HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, KIRBY, CALLINAN AND HEYDON JJ

LAURIE STEVENS APPELLANT

AND

THE QUEEN RESPONDENT

Stevens v The Queen
[2005] HCA 65
21 October 2005
B20/2005

ORDER

1. *Appeal allowed.*

2. *Set aside Order 2 of the orders of the Court of Appeal of the Supreme Court of Queensland made on 6 April 2004 and, in place thereof, order that the conviction be quashed and that there be a new trial.*

On appeal from the Supreme Court of Queensland

Representation:

B W Walker SC with N J Macgroarty for the appellant (instructed by Robertson O'Gorman)

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

CATCHWORDS

Stevens v The Queen

Criminal law – Unlawful killing – Murder – Accident – Counsel for defence requested direction on defence of accident at trial – Whether trial judge erred in declining to direct jury on defence of accident – Whether defence of accident open on the evidence – Whether jury should have been instructed that appellant could not be convicted unless prosecution had satisfied jury beyond reasonable doubt that the operation of s 23 of the *Criminal Code* (Q) had been excluded – Relationship between defence of accident and murder – Whether defence of accident inconsistent with conviction of murder – Relationship between defence of accident and manslaughter.

Criminal law – Unlawful killing – Manslaughter – Case left to jury on basis that only available verdicts were guilty or not guilty of murder – Whether manslaughter should have been left to the jury – Whether manslaughter was open on the evidence.

Criminal law – Conviction – Whether substantial miscarriage of justice occurred as a result of trial judge's failure to give directions on accident.

Statutes – Statutory construction – *Criminal Code* (Q).

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

Criminal Code (Q), ss 23, 24, 25, 289 and 668E(1A).

1 GLEESON CJ AND HEYDON J. The question for decision in this appeal is whether the trial judge (Helman J) sufficiently explained to the jury the issues which they had to resolve in deciding whether the appellant was guilty of the murder of Murray Brockhurst ("the deceased"). Those, of course, were issues of fact. The identification of those issues involved a consideration by the judge of the relevant legal principles. Those principles were to be found in the *Criminal Code Act* 1899 (Q) ("the Code"), but it is not suggested that the judge should have read parts of the Code to the jury. Indeed, he did not mention that statute by name. He simply referred, from time to time, to "the law", in the course of explaining the issues that arose from the charge against the appellant, the plea of not guilty, the evidence, and the competing arguments at trial. The appellant maintains that the explanation was deficient. The deficiency is said to arise from a consideration of s 23(1)(b) of the Code. In order to decide whether there was such a deficiency, it is necessary to have regard to the nature of the cases presented by the prosecution and defence at trial.

2 The deceased was fatally wounded by a gunshot to the head fired from a rifle. When the rifle was fired, the muzzle was in partial contact with the deceased's forehead. The rifle was owned by the appellant, but the deceased could have had access to it. The only persons present at the time of the shooting were the appellant and the deceased. They were business associates. They were together in the deceased's office. Immediately after the shooting, the appellant telephoned the ambulance service, reported that a man had been shot in the head, and, when asked what happened, said he was "going to call it an accident for the moment". The background of the relationship between the two men, and the events leading up to the shooting, are set out in the reasons of other members of the Court. It is unnecessary for us to repeat them.

3 The prosecution case, based upon circumstantial evidence, including evidence of motive, was that the appellant fired the fatal shot, intending to kill the deceased. The trial judge summarised the argument of the prosecutor as follows:

> "The deceased had no reason to commit suicide. [The prosecutor] submitted that there was no mishap. It follows that the deceased was shot and killed by another person. That other person was the accused as the only person present at the time. The position of the gun shot wound which on all of the evidence was a partial-contact wound would establish the intention to kill. Therefore it follows that the accused unlawfully killed the deceased intending to do so. He is therefore guilty of murder."

4 The reason for the references to "suicide" and "mishap" is to be found in the appellant's account of how the fatal shooting occurred. In his conversation

with the ambulance service, the appellant said that he was going to describe the occurrence, for the time being, as an accident. In his later statement to the police, and in his evidence at trial, the appellant described what happened as follows. He said that when he entered the deceased's office, for a pre-arranged meeting, the deceased was seated at his desk, holding the barrel of the rifle in front of, and very close to, his head. The appellant stepped forward and grabbed the gun, which discharged. The deceased fell back. The appellant picked up the gun and put it on the desk, and then attempted to resuscitate the deceased. His attempts were unsuccessful, and he then rang the ambulance service. The appellant said to the police:

> "I can't remember for sure but the stock [of the rifle] could have been resting on the desk but I'm not sure. I am trying to remember he just had it in front of him and was holding it.
>
> One of his hands was around the trigger area and the other higher up on the gun on the wood part just before the barrel.
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> Then he did a definite change in his hands but I can't remember what it was. I think it was moving one hand up the barrel but it could have been more to it I just don't know.
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> It was up on the desk I am sure it was up on the desk and really I thought it was still above his head. The one thing I know for sure was he closed his eyes like a squint.
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> That was like the signal for me to grab the gun. I lunged forward and assume with right hand further forward then [sic] my left to get the gun. I know I contacted the gun and may have grabbed it and bang it all happened at once."

5 Both the prosecution and the defence conducted the trial on the basis that either it was a case of murder or the appellant must be acquitted. Manslaughter was not left to the jury. Neither side wanted that, and it has not been argued that manslaughter should have been left. No doubt it is possible to surmise that something might have occurred between the two men that was different from what the prosecution alleged, and different from what the appellant said. What that could have been, however, is entirely a matter of speculation. The jury were not invited, by either counsel, or by the trial judge, to engage in such speculation. They were instructed that, unless they accepted the prosecution case, as summarised above, they must acquit the appellant.

6 At the threshold of the case was an issue of causation. The trial judge began his explanation of the law by telling the jury that, for an accused person to be guilty of homicide, "[t]he accused person's act must be a substantial or significant cause of, or must contribute significantly to, the death of the deceased". He later told the jury that, on the appellant's account of events, it was

not possible to say that it was an act of the appellant that caused the rifle to discharge. Consistently with these directions, for that reason alone the appellant was entitled to be acquitted if the prosecution failed to persuade the jury that his account should be rejected.

7 The trial judge gave the usual instructions on onus of proof and circumstantial evidence. There is no criticism of what he said in that respect. If the jury thought the appellant's version of events was at least a rational hypothesis that had not been excluded by the prosecution evidence and arguments, then they were bound to acquit. On that version, the deceased might have committed suicide. At the worst, as the judge told the jury, it was not possible to say whether the deceased pulled the trigger, or whether the sudden movement of the appellant involved some contact with the rifle that caused the rifle to discharge. There was evidence from an expert witness, Dr Vallati, which supported the hypothesis that the rifle could have discharged as a result of being struck by the appellant's hand. On the appellant's account, the only act of the appellant that might have caused the rifle to discharge was the act which he described as a "grab [for] the gun". But it was impossible to say whether the discharge was caused by that act, or by the deceased pulling the trigger. Therefore, unless the jury were satisfied beyond reasonable doubt that the appellant's account was false, the prosecution case would fail on the issue of causation.

8 The prosecution case was that the appellant shot the deceased in the forehead intending to cause his death. The jury were told that unless they were satisfied of that beyond reasonable doubt they must acquit. The need to exclude the appellant's version of events as at least a possibility arose, in the first place, because of the issue of causation. However, the trial judge went on to give additional reasons why, as a matter of law, that version was exculpatory. It is what he said, and did not say, in that regard that gives rise to the present appeal. Consistently with the directions they were given, then, if the jury thought that the appellant's version was possibly true, in the sense that it had not been excluded beyond reasonable doubt, issues of justification or excuse did not arise for their decision. Those issues could only arise for resolution by the jury on the assumption that it was established that an act of the appellant caused the death of the deceased. Moreover, if the jury found that the appellant acted with intent to kill (as they were told they must in order to convict) questions of justification or excuse were irrelevant. Nevertheless, the judge explained to the jury various additional reasons why, unless they were satisfied beyond reasonable doubt that the appellant's account was false, they must acquit.

9 Without actually mentioning the Code, or any specific sections, the trial judge referred to two aspects of Ch 5, which contains a series of provisions dealing with criminal responsibility generally. Those provisions apply generally to the parts of the Code dealing with particular offences, including Ch 28 which

deals with homicide. Because their operation is general, their relationship with specific provisions covering particular offences may need to be considered in the light of those specific provisions. Those two aspects were s 25, dealing with extraordinary emergencies, and s 24, dealing with mistake of fact.

10 The trial judge said:

> "Under our law a person is not criminally responsible for an act done under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary power of self control could not reasonably be expected to act otherwise.
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> On the accused's account he was faced with such a sudden or extraordinary emergency. He had no time to think. He reacted to it instinctively as an ordinary person would seeing a friend on the point of committing suicide. He tried to save the deceased by getting the rifle away from him. It is not possible from the accused's account to say that the accused's action caused the rifle to discharge, but even if it did the accused would not be guilty of murder on his account because he acted in a circumstance of sudden or extraordinary emergency and for that reason would not be criminally responsible for the deceased's death.
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> ...
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> Even if the accused was mistaken in thinking the deceased was on the point of committing suicide he can rely on the explanation of sudden or extraordinary emergency if his mistake was honest and reasonable.
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> That is because under our law a person who does an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act to any greater extent that [sic] if the real state of things had been such as the person believed to exist. A person who does an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act to any greater extent than if the real state of things had been such as the person believed to exist.
>
> The provisions of our law concerning emergencies and mistakes of fact provide excuses from criminal responsibility. There is no onus upon an accused person to prove those excuses. The Crown must exclude their application to the case beyond reasonable doubt."

11 It is a requirement of s 25 (and, by extension, s 24 if invoked in aid of s 25), as explained, that the act of the accused for which criminal responsibility would otherwise attach was done under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary power of self-control could not reasonably be expected to act otherwise. If a person,

possessing ordinary power of self-control, sees another person about to shoot himself in the head, the proposition that the first person could not reasonably be expected to act otherwise than by attempting to seize the gun is at least open to debate. It is interesting to note, however, that the judge did not raise for the jury's decision any issue about the application of s 25 (which would have required them to consider how an ordinary person would have acted in the situation described); he simply told them that, while it was not possible from the appellant's account to conclude that an act of the appellant caused the rifle to discharge, even if it had been possible so to conclude "the accused would not be guilty of murder on his account because he acted in a circumstance of sudden or extraordinary emergency." If that had been a direction of law as to an issue to be determined by the jury, it would have been unduly favourable to the appellant. Rather, it seems to have been put as another reason why they must acquit unless the appellant's account was excluded as a possibility.

12 This brings us to the bone of contention. Although he gave three, or perhaps four, legal reasons why, if they thought the appellant's account of events was possibly true, the jury must acquit, the trial judge declined to deal separately with what the appellant's counsel submitted at trial, and submits on appeal, was a further reason for the same conclusion.

13 Section 23 of the Code provides, so far as presently relevant:

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

14 It is to be noted that the occasion for a consideration of this ground of exculpation only arises, in a murder case, where it has been established that an act of the accused caused the death of the victim. Furthermore, the operation of both pars (a) and (b) is qualified by the opening words of the section.

15 As the majority judges in the Court of Appeal pointed out, the directions that were given to the jury as to the elements of murder, and in particular the element of intention, in the circumstances of this case subsumed any issue that might arise under s 23(1)(a). In argument in this Court, principal attention was directed to s 23(1)(b). The relevant event was said to be the death of the deceased. On the argument for the appellant, the jury should have been directed, specifically and separately, that according to the law of Queensland, a person is not criminally responsible for an event that occurs by accident, and that this was a fifth, or perhaps a sixth, reason why, if the appellant's account were to be

regarded as possibly true, he must be acquitted. The forensic significance of such a direction was said to lie at least partly in the appellant's reference to an accident when he telephoned the ambulance service.

16 It appears from the trial transcript that the judge declined to give this direction for two reasons: first, he regarded it also as subsumed by his directions about the intent necessary for murder; and secondly, because he was wary as to where this course might lead. As the reasons of McMurdo P in the Court of Appeal demonstrate, there was a real risk that it might lead into the issue, which neither party wanted to raise, of manslaughter. The risk arises from the opening words of s 23(1). So much was acknowledged in argument in this Court. The word "accident" is of notoriously imprecise connotation. Many deaths in circumstances that constitute manslaughter could properly be described as accidental. This might also account for Dixon CJ's description of the provision in the Tasmanian *Criminal Code* ("an event which occurs by chance"), which corresponds to s 23(1)(b), as a "somewhat difficult phrase"[1]. Without doubt, if the trial judge had been minded to make reference to s 23(1)(b) it would have been necessary for him to explain to the jury the meaning of "accident" and to relate that meaning to the facts of the case. In *Kaporonovski v The Queen*, Gibbs J said[2]:

> "It must now be regarded as settled that an event occurs by accident within the meaning of [s 23(1)(b)] if it was a consequence which was not in fact intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person."

It is not difficult to think of cases in which death results from a willed act which produces an unintended and unforeseeable consequence.

17 A direction based on s 23(1)(b) would necessarily have raised for the jury's consideration the foreseeability of death resulting from the (assumed) conduct of the appellant in grabbing for the rifle that the deceased was holding to his head, with his hand "around the trigger area". The jury could only have come to a need to decide an issue under s 23(1)(b) if they were satisfied that an act of the appellant caused the death of the deceased. The act could only have been the act of grabbing for the rifle. In *R v Van Den Bemd*[3] this Court accepted the statement of the Queensland Court of Appeal[4] that "[t]he test of criminal

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1 *Vallance v The Queen* (1961) 108 CLR 56 at 61.

2 (1973) 133 CLR 209 at 231.

3 (1994) 179 CLR 137.

4 *R v Van Den Bemd* [1995] 1 Qd R 401 at 405.

responsibility under s 23 is not whether the death is an 'immediate and direct' consequence of a willed act of the accused, but whether death was such an unlikely consequence of that act an ordinary person could not reasonably have foreseen it." The same proposition was more recently accepted in *Murray v The Queen*[5]. If a person is sitting at a desk, holding a loaded rifle to his head, with his hand on the trigger, apparently intending to commit suicide, it is, at the least, strongly arguable that it is foreseeable that death will result if another person attempts to seize the gun. Furthermore, par (b) could not properly have been considered in isolation from the qualification appearing at the beginning of sub-s (1); hence McMurdo P's concern about manslaughter. Why was it necessary, or in the interests of the appellant, to go down that path? The whole debate would only arise upon an hypothesis which, for several other reasons, meant, as the judge told the jury, that the appellant must be acquitted. It is to be stressed that there is no ground of appeal that complains of the judge's failure to leave manslaughter to the jury as a possible verdict. The only complaint is that he failed to raise for their decision an issue under s 23.

