new trial."

The appeal to this Court

133 The appellant relies here upon the ground of appeal advanced in the Court of Appeal, and a further ground adopting what was said by McPherson JA in that Court.

134 As I have already foreshadowed, in my opinion, the appeal should be allowed on that latter ground for the reasons stated by McPherson JA, and to which it is unnecessary to make any further reference.

135 Because, however, the other ground was argued at length I will state my opinion on it also.

136 The appellant in this Court relies on the first, rather than the second limb of s 23 of the Code, the latter of which was the subject of some attention by the parties at the trial.

137 Other sections of the Code should be noted. Section 289 is the first of these:

"**289 Duty of persons in charge of dangerous things**

It is the duty of every person who has in the person's charge or under the person's control anything, whether living or inanimate, and whether

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128 [1938] St R Qd 97 at 114, 118, 121.

129 *R v Mullen* (1938) 59 CLR 124 at 130, 136, 138.

moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health, of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger, and the person is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty."

138 Section 291 provides that it is unlawful to kill any person unless such killing is authorised or justified or excused by law. An unlawful killing is called murder or manslaughter according to the circumstances of the case (s 300). Section 302 defines murder:

"**302 Definition of 'murder'**

(1) Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say -

(a) if the offender intends to cause the death of the person killed or that of some other person or if the offender intends to do to the person killed or to some other person some grievous bodily harm;

(b) if death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life;

(c) if the offender intends to do grievous bodily harm to some person for the purpose of facilitating the commission of a crime which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such crime;

(d) if death is caused by administering any stupefying or overpowering thing for either of the purposes mentioned in paragraph (c);

(e) if death is caused by wilfully stopping the breath of any person for either of such purposes;

is guilty of '**murder**'.

(2) Under subsection (1)(a) it is immaterial that the offender did not intend to hurt the particular person who is killed.

(3) Under subsection (1)(b) it is immaterial that the offender did not intend to hurt any person.

(4) Under subsection (1)(c) to (e) it is immaterial that the offender did not intend to cause death or did not know that death was likely to result."

139 The respondent's case here was that the appellant's actions fell squarely within s 302(1)(a), as an intentional killing of the deceased.

"**303 Definition of 'manslaughter'**

A person who unlawfully kills another under such circumstances as not to constitute murder is guilty of '**manslaughter'**."

140 And, finally s 23 provides as follows:

"**23 Intention - motive**

(1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for -

(a) an act or omission that occurs independently of the exercise of the person's will; or

(b) an event that occurs by accident.

(1A) However, under subsection (1)(b), the person is not excused from criminal responsibility for death or grievous bodily harm that results to a victim because of a defect, weakness, or abnormality even though the offender does not intend or foresee or cannot reasonably foresee the death or grievous bodily harm.

(2) Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

(3) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility."

141 The two possibilities which invited the possible application of s 23 were the slight injuries to the appellant's face to which one of the police officers referred and which were consistent with the throwing of an object by Celap at the appellant; and, the tendency of the shotgun to discharge accidentally on being struck.

142 The basic submission of the respondent is that because the jury were instructed that before they could bring in a verdict of murder they had to be

satisfied beyond a reasonable doubt that the appellant intended to kill the deceased, in convicting of murder they must have negatived both an unwilled act and accident. In particular, the respondent relies upon statements made in this Court in *R v Mullen* in which Latham CJ said[130]:

> " … it is unnecessary to have any recourse to the section [s 23] in the case of wilful murder, where, by statutory definition itself, intention is expressly made a necessary element in the offence …"

143 In the same case Dixon J said this[131]:

> "For the learned judge emphasized at a number of points the obligation of the Crown to satisfy the jury beyond reasonable doubt of the facts constituting wilful murder, including the existence of an intention to kill, an intention with which, of course, accident would be inconsistent."

144 Reference was also made by the respondent to *Charlie v The Queen*[132] in which it was held that s 31[133] of the *Criminal Code* of the Northern Territory had no operation on the charge of wilful murder on the facts of that case. It should be noted that the Court in that case was concerned with "accident", and that there are

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130 (1938) 59 CLR 124 at 128.

131 (1938) 59 CLR 124 at 137.

132 (1999) 199 CLR 387.

133 Section 31 provides:

> "**Unwilled act &c, and accident**
>
> (1) A person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct.
>
> (2) A person who does not intend a particular act, omission or event, but foresees it as a possible consequence of his conduct, and that particular act, omission or event occurs, is excused from criminal responsibility for it if, in all the circumstances, including the chance of it occurring and its nature, an ordinary person similarly circumstanced and having such foresight would have proceeded with that conduct.
>
> (3) This section does not apply to the offences defined by Division 2 of Part VI."

some textual differences in that Code from the Queensland one which require that the latter be given separate consideration.

The appellant's argument

145 The appellant points out that only Latham CJ and Dixon J referred to s 23 of the Code in *Mullen*, and that the case was not argued as a substantive appeal in this Court. It is not therefore, the appellant submits, an authority which governs this appeal.

