

SUPREME COURT OF QUEENSLAND

CITATION: *R v Speedy* [2017] QCA 222

PARTIES: **R**
v
SPEEDY, Robert George
(appellant)

FILE NO/S: CA No 270 of 2015
SC No 747 of 2014

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: Supreme Court at Brisbane – Date of Conviction: 22 October 2015 (Ann Lyons J)

DELIVERED ON: 6 October 2017

DELIVERED AT: Brisbane

HEARING DATE: 7 March 2017

JUDGES: Fraser and McMurdo JJA and Dalton J

ORDER: **Appeal against conviction is dismissed.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted of attempted murder – where the appellant and his co-offender carried out armed robberies at a tavern – where police officers tracked the appellant and the co-offender to an acreage property – where the appellant fire multiple shots from his firearm in darkness towards a police officer, one of which hit the police officer – where a sample of the appellant’s blood taken shortly after the events contained drugs, including methylamphetamine and alprazolam – whether upon the whole of the evidence it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of attempted murder

Criminal Code (Qld), s 668E(1)

R v Clapham [\[2017\] QCA 99](#), cited

COUNSEL: G M McGuire, with K E McMahon, for the appellant
V A Loury QC for the respondent

SOLICITORS: Guest Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

- [1] **FRASER JA:** The appellant was charged on indictment with attempted murder (count 1), an alternative charge of unlawful wounding with intent to prevent his lawful arrest (count 2), armed robbery in company with personal violence (count 3), and two counts of armed robbery (counts 4 and 5). The appellant’s plea of guilty at the beginning of his trial to the alternative charge of wounding with intent to prevent his lawful arrest in count 2 was not accepted by the Crown in discharge of count 1 on the indictment. The appellant pleaded guilty to counts 3, 4, and 5.
- [2] The evidence in the Crown case at trial established that, after the appellant and his co-offender carried out the armed robberies at a tavern charged in counts 3, 4, and 5, police officers tracked them to an acreage property. Sergeant Hamrey called out a command and the appellant fired a .22 calibre rifle six times. One of the projectiles hit Sergeant Hamrey, travelling through his cheek and exiting behind his left ear. The only issue at the trial was whether the appellant had the intention to kill when he fired the rifle.
- [3] The appellant appeals against his conviction of attempted murder upon the ground that the guilty verdict is “unsafe and unsatisfactory”. The argument proceeded on the footing that this contention invoked the ground of appeal in s 668E(1) of the *Criminal Code*, “that the verdict of the jury should be set aside on the ground that is unreasonable, or can not be supported having regard to the evidence”. The principles applicable to this ground were summarised in *R v Clapham*:¹

“The principles to be applied in determining whether a verdict of a jury is unreasonable, or cannot be supported having regard to the evidence, are collected in *SKA v The Queen*. The question is not whether there is as a matter of law evidence to support the verdict. Even if there is evidence upon which a jury might convict, the conviction must be set aside if ‘it would be dangerous in all the circumstances to allow the verdict of guilty to stand’. The Court is required to make an independent assessment of the sufficiency and quality of the evidence at trial and decide whether, upon the whole of the evidence, it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence of which he was convicted. In considering this ground of appeal the ‘starting point ... is that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, and the jury has had the benefit of having seen and heard the witnesses’, but:

‘In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury’s advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred.’

In *R v Baden-Clay* the High Court emphasised that the jury is ‘the constitutional tribunal for deciding issues of fact’ and observed that, ‘the setting aside of a jury’s verdict on the ground that it is “unreasonable” ... is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal

¹ [2017] QCA 99 at [4]-[5].

which has not seen or heard the witnesses called at trial’, ‘a court of criminal appeal is not to substitute trial by an appeal court for trial by jury’, and ‘the ultimate question for the appeal court “must always be whether the [appeal] court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty”.’” (footnotes omitted)