18 In *Alford v Magee*[6] it was pointed out 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." A summing-up in a murder trial is not meant to take the form of an essay on the law of homicide, with points given for comprehensiveness. Juries decide issues of fact, not law. The task of the trial judge is to formulate for the decision of the jury the issues of fact which they need to resolve in order to return a verdict. In formulating those issues, the judge may think it appropriate to refer to legal principles by way of explanation, but the task of the jury is to decide facts. In *Murray*[7], Gummow and Hayne JJ framed the question for decision in that case as whether "there [was] 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". In the present case, the question is whether there was an issue for the jury about whether there was an event occurring by accident, separate from the issues of whether an act of the appellant caused the death of the deceased and, if so, whether that act was done with intent to kill. The answer to that question is no.

19 The prosecution case, from beginning to end, was that the death of the deceased was caused by the deliberate act of the appellant, the act being the

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5 (2002) 211 CLR 193 at 208 [43].

6 (1952) 85 CLR 437 at 466.

7 (2002) 211 CLR 193 at 207-208 [41].

discharge of a firearm at close range into the head of the deceased, and that such act was done with intent to kill. The jury were told that, unless they accepted that case beyond reasonable doubt, they must acquit the appellant. If they accepted that case beyond reasonable doubt, no question of "accident" could arise. It was no part of the prosecution case that the act that caused the death of the deceased was the grabbing for the rifle by the appellant in an attempt to take it away from the deceased. That was the appellant's explanation of how the death of the deceased occurred. It was common ground, and the jury were told, that unless they accepted the prosecution case beyond reasonable doubt, and rejected the appellant's explanation of how the deceased came to be fatally wounded, the appellant must be acquitted. There was no issue raised by s 23(1)(b) which was separate from the issues raised by the prosecution case, and which required separate consideration by the jury. Furthermore, if the trial judge had embarked upon a direction under s 23(1)(b), he would have had to raise, to the disadvantage of the appellant and to the likely confusion of the jury, the question of the foreseeability of death as a consequence of an act which was not the act which the prosecution alleged to have caused the death. Unnecessary proliferation of issues at criminal jury trials should not be encouraged. It does not operate to the benefit of the administration of justice. Helman J made a sound, practical decision. The refusal to give directions based on s 23(1)(b) involved no miscarriage of justice.

20 The appeal should be dismissed.

21 McHUGH J. This appeal, which arises out of a conviction for murder in the Supreme Court of Queensland, must be allowed because the trial judge refused to direct the jury to determine whether the deceased had died as the result of an accident. The deceased had been the friend and business partner of the appellant. In evidence, the appellant had claimed that, as the friend was about to shoot himself with a rifle, the fatal shot was fired as the appellant attempted to take the gun away from the deceased. In a recorded telephone call to an ambulance service shortly after the shooting, the appellant said that he was "going to call it an accident for the moment." Section 23 of the *Criminal Code* (Q) provides, subject to an exception[8], "a person is not criminally responsible for ... an event that occurs by accident." In refusing to leave the issue of "accident" to the jury, the learned trial judge thought that two other issues comprehensively covered the appellant's case. The first was the issue of intent: had the Crown proved beyond reasonable doubt that the appellant intended to kill the deceased? The second was an issue under s 25 of the *Criminal Code*: had the appellant's act in attempting to grab the gun been done under a sudden or extraordinary emergency? By majority, the Court of Appeal of Queensland upheld the trial judge's refusal to give a direction concerning "accident". Indeed, the majority thought that the directions given by his Honour were more favourable to the appellant than the accident direction sought by his counsel.

22 The material parts of the evidence are set out in the judgment of Callinan J. On the evidence, the jury could conclude that, as late as 4.45pm on the afternoon of his death, the deceased, Mr Murray Cameron Brockhurst, was relaxed and happy and making plans for his future. They included taking over a new business and engaging in social outings the following weekend. The deceased's wife also gave evidence that, on the afternoon of his death, he had phoned her and said: "this is the best day of my life." So far as the evidence goes, there was nothing in his demeanour or conduct that afternoon that suggested that within the next hour he might commit suicide. Yet, according to the appellant, when he went to Mr Brockhurst's office between 5pm and 5.30pm, the deceased was seated at his desk holding a rifle "in an upright position" pointing above his head. The appellant said that Mr Brockhurst's "right hand [was] on the barrel somehow or other" and his "left hand [was] over the end of it." Almost immediately, the deceased closed his eyes and, as the appellant went forward to grab the gun, it discharged. The appellant said that he "contacted the gun and may have grabbed it and bang it all happened at once." Although there

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8 The exception states: "Subject to the express provisions of this Code relating to negligent acts and omissions". Neither the Crown nor the accused contended that the exception was relevant. The case was fought as one of murder or acquittal. Neither side suggested that a verdict of manslaughter was appropriate. Having regard to the way the case was fought at the trial, for the purposes of this appeal, the exception must be regarded as irrelevant.

was evidence that the deceased had a troubled marital relationship and had once mentioned suicide, it was open to the jury to reject the appellant's account of the circumstances in which Mr Brockhurst met his death. But rejecting his account did not prove murder.

23 As the learned trial judge told the jury, the prosecution case was a circumstantial one. It relied on the deceased's "plans for the future, the fact that he was happy and excited at a new opportunity" and that he "was in good spirits" on the afternoon of his death. It relied on the lack of reason for Mr Brockhurst to suicide, which meant that another person had killed him. The prosecution pointed out that the appellant was the only other person present when Mr Brockhurst died. It relied on the inherent improbability of Mr Brockhurst waiting until the appellant was present before committing suicide. And it relied on the appellant having a motive – the deceased's new business venture being disruptive of and a betrayal of their business relationship.

24 Once the jury rejected the appellant's account of what had happened, it was open to the jury to conclude that Mr Brockhurst had not committed suicide and that the appellant had killed him. Rejecting the appellant's account not only put an end to the suicide explanation but it put an end to the defence based on s 25 of the *Criminal Code*. But rejecting the appellant's account did not mean that the jury had to convict the appellant of murder. Independently of the accounts that the appellant gave to the police and in the witness box, the jury had four other pieces of evidence that entitled them to return a verdict of not guilty. They were:

(1) the appellant's statement to the ambulance service that he was "going to call it an accident for the moment";

(2) the expert evidence that striking the rifle in a "karate-chop style" caused it to discharge once in five times;

(3) the expert evidence that "energy applied at one end of the rifle could transfer to the other end through vibration, allowing the sear to disengage and the gun to discharge"[9]; and

(4) the friendly relationship between the two men.

These four matters enabled the jury to conclude that accident was a reasonable explanation of the whole of the evidence.

25 As I have indicated, the prosecution case was a circumstantial evidence case. Such a case requires a direction to "the jury that, if there is any reasonable

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9 *R v Stevens* [2004] QCA 99 at [47].

hypothesis consistent with the innocence of the [accused], it is their duty to acquit."[10] In determining whether a reasonable hypothesis exists, the accused is not required to establish by inference that he or she is innocent. In *Barca v The Queen*[11], Gibbs, Stephen and Mason JJ said:

> "However, although a jury cannot be asked to engage in groundless speculation it is not incumbent on the defence either to establish that some inference other than that of guilt should reasonably be drawn from the evidence or to prove particular facts that would tend to support such an inference. If the jury think that the evidence as a whole is susceptible of a reasonable explanation other than that the accused committed the crime charged the accused is entitled to be acquitted."

26 In *Barca*, the Court held that the trial judge had misdirected the jury when he told them that it would be wrong to accept that the evidence was consistent with the accused's father (Carmello Barca) having committed the murder. Immediately before the quotation set out above, their Honours had said[12]:

> "Of course it was not proved that Carmello Barca had committed the murder. Moreover, the learned trial judge was perfectly correct in saying that there was no evidence that the [accused] took the deceased to Carmello Barca's house or that Carmello Barca fired the shots that killed the deceased."

27 Nevertheless, their Honours thought that it was open to the jury to find that on the whole of the evidence, it was a reasonable hypothesis that Carmello Barca had killed the deceased. They said[13]:

> "The evidence showed that Carmello Barca had at least as strong a motive to kill the deceased as that attributed to the [accused], that he had been enraged at the deceased's behaviour and had in consequence threatened him and that he had threatened [the deceased's wife] in an endeavour to persuade her to give false testimony as to the time at which the [accused] returned to her house after he had driven away with the deceased. *In these circumstances it was open to the jury to think that the hypothesis that Carmello Barca had committed the murder could reasonably be based upon the evidence*." (emphasis added)

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10 *Peacock v The King* (1911) 13 CLR 619 at 630.

11 (1975) 133 CLR 82 at 105.

12 (1975) 133 CLR 82 at 105.

13 (1975) 133 CLR 82 at 105.

28 In the present case, the telephone call to the ambulance service furnished specific evidence upon which the jury could find that accident was a reasonable explanation of Mr Brockhurst's death. The accident explanation received support from the expert evidence that the rifle could fire without the trigger being pulled. Moreover, the jury could reasonably think that, although the appellant's account of Mr Brockhurst's death was a lie, it was unlikely, given their relationship and the weakness of the motive attributed to the appellant, that he had intentionally killed the deceased.

29 A jury is entitled to refuse to accept the cases of the parties and "work out for themselves a view of the case which did not exactly represent what either party said."[14] As *Barca* makes clear, the appellant was not required to establish by inference that Mr Brockhurst had died by accident. Nor was he required "to prove particular facts that would tend to support such an inference."[15] If the jury rejected the appellant's account and thought it unlikely that he would have intended to kill Mr Brockhurst, they could reasonably conclude, given the call to the ambulance service and the expert evidence, that "accident" was a reasonable explanation of Mr Brockhurst's death. Of course, the jury might also think, given the appellant's hesitancy in describing the death as an accident, that a more reasonable hypothesis was that the death was the product of a struggle of some sort. If so, they would probably have rejected the accident hypothesis and, if so directed, returned a verdict of manslaughter. But the case was fought as murder or nothing. Manslaughter was not an option. Hence, if the jury thought that a struggle between the two men had caused Mr Brockhurst's death, they would have been bound to reject the defence of accident. That would have left the jury in the difficult position of finding no intent to kill and no accident. But it shows that, despite the way the case was fought[16], manslaughter should have been left to the jury, independently of the provisions of s 289 of the *Code* dealing with the duty of a person who has the charge or control of anything that might endanger another person.

30 With great respect to the majority judges in the Court of Appeal, much of their reasoning was based on the express or implied premise that the evidence had to establish a possible inference of accident before that issue could be left to the jury. *Barca* denies that proposition. Juries cannot take into account fantastic or far-fetched possibilities. But they "themselves set the standard of what is reasonable in the circumstances."[17] And, as Windeyer J pointed out in *Thomas v*

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14 *Williams v Smith* (1960) 103 CLR 539 at 545.

15 (1975) 133 CLR 82 at 105.

16 *Pemble v The Queen* (1971) 124 CLR 107.

17 *Green v The Queen* (1971) 126 CLR 28 at 33.

The Queen[18], it is not the task of juries "to analyse their own mental processes." Nor is a reasonable doubt "confined to a 'rational doubt', or a 'doubt founded on reason' in the analytical sense".[19] Jurors may have a reasonable doubt about the guilt of the accused although they cannot articulate a reason for it other than they are not satisfied beyond reasonable doubt that the Crown has proved its case. In the present case, the jury might reasonably conclude that the Crown had not proved to the requisite standard that the death was not caused by accident. That conclusion may have been based on no more than a judgment that, given the relationship of the two men, the expert evidence concerning the rifle and the telephone call, they were not satisfied that it was not death by accident.

31 The learned majority judges also thought that the directions of the trial judge were more favourable to the appellant than the direction on accident sought by counsel for the appellant. But the directions of the learned trial judge were based on the accounts of the appellant to the police and to the jury. As I have indicated, independently of his accounts, there was a case of accident to go to the jury. The learned judge's directions concerning the accounts given by the appellant did not deal with the alternative case open to the appellant on the evidence.

32 In his judgment, Callinan J has set out the directions that the learned judge should have given the jury on the issue of accident. Subject to one matter, I agree that directions to that effect should have been given. For the reasons I have indicated, the learned trial judge should also have directed the jury concerning a verdict of manslaughter. The jury should have been directed that, if they thought that, consistently with the evidence, it was a reasonable hypothesis that the deceased died after a struggle for which the appellant was responsible but which did not constitute an accident or involve an intention to kill, manslaughter was the appropriate verdict.

Order

33 The appeal against Order 2 of the orders of the Court of Appeal of the Supreme Court of Queensland should be allowed. That order should be set aside. In place of that order, it should be ordered that the appeal is allowed; the conviction of the appellant is quashed; and a new trial is ordered.

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18 (1960) 102 CLR 584 at 606.

19 *Green v The Queen* (1971) 126 CLR 28 at 33.

34 KIRBY J. This is an appeal from a judgment of the Court of Appeal of the Supreme Court of Queensland[20]. That Court was divided as to the disposition. The majority (Davies JA and Chesterman J) rejected the submission that the trial of the accused for murder had miscarried for erroneous or inadequate directions to the jury. The presiding judge (McMurdo P) favoured allowing the appeal, quashing the conviction and ordering a retrial[21].

35 The disagreement in the Court of Appeal emerged during the hearing of the appeal to that Court and upon a point not ultimately argued for the accused. In this Court, that point has been reformulated as a complaint about the failure of the trial judge to direct the jury, in accordance with s 23(1)(b) of the *Criminal Code Act* 1899 (Q)[22] ("the Code"), that they had to be satisfied that the event in issue was not an accident before they could conclude that the accused was criminally liable for the murder of the deceased. On the grounds actually argued in the Court of Appeal (the tender of fresh evidence and the suggestion that the jury's verdict of guilty was unreasonable[23]) that Court was unanimously of the opinion that the appeal failed. Its conclusions in that regard are not now questioned.

36 The ground of appeal argued before this Court is established. The appeal must be allowed and a new trial ordered.

The facts

37 *Relationships of those involved*: The facts relevant to this appeal were not contested[24]. On 28 April 2003, Mr Laurie Stevens (the "appellant") was convicted at a second trial[25] of the murder of Mr Murray Brockhurst (the

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20 *R v Stevens* [2004] QCA 99.

21 *R v Stevens* [2004] QCA 99 at [71].

22 The history of the Code and its background are described by Gummow and Hayne JJ in *Murray v The Queen* (2002) 211 CLR 193 at 202-203 [28]. See also Gibbs, "Queensland Criminal Code: From Italy to Zanzibar", (2003) 77 *Australian Law Journal* 232.