146 The appellant submits that the relevant "unwilled act" was the discharge of the shotgun, and that an event for the purposes of s 23(1)(b) of the Code would be a death or other consequence of an act, although the event might not itself have been intended, and may have occurred by accident[134]. So much may, in my opinion, be accepted. Indeed no complaint is made about the trial judge's remarks bearing upon s 23(1)(b) of the Code. The sole question on this aspect of the appeal is whether, having directed the jury of their need to be satisfied that the appellant intended to kill the deceased, there was any need at all to direct them that they should satisfy themselves that the discharge of the gun was not a willed act of the appellant.

147 In considering this question it is important to keep in mind that directions are formulated by trial judges to deal with the issues actually litigated at the trial. There is however, a qualification to this. It is that a trial judge in a criminal case is required to give directions as to any defence which arises on the evidence, and even one which may not have been the subject of a submission by either party.

148 There will, obviously, be difficulty from time to time in identifying, for the purposes of s 23(1)(a), the relevant act. Equally, from time to time there will be difficulty in determining whether the evidence provides a sufficient basis for a direction as to either limb of s 23(1). But such difficulties do not relieve a trial judge from the necessity of so directing, when required, and, as to the first of them, of identifying, that is to say, effectively isolating what on the evidence is capable of being regarded as the act causing death and as the unwilled act. Everything that has relevantly occurred before it, including the earlier relations between the victim and the accused, and the latter's acts in placing himself in such a position as to give the "act" the capacity to inflict harm, will have much to say about its true nature, that is, whether it was willed or not, but those earlier acts will generally not constitute the "act" itself, or be a constituent part of it. It will be, however, for the jury so instructed, in reaching their verdict of guilty or not guilty, to determine whether in fact the prosecutor has negatived that the death resulted from an unwilled act (or accident).

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134 See the discussion in *R v Falconer* (1990) 171 CLR 30 at 39-43, especially 43.

149 A defence under s 23(1)(a) does not depend upon proof of, or the possibility of automatism or the like. It is available if the prosecution is unable to prove that the act was not willed, whether the absence of will can be traced to a condition which can be satisfactorily described in medical or psychological terms, or whether it was simply an act neither impelled by the mind nor which the mind endorsed immediately before, or at the time of its occurrence. There may be some cases in which a sequence of acts is so interconnected, or that the first, or an intermediate act in the sequence, has so inevitable an outcome that to regard the ultimate act as the "act" for the purposes of s 23(1)(a) would be artificial and unrealistic, but such cases will be rare. The jury in this case would not have been obliged so to regard this case.

150 Here the relevant act was, as the appellant submitted, identifiable, the discharge of the gun. Everything leading up to that point might have made it unlikely that it occurred as an unwilled act, but as there was evidence that it was, an obligation to give a direction about it by reference to s 23(1)(a) did arise.

151 This was so even though intention was "the issue" at the trial. The trial judge's attention should have been drawn to the need for such a direction accordingly. The submissions that were made on the relevance of s 23 did not assist her Honour in this respect. The direction should be given, even in a case in which the substantial issue is intention, in order to draw to the attention of the jury the matters which are capable of forming a foundation for a conclusion that the prosecution had not negatived an unwilled act or accident. The directions should identify the evidence from which the "act" and the event are discernible and distinguish between them. The fact that the Code makes specific provision for defences on these bases, independently of the creation of offences of which intention is a specific element, provides an indication that separate and specific treatment of matters capable of falling within s 23 is required. Section 23 is concerned with all offences, except for ones of negligence. It is hardly likely that it would have been enacted as part of the Code if reference to it were optional or unnecessary in the vast range of offences of which intent is an element.

152 *Mullen's* case does not provide an answer to the appellant's argument that a direction should have been given with respect to s 23(1)(a) of the Code. Only two of the Justices in that case expressed an opinion to a contrary effect. It was not a substantive appeal and the Court was dealing with a case in which the Court of Criminal Appeal of Queensland had already ordered a new trial.

153 I do not think that it is an answer to the appellant's submission to say that the jury must have found, by bringing in the verdict that they did, that the appellant intended to kill Mr Celap. A direction with respect to s 23(1)(a) was required to ensure that the jury focus their minds on the state of mind and actions of the appellant at the actual time of the "act", the discharge of the shotgun, but of course in the context of his antecedent acts.

154 For the reasons I have given, I am of the opinion that the verdict should be quashed and a retrial ordered. This is so despite the powerful objective indicators of will and intention, the non-disturbance of the bottle of beer and the correspondence between the exit wounds and holes in the chair, the long-standing animosity between the appellant and the deceased, and the inculpatory statements of the appellant to the investigating police officers. I still cannot conclude that the appellant has not lost the chance of an acquittal which might have been realized had appropriate directions been given.

155 I would allow the appeal, set aside the order of the Court of Appeal, quash the verdict and order a new trial.