SUPREME COURT OF QUEENSLAND

CITATION:	*R v Stevens* [2004] QCA 99
PARTIES:	**R** **v** **STEVENS, Laurie** (appellant)
FILE NO/S:	CA No 147 of 2003 SC No 189 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 April 2004
DELIVERED AT:	Brisbane
HEARING DATE:	26 November 2003
JUDGES:	McMurdo P, Davies JA and Chesterman J Separate reasons for judgment of each member of the Court, Davies JA and Chesterman J concurring as to the orders made, McMurdo P dissenting in part
ORDERS:	**1. Application for leave to amend the grounds of appeal and to adduce fresh evidence refused** **2. Appeal against conviction dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – FRESH EVIDENCE – AVAILABILITY AT TRIAL; MATERIALITY AND COGENCY – PARTICULAR CASES – MATERIALITY AND COGENCY – EVIDENCE DIRECTED TO CREDIT – where appellant sought leave to amend grounds of appeal and to adduce fresh evidence to support new ground – where fresh evidence would go only to credit of witness – whether such evidence would be admissible – whether evidence would have affected jury verdict – whether leave should be granted to allow amendment to grounds of appeal CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE EVIDENCE CIRCUMSTANTIAL – where appellant convicted of murder on basis of circumstantial evidence – where defences of extraordinary emergency and mistake of fact raised – where

verdict of guilty or not guilty of manslaughter not left open to jury – whether it was open to a reasonable jury to be satisfied beyond a reasonable doubt that appellant intended to kill deceased

CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – HOMICIDE – MURDER – PRACTICE AND PROCEDURE – ALTERNATIVE VERDICTS – GENERALLY – where appellant convicted of murder on basis of circumstantial evidence – where left to jury as a case of murder or nothing – whether learned primary judge should have left open to jury possibility of verdict of guilty or not guilty of manslaughter pursuant to s 289 *Criminal Code*

Criminal Code 1899 (Qld), s 23, s 24, s 25, s 289, s 668E(1)

Chidiac & Asfour v The Queen (1991) 171 CLR 432, cited
Gallagher v The Queen (1986) 160 CLR 392, cited
Gammage v The Queen (1969) 122 CLR 444, cited
Griffiths v The Queen (1994) 69 ALJR 77, distinguished
Jones v The Queen (1997) 191 CLR 439, cited
M v The Queen (1994) 181 CLR 487, cited
Mickelberg v The Queen (1989) 167 CLR 259, cited
Morris v The Queen (1987) 163 CLR 454, cited
Pemble v The Queen (1971) 124 CLR 107, cited
R v Main, ex parte Attorney-General [1999] QCA 148; CA No 387 of 1998, 30 April 1999, cited

COUNSEL: A J Glynn SC with N J MacGroarty for the appellant
M J Copley for the respondent

SOLICITORS: Robertson O'Gorman for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** The appellant was convicted after a fourteen day trial in the Brisbane Supreme Court on 28 April 2003 of murdering his business partner, Murray Cameron Brockhurst, on 22 June 2000 at their business premises. He appeals against his conviction.

[2] The case against the appellant has taken a slightly unusual course. A coronial inquest into the death of the deceased was conducted and at its conclusion on 15 October 2001 the presiding magistrate rejected the assisting police officer's submissions and declined to commit the appellant for trial.

[3] On 8 April 2002, the Director of Public Prosecutions presented an ex officio indictment charging the appellant with murder. He was initially tried in September 2002. The jury in that trial were discharged when they were unable to reach a verdict after some days of deliberation. The jury in this trial convicted the appellant after deliberating for less than five hours.

The application to amend the grounds of appeal and call fresh evidence

[4] The appellant seeks leave to add a further ground of appeal, namely that a miscarriage of justice has occurred in that evidence was not available to the court at trial which demonstrated that the evidence of the witness, Alysia Nicole Brockhurst, that she was "not worried about the extra $220,000" life insurance claim in respect of the death of her husband, was untrue.

[5] It is convenient to deal with this application first. Mrs Brockhurst is the widow of the deceased. She gave evidence negativing the suggestion that the deceased may have suicided. It was put to her in cross-examination that she had an interest in giving false evidence on this issue because she would not receive an additional $220,000 of the deceased's life insurance policy if he had committed suicide. She denied that she was interested in the additional life insurance but agreed she was pursuing a claim against the insurer; not because she wanted the money, but on principle.