23 The Code, s 668E(1).

24 Facts further to those contained in my reasons appear in the reasons of Callinan J at [96]-[136].

25 The jury in the first trial were unable to agree on their verdict: *R v Stevens* [2004] QCA 99 at [3].

"deceased"). The deceased was a business partner of the appellant. His death occurred on 22 June 2000 as a result of a gunshot wound to his head. The shooting occurred at the premises of a company trading as Australian Carbide Saws ("ACS") in Newmarket, Brisbane. That company was run by the appellant and the deceased. The business relationship between the appellant and the deceased was complex, and the precise details were not altogether clear. However, evidence was adduced at trial that the appellant and the deceased were in the process of negotiating a restructuring of their relationship, with the proposed outcome being an effective separation. Furthermore, immediately before his death, and without giving the appellant prior notice, the deceased had purchased an interest in another business, Stotts Saws. That purchase was settled an hour or so before the deceased died. Stotts Saws was in a position to compete with ACS[26].

38 The appellant was aged 46 and the deceased 32 at the time of the deceased's death. According to the evidence, they enjoyed a cordial relationship, socialising away from work and sometimes fishing, diving and holidaying together. Six weeks before his death, the deceased had been the master of ceremonies at the wedding of one of the appellant's daughters[27]. However, the evidence showed that between 1995 and 1996, the deceased had engaged in an intimate affair with another of the appellant's adult daughters. The affair was briefly resumed in 1998. The evidence suggested that the deceased had wanted to continue the relationship but without avail[28]. He had resumed living with his wife whilst declaring his love for the appellant's daughter[29]. The attitude of the appellant to this relationship was not disclosed.

39 *Circumstances of the death*: Late on the afternoon of his death, the deceased had a meeting in his office at the business premises with two friends. He was described as being in a happy mood[30]. His widow confirmed that impression stating that, in a telephone conversation during the afternoon, the deceased had reported the settlement of the purchase of the new business declaring "this is the best day of my life"[31]. Nevertheless, the widow agreed that

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26 Reasons of Callinan J at [102].

27 [2004] QCA 99 at [21].

28 [2004] QCA 99 at [48].

29 [2004] QCA 99 at [49].

30 [2004] QCA 99 at [25].

31 [2004] QCA 99 at [23].

the deceased was preoccupied about informing the appellant that he had decided to go his separate way.

40 In accordance with an arrangement made between the appellant and the deceased prior to the afternoon of 22 June 2000, the appellant went to the business premises to meet the deceased and arrived at about 5 pm. He called on the deceased who was alone in his office but then visited the lavatory. On his return to the deceased's office, some time after 5 pm, the appellant claims that he saw the deceased sitting behind his desk holding a rifle. This was the appellant's rifle which the appellant kept in his office in the premises, beside a filing cabinet. Ammunition was stored in the cabinet[32]. Evidence called at the trial indicated that the deceased and other work colleagues knew of the presence of the rifle in the premises. On an earlier occasion the deceased had produced it when the business' accountant, Mr Bryant, had arrived late for a meeting. The deceased held the rifle up stating "[w]e have ways to fix people who are late". The deceased joked that the rifle was loaded. Mr Bryant upbraided him for his "stupid" conduct[33].

41 The next piece of objective evidence of what transpired was a recording of a telephone call which the appellant made from the premises to an emergency telephone number. The call was taken at 5.29 pm. According to the record, the following conversation with the appellant occurred[34]:

> "… We've got a, a bloke shot. It's, it's not a um … aah … he's shot in the head.
>
> … and how did this happen?
>
> Um … aah, it's a bit hard to explain it. I, I's [sic] going to call it an *accident* for the moment.
>
> And, okay, so he didn't pull the trigger himself?
>
> Ah … yeah, I think so.
>
> And the gun now, where's the gun?

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32 [2004] QCA 99 at [32].

33 [2004] QCA 99 at [41].

34 [2004] QCA 99 at [28] (emphasis added).

The gun's on the floor."

42 The appellant told the emergency operator that he had been giving the deceased mouth-to-mouth resuscitation. He received paramedical instructions from the operator. The appellant later made a further call to obtain additional instructions. The ambulance arrived quickly, at 5.35 pm. At 6.05 pm, the deceased was pronounced dead. The appellant was described as appearing "distressed and sombre". He cooperated with the police in the investigation that followed. He underwent a tape recorded interview at 7.05 pm that evening. He made a statement to police and although he declined to sign this, the given reason for his reticence was so that he could first secure legal advice. The appellant's evidence at his trial was not, in any substantial way, different from his statements to police after the shooting.

43 *The discharge of the rifle*: In the recorded interview, the appellant described how the deceased had held the rifle "in an upright position. I think right hand on the barrel somehow or other, left hand over the end of it. … He had … closed his eyes … as if he was sort of clinching."[35] It was at this point that the appellant stated that he grabbed the rifle. Later in the interview he said he jumped forward and that "it went off as I was grabbing it."[36]

44 In the unsigned statement to police the appellant said that the clinching of the deceased's eyes was "the signal for me to grab the gun. I lunged forward … to get the gun. I know I contacted the gun and may have grabbed it and bang it all happened at once."[37] At his trial, the appellant's evidence was along similar lines[38]:

> "The gun was raised. The barrel was lowered and I lunged for the gun and bang … It's not like as if I saw it all as I walked in. I just walked straight up against the desk. The gun's moved. I went and grabbed the gun, leaned over the desk. I know I grabbed at the gun. I felt the gun. The gun went off. [The deceased] flew over to his left hand side …".

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35 [2004] QCA 99 at [87].

36 [2004] QCA 99 at [88].

37 [2004] QCA 99 at [89].

38 [2004] QCA 99 at [90].

45 The appellant was asked in evidence to describe the grip he had on the rifle. He said[39]:

> "Certainly not enough to hold on to the gun, because as [the deceased] went over he's pulled the gun over with him, but I lunged out – I was very quick – I mean I lunged out and I would have *whacked* into the gun and tried to grab it."

46 Evidence was called at the trial from three ballistics experts who examined the rifle for the prosecution case. They were unanimous in finding the trigger pressure of the rifle acceptable. One expert gave evidence that the rifle was prone to discharge when dropped on the butt. Another expert found no defect when the rifle was struck with a rubber mallet. However, a third expert, Dr Vallati, a private forensic ballistic expert called in the prosecution case, reported that the rifle was liable to accidental discharge when the butt fell onto hard surfaces. Further, he said, when struck with the hand, the rifle discharged one in five times. He noticed that the sear in the rifle was "shiny, smooth and more worn than usual." The sear piece engages "into the rifle bolt to hold the firing pin back against the spring pressure when the bolt is properly locked down. When the safety catch is off, the bolt is turned down and the spring pressure of the firing pin pushes against the sear jamming the two surfaces together." Dr Vallati found that, whilst the trigger pressure of the rifle was satisfactory, "by applying a blow vertically to [the sear surface], the gun would discharge". Additionally, "energy applied at one end of the rifle could transfer to the other end through vibration, allowing the sear to disengage and the gun to discharge."[40]

The proceedings in the Supreme Court

47 *Issues in the appellant's trial*: The appellant was tried in the Supreme Court of Queensland, before Helman J and a jury, on an indictment containing a single count of murder. He pleaded not guilty. He gave his evidence as described above and called strong character evidence. The second jury convicted the appellant after deliberating for less than five hours[41].

48 At the close of the evidence, in the absence of the jury, counsel made submissions on the content of the matters for instruction to the jury. One point of the submissions concerned whether a direction on manslaughter was required.

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39 [2004] QCA 99 at [91] (emphasis added).

40 [2004] QCA 99 at [47].

41 [2004] QCA 99 at [3].

Counsel for the appellant agreed with the judge that it was not. On the appellant's case, it was murder or acquittal. The appellant had forensic reasons to endeavour to avoid a compromise verdict of manslaughter. On the other hand, the prosecutor suggested that a direction on manslaughter should be given[42]. The judge concluded to the contrary. This was because on the appellant's account, "his intention was not to cause the death of the deceased or to do him some grievous bodily harm but rather to save him."[43] The prosecutor did not ultimately press for a manslaughter direction.

49 Subsequently, the trial judge instructed the jury on what he saw as the critical issue in the trial. This was whether the appellant had shot the deceased intending to shoot him or in an unsuccessful effort to rescue him from an apparently intended suicide. He subsumed the latter interpretation of the evidence in directions relating to the excuses of mistake and extraordinary emergency respectively referred to in ss 24 and 25 of the Code. On these issues, I agree with Callinan J that the trial judge's directions to the jury were accurate, brief and admirably lucid[44]. He told the jury plainly that, if the prosecution had not disproved the appellant's version of events, the appellant was not guilty and was entitled to an acquittal. Correctly, he told the jury that there was no onus upon an accused to prove the identified excuses from criminal responsibility for mistakes of fact and emergencies. The prosecution was bound to exclude their application to the case and to do so beyond reasonable doubt[45].

50 *Direction on accident refused*: In the preliminary submissions on directions, counsel for the appellant asked the trial judge to direct the jury on s 23(1)(b) of the Code. That provision concerns, as will be seen, events that occur by accident. Especially in the light of the evidence of Dr Vallati that the rifle was liable to discharge on being struck by reason of the worn condition of the sear mechanism, counsel urged that it was open to the jury to conclude that the rifle had accidentally discharged.

51 The trial judge declined to give such a direction. His reasons, expressed in an exchange with counsel, are not entirely clear[46]. In part, it seems that they

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42 See *Griffiths v The Queen* (1994) 69 ALJR 77 at 79; 125 ALR 545 at 547-548.

43 This was contained in a proposed direction read to counsel by Helman J.

44 Reasons of Callinan J at [158].

45 *R v Mullen* (1938) 59 CLR 124 at 128-130; *Griffiths* (1994) 69 ALJR 77 at 80; 125 ALR 545 at 548-549; *Murray* (2002) 211 CLR 193 at 206-207 [40], 218 [78.2].

46 The relevant passages of transcript appear in the reasons of Callinan J at [137].

turned on his interpretation of the facts and the legal categories of the Code apt to his classification of the facts. In part, it seems that they followed from his understandable desire to pose for the jury, in as clear a way as possible, the choice they had between the interpretation of events respectively urged by the prosecution and the appellant. In part, it was because he considered that s 23(1)(b) of the Code "is more directed to an intentional act with an accidental event". In the end, he did not give the requested direction.

The decision of the Court of Appeal

52 *Appellate issues and dissent*: Following the jury's verdict of guilty and the conviction and sentencing of the appellant, Mr Stevens appealed to the Court of Appeal. One of his three grounds of appeal, as filed, was that the trial judge had erred in ruling that s 23(1)(b) of the Code was not available and in declining to direct the jury on its application. However, as already stated, when the appeal was argued before the Court of Appeal, that ground was not pressed in oral submissions. It seems to have arisen in the reasoning of the Court of Appeal because of a concern of McMurdo P that the jury should have been directed on an alternative verdict of manslaughter, based on s 289 of the Code.

53 That section is addressed to the duty of a person having charge or control of anything "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". In such a case, s 289 imposes a duty "to use reasonable care and take reasonable precautions to avoid such danger". It renders the person responsible for having "caused any consequences which result to the life or health of any person by reason of any omission to perform that duty". Where applicable, it provides a basis for a verdict of guilty of manslaughter[47].

54 In the Court of Appeal, McMurdo P saw the issue of directions on s 23(1)(b) as interrelated with what she perceived as the qualification presented by s 289[48]. She considered that there was "slight but sufficient evidence to raise the defence of accident"[49]. She noted that such a direction had been sought at trial. She considered that it was specifically supported by the evidence of Dr Vallati, as to the tendency of the rifle to discharge with "a mere hit with the

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47 See the Code, ss 291, 293, and 303.

48 [2004] QCA 99 at [70].

49 [2004] QCA 99 at [68]. See reasons of Callinan J at [145].

hand."[50] She concluded that an intermediate position was available "that during the course of an argument over their business arrangements, the appellant had hold of his loaded gun, which may well have been prone to unsafe discharge when hit with the hand, and it discharged, without intention on his part, killing the deceased."[51] Such an interpretation of events would support a verdict of manslaughter through criminal negligence.

55 *The majority view*: The majority of the Court of Appeal were not persuaded that this interpretation was available. Davies JA said that there was no evidence to support the negligent discharge of the rifle whilst in the appellant's charge[52]. Chesterman J agreed. He noted the concurrence of both sides in the trial that "the case was one of murder or nothing."[53] He analysed the appellant's version of events. He considered that the instructions given by the trial judge (to the effect that if the jury accepted the appellant's evidence they must acquit) were more favourable than leaving open the possibility posed by s 23(1)(b). Negligent handling of the rifle was, in Chesterman J's view, "inconsistent with, and indeed incompatible with" the appellant's evidence and case[54]. The absence of a "factual basis … in the evidence" therefore made it inappropriate to give a direction, as McMurdo P favoured, based on s 289[55].

56 It was, upon this basis, that the majority of the Court of Appeal decided that the appeal should be dismissed. However, Davies JA added remarks appearing to favour the view that s 23(1)(b) applied to the case although a verdict of manslaughter was not open. Thus, Davies JA said[56], "[o]n the appellant's evidence and statements the defence of accident was clearly open". Davies JA did not elaborate this statement. This may have been because the ground of appeal concerning the sub-section was not pressed in oral argument. More likely, it was because he considered that the point would, in any event, have

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50 [2004] QCA 99 at [68].

51 [2004] QCA 99 at [69].

52 [2004] QCA 99 at [80]. See reasons of Callinan J at [146].

53 [2004] QCA 99 at [92]. See reasons of Callinan J at [147].

54 [2004] QCA 99 at [97].

55 [2004] QCA 99 at [99].

56 [2004] QCA 99 at [76].

attracted the "proviso"[57], on the basis that the directions given to the jury were more favourable to the appellant than the addition of references to s 23(1)(b) would have been[58].

57 In this Court, the appellant revived his argument based on the failure of the trial judge to give directions on the application of s 23(1)(b). He did so, shorn of any reference to manslaughter. Indeed, he specifically disclaimed the application of s 289 of the Code. As it was accepted that a request for a direction on s 23(1)(b) had been properly advanced at trial, the prosecution raised no procedural obstacle to reliance on the provision, notwithstanding the appellant's omission to do so in the Court of Appeal.

The provisions of the Code

58 The way the Code operates in Queensland, to establish liability for homicide, is explained in the reasons of Gummow and Hayne JJ in *Murray v The Queen*[59]. Their Honours' explanation provides the starting point for analysis in this appeal.

59 Offences of homicide are dealt with in Ch 28 of the Code. Thus, s 291 provides that:

> "[i]t is unlawful to kill any person unless such killing is authorised or justified or excused by law."

By s 293 it is provided:

> "[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."

Pursuant to s 302(1)(a), 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. Manslaughter is defined, by exclusion, in s 303:

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57 The Code, s 668E(1) and (1A).

58 See eg [2004] QCA 99 at [93] per Chesterman J.

59 (2002) 211 CLR 193 at 202-203 [28]-[29].