The trial

- [4] The Crown relied upon some of the evidence about the offences committed by the appellant at the tavern as having a relevance to the appellant’s intent when he subsequently fired the rifle. It appears from the trial judge’s summing up to the jury that this evidence was relied upon particularly to exclude any doubt whether the appellant could have formed the alleged intent in light of evidence that a sample of the appellant’s blood taken shortly after the events contained drugs, including methylamphetamine and alprazolam. There was medical evidence that the former drug could affect cognitive function and a person’s perception of the environment and that it had a general effect of causing hyperactivity and hyperarousal. The latter drug could have the contrary, sedative effect. A doctor gave evidence that the influence of methylamphetamine did not affect a person’s ability to make a decision but might change the decision that person would have made if not under the influence of the drug; poor choices might be made by persons under the drug’s influence. The doctor’s evidence also included the opinion that it was difficult to determine the precise effects of the drugs taken by the appellant but observed behaviour could inform a view about the effect of the drugs.
- [5] Shortly before the robbery the appellant was seen with makeup covering his face. He was seen walking around the side of the tavern carrying a machete and wearing a wig. (Later, inside the tavern, he was also carrying a sports bag. His accomplice was then carrying a .22 calibre rifle with what some witnesses described as a silencer on the end of the barrel) The appellant and his co-offender first entered a designated smoking area outside the tavern. Two employees at the tavern, Ms Denman and Mr Douglas, and a patron, Mr Thompson, gave evidence to the effect that the appellant and the co-offender made them go inside the tavern by threatening them. The appellant was then armed with the machete and the co-offender was armed with the rifle. The co-offender told Ms Denman to go inside or he would kill her. The appellant yelled at Mr Douglas to put his hands up and go inside. When Mr Douglas asked whether that was a joke the co-offender pointed his rifle at eye level and loudly told Mr Douglas that it was not a joke. Mr Thompson’s evidence was that when the appellant approached him with a knife in his hands Mr Thompson laughed, grabbed the blade and directed it away. The appellant told him that it was serious and that this was a holdup, took Mr Thompson by the collar of shirt into the tavern, and held the knife at Mr Thompson’s chest. The three people walked inside the tavern with the armed appellant and his co-offender behind them. As they approached the entrance to the tavern, three patrons entered a car and reversed out of the carpark. The co-offender ran to the car and made the occupants get out and go inside the tavern.
- [6] Inside the tavern Mr Douglas, Ms Denman, and patrons were made to get on the ground. The appellant menaced Ms D’arcy with the machete when telling her to get on the ground, he hit Mr Elliot with the machete (described by Mr Elliot as a large hunting knife) when telling him to get on the ground, and he threatened to hurt

Ms Beaton when she told him that she did not know where the safe was. When Ms D'arcy did not respond to the appellant's question about who the manager was, the appellant put the machete to her back and pushed her hard into the office. She then called out to the on-duty manager, Mr Howson. The appellant, still holding the machete, walked into the office and threatened Mr Howson that he would cut him unless he gave the appellant the money.

- [7] There was an unusually large amount of cash that night as a result of a promotion that had been advertised. The appellant took two bags of cash from Mr Howson's desk. As a result of threats by the appellant, who was still brandishing the machete, Mr Howson opened the safe and loaded money from it into the appellant's bag. The appellant also put the contents of a till into his bag. During this time the co-offender was walking around inside the tavern holding the rifle. Ms Beaton gave evidence that she heard a voice, which must have been the appellant, saying that he had the money. The co-offender, still holding the rifle, told the people on the floor not to move. Various witnesses gave evidence that the appellant and the co-offender ran out the front entrance of the tavern.
- [8] Sergeant Hamrey arrived at the tavern with his police dog at about 1.30 am. (Ms Denman had surreptitiously called police on her mobile phone at 1.17 am) By 3.00 am Sergeant Hamrey and Senior Constable Cook had tracked the appellant and his co-offender to an acreage property. Both officers were in uniform that clearly identified them as police. After walking down the side of the house, they were in a dark area of the house's backyard where there was a shed, a tree, and a lot of vegetation. The dog gave indications of having found people.
- [9] Sergeant Hamrey gave the following evidence. When his dog gave indications of having found people, Sergeant Hamrey removed his torch, lit up the area, and saw people. He saw a flash of red, a white face, and black hair. He believed that there were two people and they were about four metres away from him. He believed that the people he saw were behind a gum tree. He could see through the gum tree, as though the trunk had split or there was a gap in it. He held the torch in his left arm bent at the elbow, with the torch sitting a little higher than his shoulder at about the same level as his chin. Sergeant Hamrey said, "armed police ... get on the fucking ground".² He started to turn back towards the shed and turned off the torch. At around the same time – Sergeant Hamrey could not say whether it was before or after he turned off his torch – he felt what proved to be the projectile fired by the appellant hit the left side of his head. Sergeant Hamrey went straight to the ground. He drew his firearm and called out to Senior Constable Cook that he had been shot. Sergeant Hamrey heard what he believed to be gunfire similar to the sound of a Glock firing. (The police were armed with Glock pistols.) He fired one shot himself, directed to the region of the gum tree, and he heard a male voice saying "You've shot me ... or don't shoot me, you've shot me, something similar to that" and that person started to cry.³ (Other evidence established that this was the co-offender.)
- [10] Sergeant Hamrey then saw a person start to move quickly across his line of sight from the area of the gum tree to the right. Sergeant Hamrey fired a shot aimed near the gum tree. The moving person was about two metres from Sergeant Hamrey. The moving person was not the person who had cried out. Sergeant Hamrey could still