[6] It seems that Mrs Brockhurst's claim against the insurance company for the additional life insurance was settled by mediation on 19 May 2003, less than one month after the appellant's conviction. The terms of the settlement were confidential. His Honour Judge Robin QC ordered on 21 November 2003 that the mediation agreement be opened but its contents transmitted to the Court of Appeal to enable this Court to determine who, if anyone, should be allowed access to its contents for the purposes of this appeal.

[7] Fresh evidence will be received on appeal if there is a significant or a reasonable possibility that the jury, acting reasonably, would have acquitted the appellant had the new evidence been before it at the trial: *Gallagher v The Queen*;[1] *Mickelberg v The Queen*[2] and *R v Main, ex p Attorney-General*.[3]

[8] There are two bases for not receiving this new evidence. The first is that it goes only to the credit of the witness: as Mrs Brockhurst has already denied that she was interested in pursuing her claim against the insurance company for the additional $220,000 life insurance claim for anything other than the principle, this answer cannot be gainsaid by calling contrary evidence. The new evidence is simply inadmissible.

[9] Even accepting that it was admissible, there is a further reason for refusing the application. There is no significant or reasonable possibility that it would have affected the jury verdict. The evidence was already before the jury that Mrs Brockhurst had initiated and was pursuing a claim for the $220,000 and that she would not be successful in that claim if it was found that her husband had committed suicide; she had said as much to her close friend, Ms Cartmill. The relevant parts of the pleadings in her action against the insurer were before the jury. In addition, as the wife of the deceased and the mother of his children, she would have an obvious interest in ensuring there was no finding that he committed suicide. Had the new evidence been before the jury, it is not such as to establish a significant or reasonable possibility that the jury, acting reasonably, would have acquitted the appellant because of it. It adds nothing of substance to the defence case.

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1 (1986) 160 CLR 392, 399, 402.

2 (1989) 167 CLR 259, 301-302.

3 [1999] QCA 148, CA No 387 of 1998, 30 April 1999, [16], [17].

[10] The application for leave to add this further ground of appeal and to adduce fresh evidence should be refused.

[11] Consideration of the appellant's sole remaining ground of appeal, that the verdict of guilty was unreasonable, involves an extensive review of the large body of circumstantial evidence called at the trial.

The evidence

(a) The relationship between the appellant and the deceased

[12] The appellant, a qualified saw doctor, and his wife were shareholders and directors of Active Saws Pty Ltd ("Active Saws"), which conducted a business primarily involved in the manufacture, supply and maintenance of wide band saws in the sawmilling industry. Active Saws provided them with their primary source of income. Its premises at Finsbury Street, Newmarket were owned by another family company associated with the appellant. In about 1989, the deceased, who was also a saw doctor but with a particular interest in carbide tip work, approached the appellant and they agreed to form a company, Heracorp, trading as Australian Carbide Saws ("ACS"), half-owned by Active Saws and half-owned by the deceased, performing carbide-tip work on circular saw blades. ACS also operated from the Newmarket premises and shared secretarial, telephone and accounting arrangements with Active Saws. The appellant did not charge ACS commercial rental for these items and, at the time of the deceased's death, ACS owed companies associated with the appellant a book debt of about $48,000. As a joint owner of ACS, the appellant received only about $23,500 from ACS over the years, (about $2,200 per year); the deceased received a similar amount as joint owner and in addition he and his wife received a salary of $47,500 each, company cars, superannuation contributions and bonuses making a combined package of about $134,000.

[13] A third entity involved in saw sharpening also operated from the Newmarket premises, JLM Grinding, ("JLM"). JLM specialised in sharpening instruments principally used in the printing trade and was established in about 1998 by finances provided by the deceased, Active Saws and another saw doctor, James Flanjack, who was the principal worker in JLM. JLM's annual profits were split equally in three, with JLM paying rent and administration fees to the appellant's company.

[14] The appellant was aged 46 and the deceased 32 at the time of his death; the deceased was a taller man than the appellant.

[15] Without telling the appellant, the deceased purchased a new business, Stotts Saws ("Stotts"). The purchase settled on 22 June 2000, just an hour or so before his death. Some weeks earlier, the deceased offered to purchase for $50,000 the appellant's half share in ACS and to sell for $30,000 the deceased's one-third share of JLM but nothing had been finalised.