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

60 Section 23(1) of the Code appears in Ch 5[60]. That chapter deals with the subject "Criminal Responsibility". Thus, s 23(1) 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."[61]

61 The provisions of the Code for the determination of appeals and their dismissal where "no substantial miscarriage of justice has actually occurred" are found, in conventional language, in s 668E(1) and (1A) of the Code.

The issues

62 Three issues arise from the way in which the appeal was argued in this Court:

(1) *The judicial directions issue*: Did the trial judge err in refusing to give the jury a direction in accordance with s 23(1)(b) of the Code?

(2) *The manslaughter issue*: In accordance with the qualification contained in the opening words of s 23(1), was it necessary and appropriate in the circumstances of the case (as McMurdo P concluded) for any such direction on s 23(1)(b) to include a direction on manslaughter? Specifically, did the circumstances of the case give rise to the need for a direction on s 289? Is this an issue that this Court should consider in the event of ordering a retrial?

(3) *The "proviso" issue*: Having regard to the entirety of the directions given to the jury by the trial judge, even if it is concluded that he fell into error in refusing the direction requested, or in declining to leave the verdict of manslaughter, is this a case, within s 668E(1A), where no substantial

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60 The full text is set out in the reasons of Callinan J at [95].

61 With the exception of Tasmania, equivalent provisions exist in the other Code jurisdictions: *Criminal Code* (WA), s 23; *Criminal Code Act* (NT), s 31.

miscarriage of justice has actually occurred, so that the appeal should be dismissed?

63 Before turning to consider the identified issues, it is necessary to make some preliminary observations regarding the relevant principles.

The applicable principles

64 *Construction of the Code*: The Code is intended to be a special statute with a purpose of providing a fresh start in the expression of the principles of criminal law. Amongst its objects was the introduction of greater clarity of expression and sharpness of concept[62]. It does not merely collect and re-state the pre-existing common law. Its provisions should, so far as possible, be capable of explanation to a jury according to the Code's own terms. Excessive subtlety or philosophical obscurity should be avoided[63]. So should an "overly refined analysis" of the facts[64].

65 *Meaning of "event"*: The paragraphs of s 23(1) of the Code draw a distinction between an "act or omission" (sub-par (a)) and "an event" (sub-par (b)). In *Murray*, it was held that the "acts" in question must be regarded as a "composite set of movements" that are to be "taken as a whole"[65]. Different interpretations have been offered for the meaning of "an event" in s 23(1)(b) of the Code[66]. In *Murray*, I suggested that, in the context of homicide, the word referred to "the entire occasion resulting in the death of the deceased."[67] In the same decision, Gummow and Hayne JJ concluded that the "event" was the death

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62 *Brennan v The King* (1936) 55 CLR 253 at 263; *Boughey v The Queen* (1986) 161 CLR 10 at 30-31; *R v Barlow* (1997) 188 CLR 1 at 31-33; *Charlie v The Queen* (1999) 199 CLR 387 at 393-394 [14]. See also *Bank of England v Vagliano Brothers* [1891] AC 107 at 120, 144-145; *Wallace-Johnson v The King* [1940] AC 231 at 240.

63 *Murray* (2002) 211 CLR 193 at 218 [78.1].

64 *Murray* (2002) 211 CLR 193 at 209-210 [49]-[50].

65 *Murray* (2002) 211 CLR 193 at 211 [53].

66 *R v Van Den Bemd* [1995] 1 Qd R 401 at 404; *R v Van Den Bemd* (1994) 179 CLR 137 at 142; *Kaporonovski v The Queen* (1973) 133 CLR 209 at 231-232.

67 *Murray* (2002) 211 CLR 193 at 218-219 [78.3].

of the deceased[68]. For the purposes of the present appeal it is appropriate to adopt that narrower view, to treat the "event" in a charge of murder as the death of the deceased, and to ask whether it was open to the jury, within the evidence, to conclude that it had "occur[ed] by accident".

66 *Meaning of "accident"*: The word "accident" has attracted considerable judicial attention in the several contexts in which it has arisen for elucidation. It commonly occurs in insurance[69] or workers' compensation cases[70]. Recently, it arose for consideration in this Court from the use of the word in an international treaty governing the liability of air carriers[71]. Although attempting to discern the proper content of the word "accident" has been said to lead to a "'Serbonian bog' of technicalities"[72], in every case it takes its meaning from the context[73]. Understood generally, an "accident" is "an unlooked-for mishap or an untoward event"[74] involving an element of fortuity[75]. In the context of s 23 of the Code, Gibbs J, in *Kaporonovski v The Queen*[76], regarded it as settled that "an event occurs by accident within the meaning of the rule if it was a consequence which was not in fact intended or foreseen by the accused and would not reasonably

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68 *Murray* (2002) 211 CLR 193 at 208 [42-43]. See also *Kaporonovski* (1973) 133 CLR 209 at 228-229 per Gibbs J; *Fitzgerald* (1999) 106 A Crim R 215 at 217.

69 For example *Hamlyn v Crown Accidental Insurance Company* [1893] 1 QB 750; *Hamilton, Fraser & Co v Pandorf & Co* (1897) 12 App Cas 518; *Dennis v City Mutual Life Assurance Society Ltd* [1979] VR 75; *Federation Insurance Ltd v R Banks* [1984] VR 525; *National & General Insurance Co Ltd v Chick* [1984] 2 NSWLR 86.

70 For example *Hensey v White* [1900] 1 QB 481; *Fenton v Thorley & Co Ltd* [1903] AC 443; *Brintons Limited v Turvey* [1905] AC 230; *Weston v Great Boulder Gold Mines Ltd* (1964) 112 CLR 30.

71 *Povey v Qantas Airways Ltd* (2005) 79 ALJR 1215; 216 ALR 427.

72 *National & General Insurance Co Ltd v Chick* [1984] 2 NSWLR 86 at 91. See also *Landress v Phoenix Mutual Life Insurance Co* 291 US 491 (1934) at 499.

73 *Saviane v Stauffer Chemical Co (Australia) Pty Ltd* [1974] 1 NSWLR 665 at 668.

74 *Fenton v Thorley & Co Ltd* [1903] AC 443 at 448. See also at 453.

75 *Hensey v White* [1900] 1 QB 481 at 485; *Saviane v Stauffer Chemical Co (Australia) Pty Ltd* [1974] 1 NSWLR 665 at 669.

76 (1973) 133 CLR 209 at 231.

have been foreseen by an ordinary person"[77]. That is the definition to be applied in the present appeal.

67 *Relationship between s 23(1) and manslaughter*: Although there were differences in the Court of Appeal over the availability, in the circumstances of this case, of a direction on manslaughter, and although powerful reasons were advanced by the majority in that Court as to why s 289 was inapplicable,[78] a consideration of manslaughter will often be required when s 23(1) of the Code is invoked. The opening words of s 23(1), with their cross-reference to "express provisions of this Code relating to negligent acts and omissions," makes this inevitable. If such other provisions apply, the total exemption from criminal responsibility provided by s 23 does not operate. Moreover, the references in s 23(1) to acts and omissions occurring independently of the exercise of the person's will and events occurring by accident direct the mind to the possibility of manslaughter by criminal negligence[79]. Whether a direction on manslaughter is required will depend on the evidence and on the way the trial is presented by the parties[80].

68 *Duty of the trial judge*: Finally, it is important to remember that the directions required of the judge in a criminal trial depend upon the real issues in that trial[81]. It is not the judge's function to give an exposition of the law that unnecessarily goes beyond those issues[82]. In a properly conducted trial, the issues will be defined, substantially, by the way the parties have conducted their respective cases. Nevertheless, the judge retains a duty to instruct a jury concerning any defence (even one not raised or pressed by a party or indeed

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77 See also *Vallance v The Queen* (1961) 108 CLR 56 at 61, 65, 82; *Mamote-Kulang v The Queen* (1964) 111 CLR 62 at 69; *Timbu Kolian v The Queen* (1968) 119 CLR 47 at 67, 71; *R v Tralka* [1965] Qd R 225 at 228, 233-234.

78 See above at [55].

79 See White, Garwood-Gowers and Willmott, "Manslaughter under the Griffith Code: Rowing not so gently down two streams of law", (2005) 29 *Criminal Law Journal* 217 at 219.

80 cf *Griffiths* (1994) 69 ALJR 77 at 81, 82; 125 ALR 545 at 550, 552.

81 The Code, s 620(1); *Alford v Magee* (1952) 85 CLR 437 at 466.

82 *Zoneff v The Queen* (2000) 200 CLR 234 at 256 [56]; *R v Chai* (2002) 76 ALJR 628 at 632 [18]; 187 ALR 436 at 441; *Williams* (1990) 50 A Crim R 213 at 214.

disclaimed by the parties) that fairly arises on the evidence and therefore needs to be considered by the jury in reaching their verdict[83].

69 There was no substantial difference between the parties to this appeal over the foregoing principles. The question is what they require for the resolution of the appeal.

The provision of a direction on s 23(1)(b) of the Code

70 *Need for direction on accident*: The prosecution resisted the appellant's argument that the trial judge should have acceded to the request of his counsel and given directions based on s 23(1)(b) of the Code. It argued that no such directions were required in the way in which the trial had been conducted; and that the trial judge had accurately discerned and drawn to the jury's attention the more immediately applicable provisions of the Code concerning the supposed want of criminal responsibility, namely mistake (s 24) and extraordinary emergency (s 25). It also argued that any directions that might have been given on s 23(1)(b) as to accident were subsumed within the clear instruction that the jury should acquit unless satisfied beyond reasonable doubt that the appellant fired the gun intending to kill the deceased.

71 In my opinion, the trial judge ought to have given the jury directions based on s 23(1)(b) of the Code. He erred in declining to do so. The evidence adduced in the trial was such that a reasonable jury could properly have concluded that the "event", being the death of the deceased, was one that occurred by accident. There was, for example, the evidence of the firearms experts and especially that of Dr Vallati. He gave evidence as to a defect in the rifle's firing mechanism and its resulting propensity to discharge if it was hit. The appellant gave sworn evidence before the jury that when he "lunged out" he "would have whacked into the gun" as he "tried to grab it". If the jury accepted the evidence of Dr Vallati and that evidence of the appellant, it was open to them to accept that the kind of actions described by the appellant might have constituted the initiating force that caused the rifle to discharge the fatal shot that killed the deceased. This was an available view of the facts. In a practical sense, the introduction of the provision

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83 *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; *RPS v The Queen* (2000) 199 CLR 620 at 637 [41]; *Murray* (2002) 211 CLR 193 at 219 [78.4], 236-237 [151]; *Fingleton v The Queen* (2005) 79 ALJR 1250 at 1266-1267 [77]-[80]; 216 ALR 427 at 445.

of s 23(1)(b) into the judge's instruction to the jury would have placed a sharp focus, in particular, on the evidence of Dr Vallati[84]. As it was, the trial judge's instructions to the jury made only brief and passing reference to that evidence. Accordingly, the appellant was deprived of specific attention to this issue which the jury were entitled to regard as potentially important.

72 This was especially so when the definition of "accident" in *Kaporonovski* is remembered[85]. Thus, it would have been open to the jury to conclude that the death of the deceased was "not in fact intended or foreseen by the accused" and would not "reasonably have been foreseen by an ordinary person". Ordinarily, rifles do not discharge except by engaging the trigger mechanism. By declining to give the direction on s 23(1)(b) the trial judge deprived the appellant of the chance of an acquittal on this ground of exemption from criminal liability.

73 There was, in addition to the foregoing, another element in the evidence of potential support for this interpretation of the facts. This is the conversation recorded with the emergency number telephoned by the appellant within minutes of the shooting of the deceased. When asked to explain how the deceased had been shot, the appellant described what had happened as "an accident"[86].

74 It is true that, as experience shows, the word "accident" is used in many different ways. Even motor car crashes involving the most egregious negligence are sometimes described as "accidents"[87]. The word is used loosely in common speech. It will often be invoked as a misnomer so far as scientific learning is concerned[88]. Nonetheless, in the situation of the trial, the refusal to give a direction on s 23(1)(b) deprived the appellant of potential forensic reliance on his own description of what had happened, moments after the shooting occurred. Although that description was not addressed, as such, to the Code language, in a sense, it offered the appellant some forensic support. Before courts and lawyers were called upon to analyse the event according to law, the appellant described it as "an accident". He revealed himself as believing that the deceased may have pulled the trigger or that the rifle had discharged without his having pulled the

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84 As to the need to draw the attention of the jury to evidence favouring the accused on the issue see *Ryan v The Queen* (1967) 121 CLR 205 at 217 per Barwick CJ.

85 See above at [66].

86 [2004] QCA 99 at [28].

87 See, eg, *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 21 [72].

88 See *Brintons Limited v Turvey* [1905] AC 230 at 233 per Lord Halsbury LC.

trigger. His virtually immediate call to the emergency number and his repeat call for instructions on resuscitation were at least arguably consistent with involvement in an accidental and not a deliberate death[89]. The appellant should have had the chance to place that interpretation before the jury with instructions from the trial judge on the language of s 23(1)(b) of the Code as applied to that evidence, so calling that evidence to the specific attention of the jury.

75 Once it is accepted that there was evidence that engaged the Code provision in this respect, it was *prima facie* for the jury, and not the judge, to determine the application of the Code to the facts[90]. It is clear from the exchanges between the trial judge and counsel that his Honour considered that other provisions of the Code, namely, ss 24 and 25, better responded to the appellant's case, as it had been presented. But in a jury trial, that was an assessment ordinarily reserved to the jury, so long as there was some evidence to attract the Code provisions. It was the jury that was called upon to make assessments of the facts. They were not required to accept, in its entirety, either the prosecution or defence cases[91]. They were entitled to form their own opinions about the facts, so long as their resulting verdict was not appellably unreasonable. It was not for the trial judge to deprive the appellant of a verdict of the jury, reached after consideration of a provision of the Code reasonably engaged by the evidence.

76 This conclusion is especially appropriate in a case concerning the excusatory provisions of the Code. The trial judge, quite properly, invoked ss 24 and 25 and gave the jury instructions on those provisions which likewise excuse the accused from criminal responsibility. But he was selective. He did not afford the appellant the specific benefit of an additional, like, direction on s 23(1)(b).

77 It should not be assumed that, in including such successive grounds of exemption from criminal responsibility, the drafters of the Code intended to afford superfluous exemptions. Although the categories referred to in ss 23(1)(b), 24 and 25 may sometimes overlap, they are conceptually distinct. Each category, where factually engaged, affords an accused person a separate basis of exemption from criminal responsibility. In practical terms, each affords

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89 cf *R v The Queen* [2004] QCA 99 at [63].

90 *Ugle v The Queen* (2002) 211 CLR 171 at 179 [31], 185 [55]; *Murray* (2002) 211 CLR 193 at 225 [99]-[100].