² Transcript 15 October 2015, 3-23.

³ Transcript 15 October 2015, 3-26.

hear the (co-offender's) crying coming from a different area. As the moving person crossed Sergeant Hamrey's sights, Sergeant Hamrey activated a light on his Glock, illuminating the area, and aimed three shots. He believed that he hit the person running away in the back of the leg or his thigh. He did so to stop that person from escaping.

- [11] In cross-examination Sergeant Hamrey accepted that when he switched on his torch he went from darkness to a very bright light. The face of the person he saw appeared to be white. He agreed that the face appeared to be quite white. He did not agree that the whiteness may have been because the brightness of the torch was shining onto the face of the person. He did not agree that the person squinted or turned slightly as the light came onto the person's face. He was not aware of that. He agreed that in a statement he had said that he believed the person "may have suffered a night blindness from the illumination by the torch". He said that the fact that he turned his torch on and off was what made him think of that. Sergeant Hamrey adhered to his evidence that when he turned his torch on he called out, "armed police, get on the fucking ground". He was quite sure that he had not in fact said, "Don't move, show me your hands, show me your hands". When he felt the blow to his cheek he had not seen a weapon or a muzzle and he had not heard a gunshot. When he fired his first two shots the area was dark. He fired the last three shots after he had activated the light on his weapon. He had fired the three shots with the intention of stopping the person who was running away from escaping.
- [12] Senior Constable Cook gave evidence that he was close to Sergeant Hamrey as they moved through the gate into the acreage property. When Sergeant Hamrey used his torch to light up the area behind the shed and the trees, Senior Constable Cook was following Sergeant Hamrey and the dog. They had moved beyond the shed. Senior Constable Cook was a couple of metres back from the corner of the shed. Senior Constable Cook saw Sergeant Hamrey use his torch to light up the area behind the shed and behind the trees. He heard Sergeant Hamrey make the "command", "don't move, show me your hands, or words to that effect."⁴ Senior Constable Cook thought, but he was not sure, that Sergeant Hamrey had come to a stop, or close to a stop, when he used his torch to light up the area. He saw Sergeant Hamrey holding the torch in his left hand, with his left arm bent at the elbow and the torch at around or above shoulder height – somewhere between the left shoulder and perhaps the same height as Senior Constable Cook's ear. Sergeant Hamrey was facing the gum tree.
- [13] Senior Constable Cook could not remember the words that Sergeant Hamrey used when he called out. The effect of the words was, "don't move; show me your hands". Sergeant Hamrey said the words very loudly. When Sergeant Hamrey spoke, Senior Constable Cook began to draw his firearm and increased his speed as he passed the shed. Senior Constable Cook turned the corner of the shed and saw two men. One was close behind the gum tree and the other was closer to Senior Constable Cook. The man closer to Senior Constable Cook was holding a long-armed firearm and "he was pointing it in the direction of Sergeant Hamrey."⁵ The gunman was about two and a half to three metres away from Senior Constable Cook and about four to five metres away from Sergeant Hamrey.

⁴ Transcript 15 October 2015, 3-46.

⁵ Transcript 15 October 2015, 3-49.