[16] Stotts was a general saw sharpening business, including circular saw blades and small band saws but it did not involve wide band saws. It had an existing customer base and was a successful business. The deceased had no plans to expand into the wide band saw business in competition with Active Saws.

[17] Richard Galley, a friend of the deceased and his wife who had recently travelled with them to the USA, was the principal of a company, Allied Timber Products, a significant but not vital client of Active Saws for its wide band saw work and a

major client of ACS for its carbide tip work. Mr Galley knew of the deceased's purchase of Stotts, was keen to support the deceased in his new business and intended to send his carbide tip work to the deceased at Stotts but to keep his wide band saw work with the appellant. Stotts, now supervised by the deceased's widow, presently does a substantial amount of work for Mr Galley, including small band saw work, but Active Saws still does his wide band saw work.

[18] The appellant's accountant, Mr Bryant, advised the appellant that his share of ACS may be worth more than the $50,000 offered by the deceased but, because he was under pressure with many clients with the recent introduction of GST, he had been unable to value ACS, despite a number of requests from the appellant. On numerous occasions over the years Mr Bryant had advised the appellant to charge ACS a more realistic rental for its use of premises and staff; although the appellant increased charges to ACS, he never charged a full commercial rate. On 14 June, the appellant phoned him to encourage him to prepare the valuation for ACS. The next day the appellant and his wife visited his office and told him that the deceased was pressuring him for the valuation. The appellant and his wife speculated about the possibility that the deceased had bought another business and wanted to move on; the appellant seemed content to accept the offer of $50,000 made by the deceased without a proper valuation and contrary to Mr Bryant's advice. Mr Bryant also advised the appellant to consider obtaining legal advice as to whether the deceased had breached his director's duties. Mr Bryant had always found the appellant "laid back" about bad financial news. At trial, Mr Bryant estimated the value of ACS at the relevant time as between $140,000-$160,000 so that the appellant's share was worth between $70,000-$80,000.

[19] On 22 June the appellant and his wife attended a meeting with their solicitor. Mr Bryant was to have attended but as he was not present, the meeting was truncated and it seems nothing of consequence happened. Mr Bryant's book keeper saw the appellant and his wife after that meeting at about 4.10 pm when he delivered a box of documents for the valuation to Mr Bryant's office. She asked them how the meeting with the solicitor had gone. The appellant replied something to the effect that there was not much that they could do; his wife said that Mr Bryant was to have a look and see if anything could be done. The appellant looked his usual cheery, happy self.

[20] The deceased's father-in-law, Mr Peel, said the deceased told him that he was purchasing Stotts as a going concern but that if any ACS customers wished to transfer their business it was a matter for them. The deceased's widow spent some time the Sunday before the death entering new customer names and data into her computer at Stotts ready for the transition and a joint letter of introduction from Stotts and the deceased was to be sent to Stotts' clients. The appellant's conversations with Messrs Flanjack, Galley and Peel on 24 June 2000, after the death, suggested that he did not know the deceased had purchased Stotts. The appellant gave evidence to that effect and denied speculating to Mr Bryant that the deceased had bought another business.

[21] The appellant and the deceased had a cordial relationship; they socialised away from work, sometimes fishing, diving and holidaying together. Six weeks before his death, the deceased was the master of ceremonies at the wedding of one of the appellant's daughters.

(b) The circumstances of the killing

[22] The business day at the Newmarket premises ended at 4 pm and the employees had usually left by 4.05 pm. The solicitor acting for the deceased in his purchase of Stotts advised him by phone at about 4.30 pm that the contract had successfully settled. The deceased thanked the solicitor and made arrangements to come to his office the next day to sign a form for the State Revenue Office. A note was found on the deceased's desk confirming these arrangements.

[23] The deceased's wife rang the deceased at his Newmarket office at about 4.15 pm and told him the purchase had settled. He said, "Yeah, I've heard that. Isn't it great?" She could hear other voices in the background. The deceased said he had to go and added, "Honey this is the best day of my life. … This has finally come to where we wanted."

[24] At the time of that call, the deceased was in his office with Mr Flanjack and an old friend, Mr O'Brien. Mr Flanjack described a relaxed atmosphere as the three discussed matters such as a cancelled fishing trip and jet skis whilst drinking light beers. He recalled the deceased receiving one telephone call which he thought was from the deceased's wife. He left about 4.45 pm and Mr O'Brien left almost directly afterwards.