91 *Williams v Smith* (1960) 103 CLR 539 at 544-545.

separate foundations for forensic arguments as to why the jury should acquit. Each requires particular attention to any relevant evidence. In refusing to direct the jury as to "accident" in s 23(1)(b), the trial judge withdrew from the appellant a basis of acquittal which was far from trivial having regard to the evidence that I have mentioned.

78 The force of the foregoing points is amplified by the undisputed obligation which the prosecution bore to negative the application of s 23(1)(b) once it was engaged[92]. The respondent did not contest that the onus would have been on the prosecution to prove that s 23(1)(b) as a "defence" did not apply to the facts once the section was found applicable. The question is not whether the accused could establish the application of s 23(1)(b), but whether the prosecution could exclude the characterisation of the "event" as an "accident" beyond reasonable doubt.

79 The result is that it cannot be said that the instructions of the trial judge to the jury concerning the need for the prosecution to establish that the appellant intended to kill the deceased subsumed any suggested separate instruction to the jury based on s 23(1)(b). That provision presented a distinct category to which the jury's mind ought to have been addressed. A direction, appropriate to the circumstances, need not have been any lengthier than those which the trial judge gave concerning the meaning and application of ss 24 and 25 of the Code. In those instances, his Honour succinctly drew attention to the exemptions from criminal responsibility there provided. A similar direction was required by reference to s 23(1)(b). Such a direction would have referred to the language of the Code, to the additional category of exemption from criminal responsibility for "an event that occurs by accident" and to the relevant evidence. For the definition of "accident", it would have been sufficient to inform the jury of the settled law explained by Gibbs J in *Kaporonovski*[93]. The point was accurately reserved at trial. The appellant has made good this argument. I accept the terms in which Callinan J has expressed a possible direction that might have been given[94]. Certainly, the substance of that direction was required.

80 *Linear logic and jury instructions*: I appreciate that an argument exists to the effect that "[w]ith offences of specific intent such as murder ... the excuse of accident is not available to an accused if the jury is satisfied that the element of

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92 *Griffiths* (1994) 69 ALJR 77 at 78; 125 ALR 545 at 546-547.

93 See above at [66].

94 See reasons of Callinan J at [160]. See also reasons of McHugh J at [32].

intention has been established."[95] This point has been made in many cases concerning the Code[96]. I believe that it lies behind the approach of Gleeson CJ and Heydon J in this appeal[97]. I cannot deny its logical force.

81 However, the "defence" of accident in s 23(1)(b) of the Code is not expressly excluded from application to a trial for murder. On the contrary, it appears in general provisions of the Code concerning "Criminal Responsibility", stated at large[98]. On the way to deciding whether the specific intention necessary for conviction of murder was established by the prosecution, the jury's attention must be directed (where accident is an available classification of the facts) to that category of exemption from criminal responsibility.

82 One assumes that the human mind, and even more the collective mind of a jury, operates in serious decision-making, rationally and reasonably. But the mind does not necessarily act according to linear paths of strict logic. At any time in a criminal trial, several issues are in play. As Callinan J correctly points out[99], different people, especially a group of people, may have different perceptions of facts and of words, expressions and language (such as on being told of the substance of the Code's provisions on accident). The appellant, who was facing, if convicted, the heaviest penalty known to the law, was entitled to have the chance of a favourable response of the jury to the exemption provided by the Code from criminal responsibility for accident, properly explained. The trial judge ought not to have deprived the appellant of that chance.

83 *Accident and the mental element for murder*: Even if, contrary to what is said above, it is not accepted that the trial judge fell into error in failing to direct the jury as to the "defence" of accident under s 23(1)(b) of the Code, it does not follow that the appeal fails. There is an alternative way of reaching the conclusion that the trial revealed error because of the absence of instructions on accident. Instead of dealing with accident as a "defence" to murder, it is arguable

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95 Kenny, *An Introduction to Criminal Law in Queensland and Western Australia*, 6th ed (2004) at 139.

96 *R v Mullen* (1938) 59 CLR 124 at 127; *Hubert* (1993) 67 A Crim R 181 at 197; *Fitzgerald* (1999) 106 A Crim R 215 at 217; *Azaddin* (1999) 109 A Crim R 474 at 479-480.

97 Reasons of Gleeson CJ and Heydon J at [19].

98 See also the Code, s 36(1).

99 Reasons of Callinan J at [158].

that the trial judge's directions were deficient because they failed clearly to draw to the jury's attention the fact that, if they concluded that the killing was accidental, the mental element required for murder was necessarily excluded. In other words, on this approach, the error in the judge's instruction to the jury was a failure properly to direct the jury as to the elements of murder rather than the "defence" of accident.

84 Although this argument was not advanced by the appellant before this Court or the courts below, it has some conceptual attraction. This is because it is entirely consistent with the appellant's position that he lacked the mental element required for murder. Furthermore, it provides a complete answer to the argument that, because the jury convicted the appellant, they *must* have been satisfied as to the existence of the mental element for murder and therefore *must* have rejected the defence of accident even if it had been left to them. That argument falls away if it is concluded that the directions on the mental element of murder were inadequate.

85 The trial judge is obliged to explain the law to the jury "in a manner which relates it to the facts of the particular case and the issues to be decided."[100] As noted above[101], the trial judge did not do this with respect to accident, although the facts at trial presented that issue and counsel requested directions upon it. Accident was an issue that the accused was entitled to have specifically drawn to the jury's attention with appropriate directions on how they should consider it. It is true that the jury may have recognised, as Gleeson CJ and Heydon J infer, that the mental element for murder and the suggestion of an accident were, as a matter of strict logic, mutually exclusive. However, it was not appropriate to leave a key issue such as this to be deduced by implication[102]. One way or the other, the jury's attention should have been drawn explicitly to accident and proper instructions given by the trial judge: preferably as a "defence" but, at the least, as an issue to be excluded by them in deciding the existence or absence of the mental element necessary for murder.

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100 *R v Chai* (2002) 76 ALJR 628 at 632 [18]; 187 ALR 436 at 441. See also *Pemble v The Queen* (1971) 124 CLR 107 at 117-118.

101 See at [71], [73]-[74].

102 *R v Zorad* (1990) 19 NSWLR 91 at 105.

A direction on manslaughter?

86 *Contested need for a direction*: At every level of these proceedings, both parties to this appeal agreed that it was not necessary for the jury to be given a direction on manslaughter. McMurdo P expressed a contrary view by reference to s 289 of the Code[103]. In this Court, neither party embraced her Honour's suggestion. The position of both sides was that the case was one of murder or nothing. Moreover, it was accepted that, at a retrial, nothing said in the present appeal would finally determine what directions were required on manslaughter on the evidence adduced in such a retrial. Nevertheless, McHugh J has found that manslaughter should have been left to the jury, independently of s 289[104].

87 Complications will sometimes arise from the suggestion that directions on manslaughter should be given together with a direction based on s 23(1) of the Code, especially because of the opening words of that sub-section. However, the present is not a case to explore such questions. I agree with the analysis in the Court of Appeal by Davies JA and Chesterman J as to why s 289 of the Code had no application to the evidence[105]. There was no evidence in the present trial upon which a jury could have concluded that the appellant was in charge and control of the rifle and that, whilst in such charge and control, the gun was operated negligently. To introduce that consideration as a possibility would have involved pure speculation applied to Dr Vallati's evidence. There was no other evidentiary basis upon which manslaughter arose for judicial directions.

88 *Conclusion: direction unnecessary*: It follows that it is unnecessary, for the purpose of affording guidance for any directions to be given on a retrial, for this Court to examine the issue of manslaughter. That issue will have to await the evidence as it unfolds in the retrial. If that evidence were no different from that adduced in the subject trial, there would be no requirement for a direction on manslaughter. As the parties jointly submitted before this Court, this was a case where the contest between the respective versions of the accused and the prosecution was clear and the choice faced by the jury stark. Although the agreement of the parties cannot control the judicial duty to instruct the jury on applicable principles of law, the trial judge did not err in failing to direct the jury in the present trial on manslaughter.

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103 *R v Stevens* [2004] QCA 99 at [68], [70].

104 Reasons of McHugh J at [29]-[32].

105 See above at [55]. cf reasons of Callinan J at [161].

The "proviso" is inapplicable

89 *Sustaining the conviction?* Finally, the prosecution submitted that, if this Court concluded that the trial judge had erred in declining to give the jury a direction based on s 23(1) of the Code (specifically sub-par (b)), the application of s 668E(1A) of the Code was called for. It was argued that, despite any omission of, or wrong direction on, a question of law, no substantial miscarriage of justice had occurred.

90 This argument is not entirely without merit. The directions given to the jury by the trial judge, taken as a whole, were quite favourable to the appellant. In effect, his Honour told the jury that they should acquit the appellant unless satisfied beyond reasonable doubt that he had fired the rifle intending to kill the deceased. He suggested that, if they accepted his evidence or, as a result of it, had a reasonable doubt that the death of the deceased occurred in the circumstances described by him, they must acquit[106].

91 It was on this basis that I take the majority in the Court of Appeal, although concluding that "the defence of accident was clearly open"[107], decided that the appeal should be dismissed. They must have decided that, in the context of this trial, looked at as a whole, the instructions given to the jury were as strong, or stronger, than would have been the case if the issue of accident had been expressly presented. This view has some persuasive force.

92 *A miscarriage occurred*: Nevertheless, the appellant was entitled to have a trial in which applicable elements of the Code were explained to, and passed upon by, the jury[108]. In concluding that the case is one in which a miscarriage of justice has occurred because of the misdirection found, I am affected by the considerations already mentioned. Trial counsel asked for a direction on accident. The trial judge's reasons for refusing it were not persuasive. The evidence specifically presented an issue of accident. Had the point been included in the judge's directions, it would have invited explicit attention to the supportive elements in the evidence of Dr Vallati and in the record of the telephone calls to the emergency number. The fact that s 23(1) deals with an exemption from criminal responsibility and that the onus rested on the prosecution to negative its application are further considerations supporting the appellant. So is the alternative way that the issue of accident might have been addressed.

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106 [2004] QCA 99 at [96] per Chesterman J.

107 [2004] QCA 99 at [76] per Davies JA.

108 *Mraz v The Queen* (1955) 93 CLR 493 at 514.

93 This case was a curious one. The evidence of motive on the part of the appellant to kill the deceased was weak[109]. The prosecution case was entirely circumstantial[110]. On the other hand, the deceased had no apparent operative reasons to take his own life although, once before and in the same premises, he had presented the rifle, when loaded, in an inappropriate way. He had mentioned the possibility of suicide to his sister[111]. He was anxious about telling the appellant of the intended business separation. However, the risk of a miscarriage of justice is not excluded. In a case of such a kind, it is essential that the directions should be accurate and especially upon reserved points that were favourable to the accused.

Orders

94 I agree in orders proposed by McHugh J.

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109 [2004] QCA 99 at [68] per McMurdo P.

110 [2004] QCA 99 at [74] per Davies JA.

111 Reasons of Callinan J at [130].

95 CALLINAN J. Should the trial judge have told the jury in this case that the appellant was entitled to be acquitted if the prosecution had failed to negative beyond reasonable doubt, not only the possibility of the occurrence of death as a result of an act that occurred independently of the exercise of the appellant's will, but also, or as a result of an accident? In short, the question in this appeal is whether the trial judge should have put to the jury both limbs of s 23(1) of the *Criminal Code* (Q) which 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 in 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."

Facts and previous proceedings

96 The appellant, his wife, and Mr Brockhurst conducted various businesses at the same premises in Brisbane. Mr Brockhurst died there of a gunshot wound to his forehead on 22 June 2000. The gun that inflicted the fatal wound was an old .22 calibre rifle owned by the appellant and customarily kept at the premises. The appellant and Mr Brockhurst were alone at the time of the fatality.

97 A coronial inquest was conducted into the death. The appellant was not committed for trial following it. On 8 April 2002 the Director of Public Prosecutions presented an *ex officio* indictment in the Supreme Court of Queensland against him for murder. At the trial the jury were unable to reach a verdict. He was then retried by Helman J with a jury and found guilty.

98 Some of the evidence at the second trial was uncontroversial. The appellant and Mr Brockhurst had been friends as well as business colleagues for some years. They fished, dived and spent holidays together. Six weeks before his death Mr Brockhurst was the master of ceremonies at the wedding of one of the appellant's daughters.

99 One of the businesses in which the appellant and Mr Brockhurst participated provided the appellant and his wife with their primary source of income. Both the appellant and Mr Brockhurst were saw doctors. Mr Brockhurst had a particular interest in carbide tips. In about 1989 he and the appellant had agreed to form and take shares in a company which may conveniently be referred to as "ACS". ACS shared secretarial, telephonic and accounting arrangements with another, similar business conducted by the appellant and his wife but did not pay for them. At the time of the deceased's death, ACS owed companies associated with, or controlled by the appellant approximately $48,000.

100 The appellant was 46 and Mr Brockhurst 32 years old at the time of his death. Mr Brockhurst was taller than the appellant.

101 The business arrangements generally of the appellant and Mr Brockhurst were complex. They either conducted, or were potentially involved in the conduct of other similar businesses with a capacity to compete with the businesses of each other. The extent to which each was fully aware of the other's business interests was not entirely clear.

102 Not long before the fatality, there had been inconclusive negotiations between the appellant and Mr Brockhurst with respect to the adjustment of their shared business interests. The appellant was seeking to obtain a greater share in the proceeds of them. Immediately before his death the deceased and his wife had acquired a business well capable of competing with the appellant's principal business.

103 There was evidence which argued against suicide. The very recent acquisition which the deceased and his wife had made was a satisfactory one. Shortly before his death and the arrival of the appellant at the premises, Mr Brockhurst had been happily drinking and conversing with two friends. There occurred, while one of the friends was present, a telephone conversation of a seemingly rather disagreeable kind which Mr Brockhurst concluded by saying, "Well, okay, I'll wait for you".

104 Another associate of Mr Brockhurst called his mobile telephone number at about 5.00 pm but there was no answer and the call was redirected to a message service. The appellant left his home at about 4.30 pm to meet the deceased at the premises to discuss their affairs. The appellant's mobile telephone records showed that he had telephoned the number there at 4.41 pm, that is, at about the

time of the somewhat disagreeable telephone conversation overheard by one of Mr Brockhurst's friends, and that the call lasted 12 seconds.

105 At 5.29 pm the appellant called the ambulance service from the premises and said:

> "… we've got a, a bloke shot. It's, it's not a um … ahh … he's shot in the head.
>
> … And how did this happen?
>
> Um … ahh … it's a bit hard to explain it. I, I'm going to call it an accident for the moment.
>
> And, okay, so he didn't pull the trigger himself?
>
> Ah … yeah I think so.
>
> And the gun now, where's the gun?
>
> The gun's on the floor."