- [14] Senior Constable Cook described the firearm held the gunman as a rifle with a shortened barrel. The man was facing directly towards Sergeant Hamrey. The barrel of the rifle was horizontal when Senior Constable Cook first saw the gunman “and then immediately, the barrel raised in an upward direction, just slightly”.⁶ Senior Constable Cook saw the barrel of the gun move from a position horizontal to the ground in an upward motion through an angle of a couple of degrees. The gunman was holding the firearm by his side, with his arm bent at the elbow, and the rifle at around or a little bit above waist height. He had his right hand around the rifle’s pistol grip. The gunman immediately fired a round at Sergeant Hamrey. Senior Constable Cook saw the muzzle flash and heard the sound of a gunshot. It was a more suppressed sound than the usual loud bang of police firearms. When Senior Constable Cook saw the flash from the muzzle of the firearm, he heard Sergeant Hamrey groan, saw the side of his face distort, and saw his hand immediately going to his cheek on the left side of his face.
- [15] Senior Constable Cook said that he did not believe that Sergeant Hamrey’s torch was activated at the time when he saw that firearm discharge. He said that in general the area was poorly lit at the time but it was all within very close range so that he was able to see. He thought that a second elapsed between when Sergeant Hamrey called out words whilst holding a torch and when the gunman’s gun discharged. When the shot was fired Senior Constable Cook was drawing his firearm. At that time the gunman was standing, looking at Sergeant Hamrey with the firearm still pointed towards the direction of Sergeant Hamrey. Senior Constable Cook drew his firearm to a position where his arms were out and raised and said, “armed police, drop the weapon, drop the weapon”, and fired a string of shots.⁷ He spoke those words in a very loud and assertive tone. The gunman was still directing the barrel of his gun at Sergeant Hamrey. When Senior Constable Cook called out his commands to the man to drop the weapon there was no movement. He continued to direct the gun barrel at Sergeant Hamrey.
- [16] Senior Constable Cook believed he fired three or four shots at the gunman. After he had fired those shots, he believed that he heard one more sound consistent with the sound of the rifle. Senior Constable Cook then lost sight of the gunman. By that time Senior Constable Cook had moved back behind the shed to obtain cover, moving backwards while still facing the gunman. When Senior Constable Cook last saw him, the gunman, was still standing but was a little hunched over. The gunman’s firearm was still pointed in the direction of Sergeant Hamrey. Senior Constable Cook lost his footing as he was moving backwards. As a result, he lost sight of the gunman. As he was trying to return to his feet, he heard a series of other gunshots. He could recall hearing one sound consistent with the gunman’s rifle and then a series of gunshots consistent with them being fired from a Glock.
- [17] After Senior Constable Cook regained his feet, he looked at Sergeant Hamrey and saw that he was lying on the ground with his left hand still to the left side of his face, and his right arm outstretched and holding his service-issued firearm. The torch attached to Sergeant Hamrey’s firearm was activated at that time. No more than some 10 seconds elapsed between the time when Senior Constable Cook first saw the man with the rifle and the last time Senior Constable Cook heard shots being fired. Senior Constable Cook subsequently went near the gum tree and saw a

⁶ Transcript 15 October 2015, 3-51.

⁷ Transcript 15 October 2015, 3-53.

man who had not been the man armed with the rifle. That man was dressed completely in black. He was later identified as the co-offender. He had a gunshot wound to his foot. The man who had held the rifle had red around his torso.