[25] Mr O'Brien said the deceased was in quite a happy mood, anticipated a busy weekend organising his new business but planned to go swimming or fishing with Mr O'Brien, depending on the weather. He recalled the deceased receiving two phone calls on the office line, one associated with work and another, shortly before he and Mr Flanjack left, to which the deceased responded crankily. The deceased's final words were, "Well, okay, I'll wait for you." He and Mr Flanjack left at about 5.00 pm.

[26] Mr Galley rang the deceased's mobile phone at about 5.00 pm but there was no answer and the call went through to a message service.

[27] The appellant left his Jindalee home at about 4.30 pm to meet with the deceased at the office to discuss his offer. The appellant's mobile telephone records show that he phoned his work premises at 4.41 pm when at Red Hill and that this call took 12 seconds.

[28] At 5.29 pm the appellant phoned the ambulance on 000 from the Newmarket 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't [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?
> The gun's on the floor."

[29] He told the operator that he had been giving the deceased mouth to mouth resuscitation and received further para-medical instructions from the operator. He later made a second call to get further instructions.

[30] Ambulance bearers arrived at the scene at 5.35 pm. One bearer detected a pulse but the other did not. They attempted to ventilate and then applied CPR to the deceased before attempting more sophisticated methods of resuscitation. They finally accepted that all their efforts were futile at 6.05 pm when they abandoned attempts to resuscitate the deceased.

[31] The appellant had blood on the back of his hands and on his shirt and smears of blood on his face, consistent with his attempts at resuscitation. He appeared distressed and sombre and to cooperate with the police in the investigation.

[32] The deceased was killed with the appellant's rifle. The appellant told police, who arrived at the scene shortly after the ambulance officers, that the rifle was kept in his office beside a filing cabinet and the ammunition was kept in the top drawer of that same cabinet. The ammunition was found in the bottom drawer of that cabinet.

[33] Scientific officer Gunthorpe examined the scene. He formed the view that the deceased had been sitting in his chair at the desk with the rifle touching the skin of his forehead when the gun discharged, causing blood to splatter onto the desk, and as he fell to the left and backwards, onto the filing cabinet. There was no sign of a struggle. The wound to the deceased's forehead was a contact or partial contact wound but the various forensic experts could not definitively 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 a partial contact wound meant there had been some small gap between the skin at the bottom of the wound and the muzzle of the gun allowing for the escape of gases which burn the skin near the wound. The larger area of burn 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 30 degrees downward from the horizontal angle. The cause of death was a .22 calibre bullet entering his brain.

[34] Ballistics expert Bennett thought the shape of the contact wound indicated that the barrel of the gun would have been at a downward angle at discharge although he later recanted that opinion after conducting further tests; he stated that powder or hot gas burns alone are not a reliable indicator of the angle of a shot. In cross-examination Bennett said 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.[4]

(c) The appellant's accounts

[35] The appellant told police in a tape-recorded interview at 7.05 pm that evening that he had arrived early, somewhere between 5.00 and 5.30 pm, for an arranged business meeting with the deceased at 5.30 pm. 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 deceased's office, the deceased was seated at his desk holding the rifle "sought [sic] 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. The deceased closed his eyes as if he was sort of clinching. The appellant was right up against the

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[4] The appellant placed considerable emphasis on this piece of Bennett's evidence but it was of questionable relevance and little, if any, weight.

desk, leant forward and grabbed the gun, which discharged. The deceased fell back. The appellant picked up the gun and put it on the desk. He tried to drag the deceased 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 the floor again. 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 the neck to raise the head. He continued mouth to mouth resuscitation for a time and he tried compressing the heart. He thought he heard a heart beat but then was unsure. He walked out of the office, returned and rang 000. The ambulance arrived very quickly.

[36] In a typewritten statement prepared by police later that night he was recorded as saying that after visiting his solicitor and accountant he dropped his wife home, mucked around a bit and then headed back to work. He got caught in traffic and missed the most direct turn off Waterworks Road to Newmarket. He got to work just after 5.00 pm. He parked behind the deceased's van. No-one else was at work except the deceased. When he returned from the toilet he saw the deceased with 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 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.
>
> … ."

[37] The appellant declined to sign this statement because he wanted to get legal advice and was unsure about a few things.