106 He told the operator that he had been giving the deceased mouth to mouth resuscitation. He was given further paramedical instructions by the operator. He later made a second call to obtain further instructions.

107 Ambulance officers arrived at the premises at 5.35 pm. On their arrival, the appellant had blood on the back of his hands, on his shirt, and there were smears of blood on his face, consistent with attempts at resuscitation. He was distressed but cooperative. One paramedic detected a pulse, the other did not. They futilely attempted ventilation and other resuscitatory measures.

108 Police officers arrived shortly after the ambulance officers. The appellant told them that the rifle was his and that he kept it in his office between a filing cabinet and the wall. A stick was required to retrieve it. The ammunition, he said, was kept in the top drawer of the same cabinet. In fact the ammunition was found in the bottom drawer of the cabinet.

109 A forensic officer examined the scene. His opinion was that the deceased had been sitting in his chair at his desk with the rifle touching the skin of his forehead when it discharged, causing blood to splatter on to the desk, and, as he fell to the left and backwards, on to the filing cabinet. The officer could find no evidence of a struggle. The wound to the deceased's forehead was a contact, or partial contact wound, but no forensic experts were able definitively to determine the angle at which the muzzle was held by reference to the trajectory of the bullet through the head. The pathologist's view was that the presence of a partial contact wound indicated that there had been a small gap between the skin at the

wound and the muzzle of the gun allowing for the escape of gases which caused the skin to burn. A larger area of burnt tissue below the wound suggested the absence of a completed seal between the gun muzzle and the skin at that point. The bullet tracked through the brain at an angle of 30 degrees downwards from the horizontal angle.

110 A ballistics expert at first thought that the shape of the contact wound indicated that the barrel of the gun would have been pointed downwards at discharge. He withdrew that opinion after conducting further tests and concluding that powder, or hot gas burns alone were not a reliable indicator of the angle of the bullet. In cross-examination this witness said that in his 11 years of experience with the Queensland Police Service in ballistics and firearms, he had never seen a contact wound in a known murder investigation. The appellant placed emphasis on this piece of evidence in his appeal to the Court of Appeal.

The appellant's account

111 In a recorded interview at 7.05 pm on the evening of the death, the appellant told police officers that he had arrived at the premises somewhere between 5.00 pm and 5.30 pm, in accordance with prior arrangements. He entered the office and said, "How are you going?" and "I'll be with you in a minute". The appellant went to the toilet on the mezzanine floor. When he returned to the office he saw that Mr Brockhurst was seated at his desk holding the rifle "sort of in an upright position" with his "right hand on the barrel somehow or other" and his "left hand over the end of it". The barrel of the gun was pointing above his head, right in front of him. The appellant stopped, then stepped forward to grab the gun. Mr Brockhurst closed his eyes "as if he was sort of clinching". The appellant, who was right up against the desk, leant forward and grabbed the gun. It discharged. The deceased fell back. The appellant picked up the gun and put it on the desk. He tried to drag the body around the desk; he had to push the chair back out of the way; he had difficulty because of the position of the furniture in a small space. He dragged and pulled the deceased. The gun fell on to the floor. A box fell over and he picked it up. Blood was coming out of the deceased's nose and the appellant used some nearby rags to wipe it. He gave the deceased mouth to mouth resuscitation; he tried to clear the mouth and make sure the tongue was out of the way; he put a beer bottle in a carton under his neck to raise the head. He continued mouth to mouth resuscitation for a time. He tried compression of the heart. He thought he heard a heart beat but then was unsure. He went out of the office, returned and telephoned "000". The ambulance arrived shortly after.

112 In a further statement committed to writing by interviewing officers later that night the appellant said that after visiting his solicitor and accountant he dropped his wife home, "mucked around a bit and then headed back to work". On his way he was caught in traffic and missed the most convenient turn-off to the premises. He arrived there sometime after 5.00 pm and parked behind the

deceased's van. No-one else was there. When he returned from the bathroom he saw the deceased holding the gun, sitting behind his desk straight in front of the appellant. When he first saw the gun "it was up in the air, no threat to him". He is recorded as saying:

> "I can't remember for sure but the stock could have been resting on the desk but I'm not sure. I am trying to remember he just had it in front of him and was holding it.
>
> One of his hands was around the trigger area and the other higher up on the gun on the wood part just before the barrel.
>
> Then he did a definite change in his hands but I can't remember what it was. I think it was moving one hand up the barrel but it could have been more to it I just don't know.
>
> It was up on the desk I am sure it was up on the desk and really I thought it was still above his head. The one thing I know for sure was he closed his eyes like a squint.
>
> That was like the signal for me to grab the gun. I lunged forward and assume with [my] right hand further forward then [sic] my left to get the gun. I know I contacted the gun and may have grabbed it and bang it all happened at once."

113 The appellant did not sign that statement, explaining that he wished to obtain advice from a lawyer and to be certain about some aspects of it.

114 The appellant's evidence at trial was, for the most part, consistent with his statements to the police, although he emphasised that he was distressed and emotional following the death and could not accurately recollect what he had said in interview. This was why he had not signed any statement. He was unable to say whether the gun was resting on the desk when he came into the room: he did not intend to convey that it was then pointing straight up in the air. At first the rifle was pointing just above the deceased's hair, a little bit upwards, with the tip of the barrel just above the head. As he walked into the office the deceased lowered the barrel, the appellant lunged for the gun, and it discharged as he grabbed it. It was his belief that the deceased had deliberately shot himself. He was reluctant however to say such a thing about someone, and probably even more so the deceased, having regard to his close working and personal relationship with him.

115 The appellant accepted that he had not been happy since returning from a trip to the United States of America in March 2000. He may have been short with staff and given the impression that something, or things were bothering him. He admitted that he thought the deceased's offer of $30,000 for the appellant's interest in one of their joint businesses was appropriate but that $50,000 for

another of them was "a bit short of the mark". The deceased had been pressing him for a valuation by a valuer nominated by the former. While he was driving to the meeting, the appellant had been thinking about the business. He had used his mobile telephone at 4.41pm to call Mr Brockhurst to check that he was there, and to tell him he was on his way. The deceased said something like, "Yeah. Fine. I'll be here. I'll wait for you." He arrived at the premises at about 5.15 pm.

116 The appellant called evidence of good character. Mr Yuri Koszarycz, who was a senior lecturer in ethics at the Australian Catholic University and had known the appellant for 20 years, said that the appellant's general reputation in the community was of a highly respected family man who was not obsessive about money and was truthful. Steven Polter, a close friend of the appellant, gave evidence that he had known the appellant for many years and considered him to be very calm and honest; he had never seen him lose his temper.

Evidence about the rifle

117 On 10 November 1999 Mr Bryant, a friend of the deceased, had arrived late for a meeting fixed for 4 pm at the premises. When he sat down, the deceased said, "We have ways to fix people who are late." He then partially closed the office door and picked up the rifle from behind it, held it in the air and said, "We use these to solve people being late." Mr Bryant said, "I hope that's not loaded" and the deceased replied, "It certainly is". He thought the deceased was joking. He told him that he thought his conduct stupid. The deceased put down the rifle and they commenced their discussion.

118 The deceased visited his father-in-law, Mr Peel, a few weeks before his death to collect a single shot bolt action rifle. Mr Peel knew the gun was unloaded, but, because its working parts were "forward", it may not have appeared that way to the casual or uninformed observer. Mr Peel gave his son-in-law a quick lesson about gun safety, instructing him not to pick up a gun without knowing it was safe, and always to check the breech.

119 The appellant said in evidence that he had not seen the rifle which inflicted the fatal wound for a year before the fatality. He had inherited it from his wife's uncle about 18 to 20 years earlier. It was kept down the side of a filing cabinet in his office. It was in an awkward position and could not be reached without using a stick. From time to time he would ask the deceased to get it out for him as he had longer arms. He had used the gun on about half a dozen occasions, to shoot at the back of the shed at the premises with low velocity bullets. He did not notice, or know of any problems with it. It was old however, and the extractor was damaged. The only way to remove bullets was to flick them out with a fingernail.

120 A previous employee, Mr Gatt, had borrowed the rifle for a shooting trip in about 1994 and had used, and seen others using it for target practice with low

velocity bullets at the premises. He did not notice any difficulties with it and did not know whether it was prone to accidental discharge.

121 Mr Flanjack had not seen the rifle for some time before the deceased's death. He, as with Mr Gatt, had borrowed it for shooting trips, and had seen some employees use it at work for target practice. This had not happened for some years.

122 A scientific officer who examined the gun said that the trigger pressure was acceptable at 1.8 kilograms. It was however prone to discharge if dropped on its butt. It passed a "strike test" when struck with a rubber mallet. This officer adopted a policy of not dismantling firearms when examining them so as to avoid the risk of damaging a part, or otherwise causing them to function differently upon reassembly. Another scientific officer performed similar tests. His conclusions were much the same although his calculation of the required trigger pressure was a little less.

123 A ballistics expert independent of the State, Dr Vallati, was also called in the prosecution case. He found that the trigger pressure varied within a normal range for a rifle of the type and age (some 40 years). That range was a safe one although current import regulations required guns to have a greater trigger pressure, of between 3.5 to 4 kilograms. Dr Vallati conducted "drop tests". These showed that the gun was prone to accidental discharge when the butt fell on to a hard surface from a height of 20 centimetres or so. He dismantled, and then reassembled it without finding anything alarming about its safety. He next performed a "strike test" with a rubber mallet although he did not generally find that type of test helpful because of the variables that could operate. He also tested it by using his hand, "karate-chop style" to strike the gun. This caused the rifle to discharge one in five times. He dismantled it a second time to ensure that no parts had moved out of alignment in the striking, and completed further tests on the firing pin. He noticed that the sear on the rifle was shiny, smooth and more worn than usual.

124 The function of the sear piece and the implications of its worn state are captured in this passage from the judgment of the President of the Court of Appeal[112]:

> "The sear piece engages into the rifle bolt to hold the firing pin back against the spring pressure when the bolt is properly locked down. When the safety catch is off, the bolt is turned down and the spring pressure of the firing pin pushes against the sear jamming the two surfaces together. The trigger pressure is a combination of this pressure against the sear and

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112 *R v Stevens* [2004] QCA 99 at [47].

> also some spring pressure in the trigger bar itself, within the woodwork of the rifle. The trigger pressure pulls the sear out of engagement. If the sear surface is very smooth or has liquid on it, it will move easily; if it is rough or uneven more pressure will be needed. The trigger bar engages the forked section of the sear and is also on a spring. The trigger pressure was within a normal, safe range. The worn or polished surface of the sear, however, made it much more likely for the sear to slip and be released by a blow or by pulling the trigger. Whilst the trigger pressure was satisfactory, Dr Vallati found that, by applying a blow vertically to that area, the gun would discharge. Additionally, energy applied at one end of the rifle could transfer to the other end through vibration, allowing the sear to disengage and the gun to discharge."

The deceased's state of mind

125 There was evidence to suggest that Mr Brockhurst's life was not without its problems. His marriage was not untroubled. He had conducted an affair with the appellant's adult daughter, a police officer, Susan Stevens, in 1995 and 1996. He had separated from his wife and lived near Ms Stevens at the Sunshine Coast for some months in 1996 during which he proposed to her. She declined the proposal and he returned to live with his wife.

126 Ms Stevens gave evidence that this extra-marital relationship resumed after the birth of the deceased's son in 1996 and continued for about six months. At the time of death the relationship was no longer one of physical intimacy although the deceased continued to visit his former lover over the years. It was her evidence that the deceased had always wished to resume their sexual relationship. As recently as a few weeks before his death when she had visited the premises, Mr Brockhurst had asked her to go out with him again. He had previously told her that he was considering purchasing the business which presented the particular opportunity to compete with the appellant's business.

127 Lisa Cartmill, a friend of the deceased, also gave evidence. At Christmas 1999 he was in hospital with a stress related illness. She thought that in the six months prior to his death Mr Brockhurst "seemed more stressed, I guess, … I don't know, a bit quieter, not his normal, joking self." At a race meeting on 10 June 2000 Ms Cartmill told the deceased how lucky his wife was to have him looking after things, and he replied that he was at his wit's end, running his hands through his hair, as he said it. She understood him to be talking about "the business and everything". About a month before his death the deceased had told her that he had been unable to sleep because of worry about work. In early 2000 Mr Brockhurst told Ms Cartmill that he still loved the appellant's daughter. He said that he felt a person had two chances at love in this life and he believed he had had them both, and he still loved Susan; he could not leave his wife because she was very jealous.

128 The deceased's widow gave evidence that their marriage was a happy one. Her husband was excited about his new business plans, but concerned about finalising his business relationship with the appellant: the forthcoming confrontation was playing on his mind. He was looking forward to owning his own business with a house on acreage for his children. He had recently bought a boat for $54,000 and loved fishing and other outdoor activities. During and after the stressful period in their relationship when he had conducted his affair with Ms Stevens, the deceased and his wife had been counselled. On one occasion he had severely injured his hands by punching a wall. Mr Brockhurst had recently borrowed $300,000 from his father which he was to repay if and when he could.

129 The deceased and his wife were also in the course of borrowing $129,000 from a bank. It was a condition of the loan that they effect life insurance. They had other debts which they were repaying.

130 In 1996 the deceased spoke to his sister about his affair with the appellant's daughter. On one occasion he said that he could fix up his problems if he just drove off the road and into a tree. She was allowed to give evidence that she did not interpret this as a statement that he was suicidal but rather as mere words, expressing frustration about his situation.

131 The deceased's friend, Mark Kahler, was at a family barbeque with the deceased during the weekend before his death. The deceased was very excited about owning his own business, house and other property. He described the deceased as "upbeat and confident". Mr Brockhurst was planning a fishing trip in the latter half of 2000 and enjoyed regularly using a new boat that he had acquired. Mr Kahler had spent three or four weekends in the late 1980s on shooting trips with the deceased and had introduced him to firearms. He taught the deceased many safety aspects of firearms, and he had observed him handling firearms safely and with respect.

132 Steven Colvill, who had been a very good friend of the deceased since childhood, spent some time with Mr Brockhurst on the weekend before his death. Mr Colvill gave evidence that Mr Brockhurst told him that he felt "like the King of the world" and that he was happy about purchasing the new business. They had discussed suicide when it came up on the news. The deceased always said that suicide was "gutless".

133 The deceased's widow, sister and most of his friends were unaware of any resumption of the relationship between Mr Brockhurst and the appellant's daughter after the former had returned to his wife in 1996.

134 An entry in the back of the deceased's diary read:

> "Tell emp I'm not here from 30 June. They ask moving on to other interests. If they ask can they come, look in paper. Tell L.S. where apply

> to liquidate. I am concerned about future of company and I was MD. Won't be there."

135 Bruce Gatt, who was a friend of the deceased, spoke to him on 21 June 2000 and asked whether he had work available for him. The deceased told him that he had something in mind and would speak to him on the following Friday.