- [18] In cross-examination Senior Constable Cook said that he began to draw his firearm when he heard Sergeant Hamrey announce his presence to persons Senior Constable Cook could not then see. He was in the process of drawing it when he heard the commands and saw the torch light. Senior Constable Cook said that when he saw the muzzle flash from the firearm held by the gunman Sergeant Hamrey's torch was off. He distinctly recalled seeing the flash of the muzzle. It would not have been as bright if a light had been shining onto the weapon. Defence counsel referred to Senior Constable Cook having expressed an opinion that the gunman shot at the light and suggested that the torch light was then on. Senior Constable Cook replied that the gun was shot at where the torch light had been on. Senior Constable Cook agreed that two bullet holes found in front of the shed were from a shot he had fired and the hole in the shed was consistent with him being almost completely behind the shed when he fired. He could not recall whether he could then see the gunman. He agreed that when he was losing his footing he lost sight of the immediate area where the gunman was.
- [19] Senior Sergeant St Clair was with the other two officers when they arrived at the property. He did not go into the yard. A short time after the other officers went inside he heard somebody yelling. The first word he heard was "police", and he then heard words "similar to show us your hands or get your hands up or something to do with hands".⁸ He believed the words to have been spoken by Sergeant Hamrey but was not sure. He was some thirteen metres away. Immediately after that he heard two very muffled shots followed by two very loud shots, and subsequently there were muffled and loud shots. He heard yelling but could not hear what was said. He saw a light silhouetting Sergeant Hamrey and he saw Sergeant Hamrey fall to the ground and the light silhouetting him go to the ground or at least going down. When he first saw the light it was in the position of a torch being held at roughly upper body height. He thought the light was then between the lower chest and shoulder area. He activated his own torch when he heard the gunshots.
- [20] Officers in police cars near the property heard voices and gunshots. One of those officers, Constable Cempiel, gave evidence that he heard yelling in male voices. He could not make out what was being yelled. Immediately after the yelling he heard a gunshot followed in quick succession by two more gunshots. There was no difference in sound between the gunshot and the two further gunshots. He saw in the tree line quick flashes of white light which he believed to be muzzle flashes. After he contacted police communications to report shots had been fired, he heard two more gunshots, a short pause, and one more gunshot. There was no difference in the sound of the various gunshots. The gunshots happened within five to seven seconds. Neighbours gave evidence of having been woken by gunshots just after 3.00 am. An occupant of the property where the offence occurred gave evidence that she was woken by her dog at about 2.50 am. It was very dark. A couple of minutes after returning to bed she heard six gunshots with a little bit of time between them. There were probably three, a gap, and then three other gunshots. She heard shouting that she thought was a bit after the gunshots. Seconds after she heard that she heard a voice say, "I'm hit. I'm down" and she heard another voice

⁸ Transcript 16 October 2015, 4-17.

say "I've been shot in the foot".⁹ The period during which there were sounds probably occupied thirty seconds.

- [21] When the appellant was found in a different property he was wearing a red jumper. When asked where the gun was he said it was "next to the tree" and indicated the direction of the property where the offence occurred. He had injuries to his right hand that were consistent with him being shot in the back of the hand.¹⁰ He also had two wounds to his right leg which were consistent with a bullet passing through it, and he had a gunshot wound to his right knee. Senior Constable Cook found a rifle with a shortened stock and barrel, and a suppressor on it, in the corner near the shed and the gum tree. The chamber was empty and there were no bullets in the magazine. The appellant's DNA was found on the trigger and the cocking handle. Blood stains around the trigger guard matched the appellant's blood. The rifle had a gouge on the stock that appeared to have been caused by a projectile. The suppressor appeared to be a homemade device. Tests revealed that it reduced the sound of rifle shots to within the range that might result from a commercially manufactured silencer. A partial rifle stock found at the appellant's apartment complex was consistent with the portion of stock missing from the rifle.
- [22] Six discharged .22 calibre cartridges were found between the gum tree and the shed in the area where the rifle was found. Each of those cartridges had been ejected from the rifle. Testing on the rifle indicated that it was necessary to push the trigger to fire each shot. The breach bolt on the rifle was found in a closed position. A possible explanation for that was that six shots were fired with six bullets in the magazine and the trigger was pulled for a seventh shot but there was no bullet. A police officer with expertise in ballistics, Sergeant Clark, gave evidence that if the silencer had been placed on the gun and the gun had not been test fired, it was possible that the first shot fired through the silencer might in some way be deflected if the holes and baffles in the silencer were not lined up. A deformation found in the silencer might be consistent with a projectile having struck it as it passed through a hole.
- [23] Examination of the Glock pistols of the police officers revealed that there were five discharged cartridges and five rounds missing from Sergeant Hamrey's firearm and three discharged cartridges and three rounds missing from Senior Constable Cook's firearm. Perforations of the shed were consistent with a single bullet from one of the officer's firearms having travelled through it. No .22 calibre projectiles were found. The projectiles weigh about 40 grains. They are .22 of an inch (less than six millimetres) in diameter. The area where the events occurred was an open area although with some trees Sergeant Clark explained that such projectiles could travel up to two kilometres so that, if the projectile did not hit any intervening target nearby, there was a high likelihood it would not be discovered. A .22 calibre projectile was certainly capable of killing someone, depending on where it struck the person.
- [24] Police found a bag, the handles of which had DNA matching the appellant and DNA matching his co-offender. The bag contained \$40,766.80 in cash, a \$100 cheque, a machete, a wig, and a till. A white glove with DNA matching the appellant and DNA matching the co-offender was found in a nearby property. Part of a stocking with DNA matching the co-offender's DNA was found in the same