136 I have not referred to all of the witnesses, who were numerous, but what I have summarized is sufficient to convey the substance and flavour of the evidence on both sides.

The trial judge's summing up

137 Before he commenced his summing up the trial judge heard argument on some of the matters he might include in it. After telling the parties what he proposed to say about extraordinary emergency, he asked whether there was anything else he should put to the jury. It is necessary to set out what ensued:

> "[COUNSEL FOR THE ACCUSED]: Well, there is one further thing I would submit that should be added to that and that is section 23, your Honour, because you have the evidence of Dr Vallati.
>
> The evidence of Dr Vallati is when the gun is struck in a certain location it can send up a vibration, the sear mechanism was worn, and that the vibration he found on being struck in a certain position could let go.
>
> Now, my client was unable to say precisely where he struck the rifle with his right hand, but, nevertheless, he said he struggled with his right hand in that general area, if I can put it that way. That is my phrase, not his, and so in my submission that raises as a matter of fact for the jury's determination whether perhaps his strike – his grabbing of the gun and the position which his right hand struck the gun may have, and whether they can be satisfied beyond reasonable doubt – sorry, whether the Crown has excluded beyond that that the rifle accidentally discharged at that point of time. So, I'm agreeing with your Honour's general proposition, but I'm saying this further proposition does arise on the evidence.
>
> HIS HONOUR: I thought of that possible line of analysis, but it seemed to me section 23 is more directed at an intentional act with an accidental event. The proper characterisation of your client's account, I think, is one of extraordinary emergency followed by an instinctive ---
>
> [COUNSEL FOR THE ACCUSED]: Grabbing for the gun.
>
> HIS HONOUR: --- action to grab the gun, and I just wonder whether that – what you're suggesting tends to muddy the waters a little. As part of

that proposition, you have got to remember I said this, that it is not possible from the accused's account to conclude that his action caused the rifle to fire, but even if it did he's not guilty because he lacks the intention.

[COUNSEL FOR THE ACCUSED]: Because he would have no intention.

HIS HONOUR: He had no intention to harm the deceased. Isn't that sufficient?

[COUNSEL FOR THE ACCUSED]: Your Honour, perhaps as one view of the matter, but, nevertheless, the evidence of Dr Vallati is that it is there and could explain the discharge of the rifle upon being struck and as a – because of that evidence, that is a factual matter which I submit should be left with the jury because it is an additional factual matter, and in the normal way it is for the Crown to exclude that beyond reasonable doubt.

HIS HONOUR: So – well, of course, I would be telling the jury the Crown would have to exclude the explanation that I've ---

[COUNSEL FOR THE ACCUSED]: Yes, I understand that, your Honour.

HIS HONOUR: --- proposed beyond reasonable doubt as well.

[COUNSEL FOR THE ACCUSED]: Yes. I expect your Honour would be telling the jury that, but I still would submit that the evidence of Dr Vallati does raise this further factual point which as a factual point is a matter for the jury's determination.

HIS HONOUR: So that would then require the usual directions on section 23, you say?

[COUNSEL FOR THE ACCUSED]: Yes, your Honour. You see, your Honour, I don't quibble at all with the proposition your Honour read to us, but there is this additional factual situation. You see, it is quite correct, in my submission, for your Honour to tell the jury they'd have to be satisfied beyond reasonable doubt they could exclude that his grabbing of the gun was in response to the extraordinary emergency and to get the gun from him and, therefore, no intention. But there is still that additional fact that according to the evidence of Dr Vallati, and it is for the jury to determine that additional fact, it could have discharged on that impact.

In my submission, your Honour, all three sections should be left with the jury for those reasons.

HIS HONOUR: What, when you say 'all three sections, what ---'

[COUNSEL FOR THE ACCUSED]: Well, section 24, your Honour, is available because the jury may conclude that Murray Brockhurst was not going to commit suicide.

HIS HONOUR: I hadn't included that in my analysis.

[COUNSEL FOR THE ACCUSED]: Well, I thought your Honour was contemplating it because what I'm saying is the jury may conclude on the evidence that Murray Brockhurst was not intending to commit suicide.

HIS HONOUR: Yes.

[COUNSEL FOR THE ACCUSED]: But that still leaves open to the jury – for the jury's consideration, sorry, your Honour, that my client honestly and reasonably, albeit mistakenly, thought he was, and that section 24 belief in turn brings section 25 into play. So it is a two-fold thing.

Section 25 could arise on my client's own evidence, but the secondary factor is that if the jury did conclude that Murray – as a matter of fact that Murray Brockhurst was not intending to shoot himself, nevertheless my client honestly and reasonably, albeit mistakenly, believed that he was and therefore acted in an extraordinary emergency.

HIS HONOUR: Yes, all right. Mr ---

[COUNSEL FOR THE ACCUSED]: I appreciate your Honour's way of putting it is somewhat simpler, but nevertheless these other two sections, I submit, are available. It would be, of course, your Honour, a matter of if you came to the conclusion as a matter of fact that Murray Brockhurst was intending to kill himself, then section 24 doesn't apply. But if they found the other fact that he was not ---

HIS HONOUR: I think extraordinary emergency would arise whether he was or he wasn't.

[COUNSEL FOR THE ACCUSED]: That is so, but it is linked to section 24, I would submit.

HIS HONOUR: Well, may be, but it was an extraordinary emergency as it appeared to your client.

[COUNSEL FOR THE ACCUSED]: As it appeared to my client, yes.

HIS HONOUR: Well, perhaps you are right about that. I just have some doubts about the necessity to direct on accident."

138 After hearing submissions from the prosecution his Honour informed the parties that he would not put accident to the jury.

139 His Honour, in his summing up, explained to the jury that intention to kill or cause grievous bodily harm was an essential element of the crime of murder:

> "Our law says that any person who causes the death [of] another, directly or indirectly, by any means whatever, is deemed to have killed that other person. The accused person's act must be a substantial or significant cause of, or must contribute significantly to, the death of the deceased.
>
> A person who unlawfully kills another intending to cause the death of the person killed, or intending to do the person killed some grievous bodily harm, is guilty of murder. ... You must decide in this case, having carefully considered all of the evidence, whether you are satisfied beyond reasonable doubt that the accused had such an intention at the relevant time, because the Crown case here is that the accused unlawfully killed the deceased intending to cause his death or at least intending to do him some grievous bodily harm. You may think that it is obvious if one were to shoot another in the forehead the inference could be drawn of the intention to cause death.
>
> The term 'grievous bodily harm' means any bodily injury of such a nature that, if left untreated, would endanger, or be likely to endanger, life or cause, or be likely to cause, permanent injury to health, whether or not treatment is or could have been available."

140 The trial judge continued:

> "I come now to a feature of the case which arises on the accused's evidence. It is that of sudden or extraordinary emergency.
>
> Under our law a person is not criminally responsible for an act done under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary power of self control could not reasonably be expected to act otherwise.
>
> On the accused's account he was faced with such a sudden or extraordinary emergency. He had no time to think. He reacted to it instinctively as an ordinary person would seeing a friend on the point of committing suicide. He tried to save the deceased by getting the rifle away from him. It is not possible from the accused's account to say that the accused's action caused the rifle to discharge, but even if it did the accused would not be guilty of murder on his account because he acted in a circumstance of sudden or extraordinary emergency and for that reason would not be criminally responsible for the deceased's death.

> But, further, his intention was not to cause the death of the deceased or to do him some grievous bodily harm but rather to save him.
>
> Even if the accused was mistaken in thinking the deceased was on the point of committing suicide he can rely on the explanation of sudden or extraordinary emergency if his mistake was honest and reasonable.
>
> That is because under our law a person who does an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act to any greater extent [than] if the real state of things had been such as the person believed to exist. A person who does an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act to any greater extent than if the real state of things had been such as the person believed to exist.
>
> The provisions of our law concerning emergencies and mistakes of fact provide excuses from criminal responsibility. There is no onus upon an accused person to prove those excuses. The Crown must exclude their application to the case beyond reasonable doubt."

141 His Honour then carefully summarized the facts upon which each of the prosecution and the appellant relied for their respective cases. For example, he referred to this point made by the latter in counsel's address to the jury:

> "[Counsel for the appellant] submitted that the scientific evidence bears out the accused's evidence, and submitted to you that it was inconceivable that the deceased should have met his end as the Crown has argued. Why wouldn't the deceased have backed away? How is it that the accused was able to come into the room, place the muzzle of the rifle in contact with the deceased's forehead and shoot without the deceased's doing something – doing something to defend himself? Remember that the deceased was a large man, fit and alert, it appears."

142 After he concluded his summing up, the trial judge invited requests for redirections if any. The appellant did not seek any redirection with respect to the possibility of a verdict of manslaughter. This is why the case was left to the jury as a case of murder or nothing. Indeed, it could hardly be otherwise in the light of the prosecution's assertion of an intentional firing of the rifle by the appellant, and the appellant's account of the circumstances of the death, though at one stage the former had suggested that an alternative verdict of manslaughter might be open.

The appeal to the Court of Appeal

143 The appellant unsuccessfully appealed to the Court of Appeal (McMurdo P dissenting in part, Davies JA and Chesterman J). The grounds of appeal were as follows:

> "1. The verdict is unsafe and unsatisfactory;
>
> 2. His Honour, the learned trial Judge, erred in ruling that s 23 of the Criminal Code was not available as a defence to the Appellant and erred in failing to direct the jury that on the evidence the prosecution had to satisfy the jury beyond reasonable doubt that the operation of s 23 had been excluded;
>
> 3. His Honour, the learned trial Judge, erred in bringing to the notice and attention of the jury during his summing up the fact that the Appellant had previously been tried on this indictment."

144 The appellant does not appear to have pressed an argument in the Court of Appeal that the trial judge had erred in not informing the jury that the prosecution was obliged to negative accident even though there is reference to it in the reasons of the Court.

145 In her partially dissenting judgment, McMurdo P said this[113]:

> "There was here slight but sufficient evidence to raise the defence of accident, (s 23, *Criminal Code*), beyond that covered by the appellant's account of extraordinary emergency. This evidence came from Dr Vallati; the gun may have discharged by a mere hit with the hand. A consideration of the defence of accident on this evidence would then necessitate a consideration of the duty on persons in charge of dangerous things, (s 289 *Criminal Code*), leaving open the possibility of a verdict of guilty of manslaughter. Indeed, defence counsel at trial made brief submissions that the defence of accident should be left to the jury.
>
> For the reasons given earlier, the jury may well have completely rejected the appellant's explanation to police and his evidence in court, and the evidence of motive supporting an intention to kill or do grievous bodily harm was not strong. The remaining evidence gives no explanation as to what happened between the deceased and the appellant immediately prior to the shooting. Having excluded the appellant's account and evidence of any strong motive to kill, if the jury understood there was an alternative verdict of not guilty to murder but guilty of manslaughter, they

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113 [2004] QCA 99 at [68]-[70].

may not have been satisfied that the appellant deliberately shot the deceased with an intention to kill or do grievous bodily harm. It was open to a reasonable jury on the evidence to have found that there was a reasonable possibility, not excluded beyond reasonable doubt, that during the course of an argument over their business arrangements, the appellant had hold of his loaded gun, which may well have been prone to unsafe discharge when hit with the hand, and it discharged, without intention on his part, killing the deceased. A reasonable jury could well determine that such conduct amounted to manslaughter through criminal negligence. Any subsequent lack of candour by the appellant would be equally consistent with this scenario, manslaughter, as with murder.

It is no answer to say that the jury verdict means they rejected Dr Vallati's evidence and were satisfied that the appellant acted with an intention to kill or do grievous bodily harm. The jury's reasoning process may well have been quite different had accident, qualified by s 289 *Criminal Code* and the alternative verdict of manslaughter, been left for their consideration. Although this required a more complex summing up of these additional issues, the appellant was entitled to have placed before the jury this alternative case, which, although not his account, was open on the evidence. The learned primary judge's failure to leave to the jury the possibility of a verdict of guilty or not guilty to manslaughter and an explanation of the manner in which such a verdict could be reached, unintentionally deprived the appellant of a chance of an acquittal. There should be a retrial so that these issues can be considered by a properly instructed jury." (Footnotes omitted)

146 Davies JA was of a different opinion from the President. His Honour said that no occasion had arisen for a direction that manslaughter was available as an alternative verdict under s 289 of the *Criminal Code*. His Honour said[114]:

"On the appellant's evidence and statements the defence of accident was clearly open; that the gun discharged independently of the exercise of his will. On the prosecution circumstantial evidence a verdict of murder was open. On neither, in my opinion, was manslaughter open.

When asked what kind of a grip he got of the gun, the appellant answered:

'Certainly not enough to hold on to the gun, because as Murray went over he's pulled the gun over with him, but I lunged out – I was very quick – I mean, I was I lunged out and I would have whacked into the gun and tried to grab it.'

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114 *R v Stevens* [2004] QCA 99 at [76]-[83].

He made similar statements in his record of interview and in an unsigned statement.

In view of the learned President's conclusion, on the basis of the point which her Honour raised in argument, that the learned trial judge should have directed on manslaughter by reason of s 289 of the *Criminal Code*, it should be noted that there was no possible basis on the appellant's evidence or statements to police for a contention that the appellant was at any relevant time in charge of or in control of the gun within the meaning of s 289. That section provides:

> 'It is the duty of every person who has in the person's charge or under the person's control anything ... 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.'

In my opinion that section can have application only where, **on the evidence**, there is a possible basis for saying that immediately before the gun discharged it was in the appellant's charge or under his control and that it discharged, killing the deceased because of the appellant's negligence. I have already pointed out, that on the appellant's case, there was no evidence on which the first of such inferences could be drawn.

It was possible to infer from the circumstantial evidence that the appellant entered the deceased's office in charge of and in control of the gun. But there was no evidence from which it could have been inferred that, whilst in his charge and control, the gun was operated negligently. To use Dr Vallati's evidence, that the gun could discharge if hit, to reach such a conclusion is no more than speculation. There was no evidence, direct or circumstantial from which negligent operation of the gun by the appellant could have been inferred.

This case may be distinguished from a case such as *Griffiths v The Queen*[115]. In that case the defence of accident was raised in the evidence. It was in one of the appellant's confessional statements upon which the prosecution relied to prove that the appellant shot the deceased. Moreover *Griffiths* was not merely a case of failing to direct on a possible defence

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115 *Griffiths v The Queen* (1994) 69 ALJR 77 at 79, 81; 125 ALR 545 at 547-548, 550.

but of effectively withdrawing from the jury an issue arising under s 23 of the *Criminal Code*[116].

Nor do I think that this was a case in which, on some basis other than s 289, a direction should have been given that manslaughter was a possible verdict. On the appellant's case based on his evidence and statements, he did not, except by an act independently of his will, cause the gun to discharge. On the prosecution's circumstantial case he caused the gun to discharge with the intention of killing the deceased. There was no evidence upon which, on any rational basis, it could have been concluded that the appellant intentionally discharged the gun but not with the intention of killing the deceased or causing him grievous bodily harm.