⁹ Transcript 16 October 2015, 4-44.

¹⁰ Transcript 19 October 2015, 5-17 (Dr Lincoln).

yard. Other parts of the stocking were found in the appellant's unit, where police also found packaging consistent with the brand of the glove. Police found a pair of white cotton gloves, with DNA matching the appellant and DNA matching the co-offender inside them, in the vicinity of the carpark at the appellant's unit.

Consideration

- [25] The appellant argued that there was no evidence of any statement from the appellant of intent to kill Sergeant Hamrey and that the evidence to the effect that the robbery appeared to have been premeditated and planned was of little assistance because of the delay between the robbery and the shooting and because the appellant did not have the rifle during the robbery. The absence of evidence of a statement by the appellant of an intent to kill is not relevant in an assessment of the strength of the circumstantial Crown case that the appellant had that intent when he fired the rifle. The evidence about the way in which the appellant behaved during the robbery at the tavern was relevant mainly to exclude any possible inference arising out of the evidence about the effect of drugs found in the appellant's blood upon his ability to form an intent to kill: this topic is discussed in [33] of these reasons.
- [26] The appellant acknowledged that it was not necessary for the prosecution to prove that the appellant had an intent to kill to the exclusion of any other intent, but the appellant argued that it was not reasonably open to the jury to find that the Crown had excluded beyond reasonable doubt that the appellant intended by firing the rifle only to escape capture. The appellant referred to various features of the evidence which were submitted to support that argument. For the following reasons that argument should not be accepted.
- [27] The appellant argued that the evidence established that Sergeant Hamrey's torch had been shone in the appellant's eyes immediately before the appellant fired the rifle. It is possible that Sergeant Hamrey's torch caused the appellant momentary night blindness, as Sergeant Hamrey speculated in the statement put to him in cross-examination, but it was reasonably open to the jury to exclude that possibility upon the evidence: Sergeant Hamrey said that the whiteness of the face of the person he saw did not result from the brightness of the torch shining on to that person's face and that person did not squint or turn slightly when the light came onto the person's face; and Senior Constable Cook gave evidence to the effect that the appellant fired his rifle after Sergeant Hamrey's torch was off and from a distance of only some metres away. Even if the appellant's vision was impaired to some extent as a result of the torch light, the jury nevertheless could accept that the appellant aimed his rifle at the place where the appellant knew Sergeant Hamrey to be with the intention of killing him.
- [28] The appellant argued that the evidence suggested the appellant did not aim the rifle in the usual way while holding it at shoulder height but rather while holding it at waist level pointing slightly upwards. The evidence that part of the rifle's stock had been removed, and the evidence about the way in which the appellant pointed the rifle, allowed the jury to conclude that the weapon as modified was designed for aiming at close quarters by holding the rifle in the way Senior Constable Cook described the appellant as holding it.
- [29] The appellant argued that the evidence about the silencer left open the hypothesis that the shot which struck Sergeant Hamrey had been deflected, so that it was not

necessarily aimed at Sergeant Hamrey. This hypothesis is based upon the evidence of Sergeant Clark that, if the silencer had not been test fired, the first shot fired through it might have been deflected. A more likely view on the evidence is that the homemade silencer would have been tested by the weapon being fired before it was taken to the tavern. In any event, in the absence of evidence that the projectile that hit Sergeant Hamrey was deflected by the silencer, the possibility of such a deflection did not preclude the jury from relying upon the evidence, including in particular the evidence of Senior Constable Cook, to find that the projectile struck Sergeant Hamrey very close to where the appellant had aimed the rifle when he discharged it.

- [30] The appellant argued that the injury to his hand could have occurred before he fired the rifle. The only evidence was to the effect that the appellant fired the first shot, the shot that hit Sergeant Hamrey, before either police officer discharged his firearm. There was no basis in the evidence for the jury to conclude that the appellant was shot in the hand before he shot Sergeant Hamrey. The injury to the appellant's hand was of no significance in relation to the question whether the appellant fired the first shot with an intent to kill.
- [31] The appellant argued that because the other five projectiles discharged from the rifle were not found in the yard, it was not possible to say where the last five shots had been aimed, or if they had been aimed at all. This argument did not preclude the jury from being satisfied beyond reasonable doubt that the appellant aimed the first shot with an intent to kill.
- [32] The appellant argued that after the appellant fired the shots he abandoned the money obtained by the earlier robbery and his co-accused. The evidence reveals, however, that the appellant abandoned his co-accused, the large sum of money, and the rifle only after he had shot Sergeant Hamrey and continued to discharge the rifle until he ran out of ammunition. Given that the unarmed appellant was faced with two armed police officers, it is unsurprising that he then decided to flee. This conduct was in no way inconsistent with the appellant having intended to kill when he fired the first shot.
- [33] The appellant argued that methylamphetamine in his system was affecting his decision making ability. It was not submitted that it was not reasonably open to the jury to be satisfied beyond reasonable doubt that when the appellant fired the rifle he was capable of holding an intent to kill. There was nothing in the appellant's conduct at the time he discharged the rifle, as described the police officers, to indicate that the appellant might have been incapable of forming that intent. The evidence of the appellant's conduct during the offences he committed at the tavern revealed that the appellant carried out those offences apparently in accordance with a pre-determined plan, including the use of threats of violence only where that was necessary to facilitate the offences, and without any sign of irrational behaviour.
- [34] The evidence established that the appellant fired the rifle. The contrary was not suggested. The presence at the scene immediately after the shooting of six cartridges ejected from the rifle used by the appellant allowed the jury to conclude that the appellant fired the rifle six times. That is so notwithstanding the unsurprising variations in the evidence of witnesses about the numbers of gunshots they heard. Upon the evidence of Sergeant Hamrey and Senior Constable Cook the jury could also find that, very shortly after Sergeant Hamrey called out a command to the appellant, the appellant fired the first of the six shots discharged from the

rifle. The conclusion seems virtually inevitable that the appellant did so at a time when he appreciated that the command was given by a police officer. That the appellant was then in the process of attempting to escape police who effectively had him and the co-offender cornered is not inconsistent with the appellant having fired the first shot with an intent to kill. The inference that the appellant aimed the rifle at Sergeant Hamrey's head could be derived from the evidence of both police officers to the effect that the first shot fired by the appellant hit Sergeant Hamrey in the face shortly after Sergeant Hamrey had illuminated his torch close to his face, together with Senior Constable Cook's evidence that he saw the man point the rifle from about waist height upwards at Sergeant Hamrey. Upon the evidence of both police officers the appellant was only some metres away from Sergeant Hamrey. The appellant must have known that the .22 rifle, was capable of causing death over that distance. The evidence of Senior Constable Cook in particular also allowed the jury to conclude that although the area was generally dark, there was sufficient visibility for the appellant to see Sergeant Hamrey quite clearly, even when Sergeant Hamrey's torch was not illuminated. The jury also could accept the evidence of Senior Constable Cook that after the appellant fired that first shot at Sergeant Hamrey, he continued to aim the rifle in the same direction despite Senior Constable Cook's command to him to drop the weapon. The appellant's conduct described by the police officers of continuing to fire the rifle after both police officers discharged their weapons provides yet further support for a conclusion by the jury that the appellant had fired the first shot from the rifle with murderous intent.

- [35] The combination of those circumstances established a strong Crown case that the appellant fired the rifle with an intent to kill. Upon the whole of the evidence it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of attempted murder.

Proposed order

- [36] I would dismiss the appeal.
- [37] **McMURDO JA:** I agree with Fraser JA.
- [38] **DALTON J:** I agree with the reasons of Fraser JA and with the proposed order.