For those reasons I disagree with her Honour's conclusion that, because of the learned trial judge's failure to direct the jury on a possible verdict of manslaughter, the trial miscarried. I would, accordingly, dismiss the appeal." (Original emphasis)

147 Chesterman J in giving his opinion that the appeal should be dismissed said this[117]:

"Counsel for the accused and for the Crown at the trial agreed that the case was one of murder or nothing. They both submitted that the alternative verdict of manslaughter should not be put to the jury. The learned trial judge's summary of the submissions was that the prosecution case was that the appellant unlawfully killed the deceased intending to kill him while the case for the accused was that the deceased either committed suicide by pulling the trigger himself or died in circumstances in which the appellant could not be criminally responsible for the death. That result might have followed from the operation of s 23(1)(a) of the *Criminal Code* but that section did not figure in the summing up. I agree with Davies JA that on the account given by the appellant the section was applicable, and the jury could well have thought that the discharge of the gun was something which the appellant caused, but independently of the exercise of his will.

The charge which the trial judge gave to the jury was more favourable to the accused. It was, in essence, that if the evidence of the appellant left them with a reasonable doubt that the death had occurred in the circumstances described by the appellant, he would not be guilty of murder and must be acquitted."

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116 *Griffiths v The Queen* (1994) 69 ALJR 77 at 79; 125 ALR 545 at 547-548.

117 [2004] QCA 99 at [92]-[93].

148 Later his Honour said this[118]:

> "The jury was thus instructed in express terms that:
>
> (a) They should acquit unless satisfied beyond reasonable doubt that the appellant fired the gun intending to kill the deceased.
>
> (b) That if they accepted the appellant's evidence, or by it entertained a reasonable doubt that the death occurred in the circumstances described by the appellant, they must acquit because the appellant would not be criminally responsible for the death.
>
> This approach was more favourable to the appellant than leaving open the possibility that the appellant had caused the deceased's death by discharging the rifle in circumstances where the discharge was not his willed act.
>
> It must follow from the guilty verdict that the jury disbelieved the appellant and was satisfied beyond reasonable doubt that he intentionally killed the deceased. Such a verdict in the circumstances I have described is inconsistent with, and indeed incompatible with, the possibility that the appellant negligently handled the rifle causing its discharge unintentionally killing the deceased."

The appeal to this Court

149 The appellant's principal submission to this Court is that the evidence did raise a defence of accident which it was for the prosecution to negative. The evidence to which the appellant points is in two categories. His statements to the ambulance service on the telephone in which he used the word "accident", and his account to the police officers of the circumstances of the discharge of the rifle, constitute the first. The second is the evidence of Dr Vallati which I summarized earlier. He makes the point that all members of the Court of Appeal found that the evidence did raise such a possibility[119] and that he had sought a direction on it which was refused. He further submits that the reasons of the judges of the Court of Appeal provide neither explanation nor justification for the trial judge's refusal. The defence of accident in terms of s 23(1) was raised on

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118 [2004] QCA 99 at [96]-[97].

119 [2004] QCA 99 at [68] per McMurdo P, [76] per Davies JA and [92] per Chesterman J.

this evidence. It was available therefore as a defence to the charge of murder. The jury should have been instructed that the appellant could not be convicted of it unless the prosecution had satisfied the jury beyond reasonable doubt that the operation of each limb of s 23(1) had been excluded[120].

150 The appellant consistently with his stance in the Court of Appeal makes no submission in this Court that the trial judge should have left manslaughter as an alternative verdict to the jury.

151 The respondent submits that in the case of a homicide, the "event" is the death[121]. A claim that a death occurred by accident will be defeated, as here, by proof that it was either intended, foreseen or reasonably foreseeable[122].

152 Further, the respondent submitted, the critical issue at trial was whether the appellant shot the deceased intending to shoot him, or in an unsuccessful effort to prevent him from shooting himself.

153 It is correct, as the respondent also submits, that the trial judge did subsume a possible defence of accident into an excuse of extraordinary emergency and mistake under ss 24 and 25 of the *Criminal Code*. But what is not correct is the next submission of the respondent, that the prospects of the appellant could not then have been improved by what was contended to be a formal reference only to unwilled acts or accident. The trial judge's approach, it was submitted, was consistent with the approach approved by this Court in *Murray v The Queen*[123].

The disposition of the appeal

154 In almost every respect the trial judge's summing up was favourable to the appellant. It is clear that his Honour did intend, and did direct the jury of a possible defence under s 25 of the *Criminal Code*, even though he made no express reference to the likely reactions of an ordinary person confronted with the situation in which the appellant claims to have found himself, of which that section speaks. This was no doubt because on the facts as recounted by the appellant, it was easily imaginable, indeed rather likely, that an ordinary person

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120 *R v Mullen* (1938) 59 CLR 124 at 130, 134, 138.

121 *Murray v The Queen* (2002) 211 CLR 193; *Ugle v The Queen* (2002) 211 CLR 171 at 178 [25].

122 *The Queen v Van Den Bemd* (1994) 179 CLR 137.

123 (2002) 211 CLR 193 at 196, 201 [4]-[5], [20]-[21] per Gaudron J, 208-209, 211-212 [43]-[45], [54]-[55] per Gummow and Hayne JJ.

would try, as the appellant did, to prevent Mr Brockhurst from discharging the firearm and injuring or killing himself. His Honour was at that stage of his summing up dealing with the appellant's case, and, on the facts of it, and the inferences available from them, a reference to the reaction of a notional ordinary person was not necessary.

155 The characterization of an event or a series of events as an accident has notoriously given rise to difficulties in the law. This Court recently grappled with some of these in a civil case[124] in which the concept had to be understood in the setting of its use in an international instrument. The Chief Justice and Heydon J in their judgment in this case have touched upon some of the criminal cases in which the meaning of "accident" has been considered. One of these is *Kaporonovski v The Queen*[125], in which Gibbs J said that it was now settled that an event can be regarded as having occurred by accident if it was not in fact intended or foreseen by the accused, and would not reasonably have been foreseen by an ordinary person.

156 The problem about that is, as I recently pointed out in *Koehler v Cerebos*[126], that it is possible with enough imagination and pessimism for any ordinary person to foresee the occurrence of practically any event in the range of possible events in human affairs. On the appellant's version, he neither intended nor foresaw the death of Mr Brockhurst when he instinctively lunged for the rifle. With more time to think before acting, and with a knowledge that the rifle might more easily discharge because of the wear on the trigger and its propensity to do so when struck, bumped or dropped, the appellant, and indeed the notional ordinary person might well foresee a real possibility of death. It is the use of the word "reasonably" which qualifies the concept of foreseeability in this context. It requires regard to be had to all of the surrounding circumstances, for the tribunal of fact to ask itself whether, in the light of them, an ordinary person, acting and thinking reasonably, and with time to do so, would not have foreseen the death, or any real possibility of it. It is important to notice and distinguish the nature and quality of the acts leading to, indeed, causing the grievous bodily harm inflicted by the appellant in *Kaporonovski* on his victim from those preceding the fatality here. In *Kaporonovski* the preceding act was the forcing of a glass against the latter's eye in order to hurt him. The argument of the appellant in that case was that the consequential cutting of the eye occurred independently of the appellant's will, or by accident. As Gibbs J said it was impossible to say that in those circumstances no ordinary person could

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124 *Povey v Qantas Airways Ltd* (2005) 79 ALJR 1215; 216 ALR 427.

125 (1973) 133 CLR 209.

126 (2005) 79 ALJR 845 at 854 [54]; 214 ALR 355 at 367-368.

reasonably have foreseen that harm, grievous bodily harm as it turned out to be, to the victim could result[127]. It was never disputed that the forcing of the glass was a willed act intended to cause some harm to the victim there. The particular facts and circumstances determine the cases. It is in the light of them that the actions of an accused, and the responses of the ordinary rational person are to be judged and assessed. The fact that the occurrence of an event as a consequence of an act or series of acts, might seem in hindsight to have been a real possibility, does not mean that an accused must always to be taken as having foreseen it, or that an ordinary person in the same circumstances would *reasonably* have foreseen it. I do not think that what Gibbs J said as to the settled state of the law on s 23 of the *Criminal Code* necessarily forecloses a right to a direction on the second limb of it in a case such as this one.

157 That does not of itself mean that without more the appellant was entitled to it. There are the further questions whether the trial judge's otherwise impeccably fair directions obviated the need for it, either by subsuming all possibly relevant issues within it, or otherwise.

158 I have found this question a difficult one. Directions to juries are directions in respect of the evidence and the parties' cases as they emerge at trial. In this case the trial judge's directions were not only admirably brief, but also lucid. What his Honour said of extraordinary emergency was helpful to the appellant. But in the circumstances, I nonetheless think that his Honour should have given a direction of the kind sought by the appellant's counsel at the trial. His Honour's willingness to direct on the possibility of the several different defences to which the Chief Justice and Heydon J in this Court refer in their reasons, was orthodox and correct. The fact however that one of those defences might be stronger, indeed significantly so, does not mean that directions on the others may be dispensed with. Nor do I think it is an answer in this case to say that one defence, or a direction in respect of it, subsumed another to the extent that the latter needed not to be mentioned or put to the jury in appropriate terms. Different people may have different perceptions of facts. Certain words, or language, or expressions of concepts, may provoke different responses in different people. It may be that some might be more influenced by a reference to an accident than to an extraordinary emergency. The fact that "accident" as used in the *Criminal Code* may require judicial explanation does not deprive the word of its natural, sometimes graphic connotations of an unhappy, unintended, and unexpected adverse event.

159 The appellant did describe the death as an "accident" to the ambulance service. Evidence of that was received and referred to in the appellant's counsel's address to the jury. "Accident" may admit of many different shades of meaning,

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127 (1973) 133 CLR 209 at 232.

but it is part of the unadorned language of the second limb of s 23 of the *Criminal Code*. The other particular evidence suggestive of accident is the evidence of Dr Vallati of the propensity for the rifle to discharge in certain circumstances and of the sensitivity of its trigger.

160 The circumstances leading up to the discharge of the rifle, its discharge and Mr Brockhurst's death were capable of several characterizations: extraordinary emergency; a reasonable perception, whether mistaken or not, of an extraordinary emergency; an act, or acts, the instinctive lunging for the rifle, the making of contact with it, and its discharge, independent of the exercise of the appellant's will, an entirely unintended act, or, an accident. The appellant was entitled to have the last of these, with appropriate judicial elaboration, put to the jury. What was said by Gibbs, Stephen and Mason JJ in *Barca v The Queen*[128] is also of relevance to this case:

> "[A]lthough a jury cannot be asked to engage in groundless speculation it is not incumbent on the defence either to establish that some inference other than that of guilt should reasonably be drawn from the evidence or to prove particular facts that would tend to support such an inference. If the jury think that the evidence as a whole is susceptible of a reasonable explanation other than that the accused committed the crime charged the accused is entitled to be acquitted."

Having regard to what their Honours said in *Barca* and the matters to which I have referred, his Honour in this case might have said something to this effect to the jury:

> "Another possible way of viewing Mr Brockhurst's death is as an event that occurred by accident. 'Accident' does have a particular meaning however in the criminal law of this State. An event, here the death of Mr Brockhurst, could only be regarded as an accident if the accused neither intended it to happen nor foresaw that it could happen, and if an ordinary person in his position at the time would not reasonably have foreseen that it could happen. There is evidence before you which raises the possibility of accident you may think raises accident as a reasonable explanation of Mr Brockhurst's death. The accused's account of what happened, which involved little or no time for him to act other than instinctively and suddenly, his description of the events as an accident to the ambulance officer, Dr Vallati's evidence that the rifle could discharge in certain circumstances of which these could be an instance, and the evidence that the trigger was worn and, because of that could more readily operate, constitute part of that evidence. It also included the accused's statement to

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128 (1975) 133 CLR 82 at 105.

> the ambulance service that he was 'going to call it an accident for the moment'; the expert evidence that striking the rifle in a 'karate-chop style' caused it to discharge once in five times; the expert evidence that 'energy applied to one end of the rifle could transfer to the other end through vibration, allowing the sear to disengage and the gun to discharge, and the friendly relationship between the two men. That evidence may also raise the possibility that neither the accused nor an ordinary person could reasonably have foreseen that the fatal rifle shot would not have occurred in the circumstances. Even if you reject the accused's accounts that he gave to the police and in the witness box, you could find that these additional matters made accident a reasonable explanation of the death.
>
> This should also be said. The accused is under no obligation to prove any of these matters. Before you can convict, you must be satisfied by the prosecution on whom the onus lies, beyond reasonable doubt, that the death was not an accident, that is, not an event which occurred as a result of an unintended and unforeseen act or acts on the part of the accused; and that it would not have been reasonably foreseen by an ordinary person in his position.
>
> Remember too, that although you cannot engage in groundless speculation, it is not necessary for an accused in order to be acquitted, to establish any facts, matters or inferences from them. You must acquit him if you think that, on the evidence as a whole, accident in the sense I have explained is a reasonable explanation for the death of Mr Brockhurst. As I told you earlier, you must be satisfied beyond reasonable doubt that the evidence is inconsistent with any rational conclusion other than the guilt of the accused. And you could not be satisfied beyond reasonable doubt of his guilt if you think that the evidence on the whole does not negate beyond reasonable doubt accident as a reasonable explanation for Mr Brockhurst's death."

161 That in my opinion would have sufficed. I do not think to have given such a direction would have led to an excursion into s 289 of the Code, and the need for a direction as to an alternative verdict of manslaughter. It was not the prosecution's case as it finally went to the jury that any negligence was involved. It was the intentional crime of murder or nothing, and the defence was content with that.

162 The respondent submits that even if such a direction should have been given there was no substantial miscarriage of justice sufficient to justify the quashing of the conviction. I am unable to agree. True it is, the case was a relatively strong circumstantial one but it was not without its perplexities and the evidence left many unanswered questions. The jury in an earlier trial were unable to reach a verdict. Those matters are troubling. But of more significance are these: the particular evidence of the matters to which I have referred being

capable of being characterized as an accident, the appellant's rejected application for a direction to that effect, and the need for the jury to have been told that the prosecution had a continuing onus to negative that the death had relevantly been an accident. They require in my opinion that the verdict of guilty be quashed, and a new trial ordered. I cannot be satisfied that the appellant has not missed a chance of an acquittal by reason of the absence of a direction of the kind that I have suggested.

1. Appeal allowed.

2. Set aside order 2 made by the Court of Appeal of the Supreme Court of Queensland on 6 April 2004 and in lieu thereof order that the appeal against conviction is allowed.

3. That the conviction is quashed and a new trial ordered.