[38] The appellant gave evidence at trial largely consistent with his version to the police. He emphasised that he was upset and emotional after his experience and was unsure what he told police when they interviewed him. Because he was uncertain of some matters in the typed statement prepared by police, he did not sign it. He could not say that the gun was resting on the desk when he came into the room and he did not intend to convey that the gun was pointing straight up in the air. The rifle was first

pointing just above the deceased's hair, a little bit upwards, with the tip of the barrel just above his 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, although he was reluctant to make such a statement about someone. He had a good working relationship and personal friendship with the deceased and with his third partner, Mr Flanjack. The appellant had not been his old self since returning from his trip to the USA with Mr Galley in March 2000; he was a bit agitated and it was plain there was something bothering him; he was cranky with staff and was just not happy. He thought the deceased's offer of $30,000 for JLM was appropriate but the $50,000 offer for ACS was "a bit short of the mark". The deceased was pressuring him for a valuation from the accountant, Mr Bryant. He left his home at Jindalee at about 4.30 pm on 22 June 2000 to travel to the 5.30 pm meeting with the deceased. The traffic on Waterworks Road was heavy and because of parked cars he missed his usual turnoff into Ashgrove Avenue. He was thinking about the business and knew there was no rush; he was early for the 5.30 pm meeting. The appellant used his mobile at 4.41 pm to phone the deceased to make sure he was there and to tell him he was on his way; he made this call when he neared the intersection of Fulcher Road, near the Broncos' Leagues Club. The deceased said something like, "Yeah. Fine. I'll be here. I'll wait for you." He did not take the turn down Windsor Road from Waterworks Road to Kelvin Grove Road but instead drove through the Normanby Fiveways (where he was unable to turn because of road works), through Bowen Hills, outbound on Lutwyche Road to Newmarket Road and to Finsbury Street, taking a further 34 minutes and arriving at about 5.15 pm.

[39] The appellant also called evidence of good character from Mr Yuri Koszarycz, a senior lecturer in ethics at the Australian Catholic University who has known the appellant for 20 years and who stated that the appellant's general reputation in the community was as a highly respected family man who was not obsessive about money and was truthful.

[40] Steven Polter gave evidence that he has known the appellant for 47 years and is a close friend; the appellant is very calm and honest and he had never seen him lose his temper.

(d) Evidence about the gun

[41] On 10 November 1999 Mr Bryant arrived late for a 4 pm meeting with the deceased at the Newmarket premises. As he sat down in the deceased's office, the deceased said, "We have ways to fix people who are late." The deceased partially closed the office door and picked up a .22 rifle from behind that door, held it up 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 understood the deceased was joking and told him that he thought his conduct was stupid. The deceased put the rifle back and they continued their business meeting.

[42] The deceased visited his father-in-law, Mr Peel, a couple of weeks before his death and picked up 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 observer. Mr Peel gave his son-in-law a five minute lesson on weapon safety, instructing him not to pick up a gun without knowing it was safe and to always check the breech.

[43] The appellant gave evidence that he had not seen the rifle for 12 months prior to the death. The gun, which he inherited from his wife's uncle about 18-20 years earlier, was kept down the side of a filing cabinet in his office. It was in an awkward position and he could not get it out without using a stick; he would ask the deceased, who had long arms, to get it out for him. He had used the gun on about half a dozen occasions, shooting at the back of the shed at work with low velocity bullets. He did not notice any problems with the gun, although it was old and the extractor was damaged so that the only way to remove bullets was to flick them out with a fingernail.

[44] Mr Gatt, a previous employee of ACS, had borrowed the gun for a shooting trip in about 1994 and had used and seen others use it for target practice at the work premises using low velocity bullets. He did not notice any difficulties with the gun and was unaware that it was prone to accidental discharge.

[45] Mr Flanjack had not seen the rifle for some time before the deceased's death. He too had borrowed it for shooting trips and had seen some employees use it at work for target practice but this had not happened for years.

[46] Scientific officer Bennett examined the gun and found the trigger pressure acceptable at 1.8 kg. The gun was prone to discharge when dropped on its butt.[5] The gun passed Bennett's strike test when struck with a rubber mallet. Bennett said that it was his policy not to dismantle firearms when examining them because, in the dismantling and reassembly, a part may be put back slightly differently or a part may be damaged and not function as it did originally. The gun was subsequently examined by Sgt Neville, who performed similar tests and came to similar conclusions but noted the trigger pressure was 1.7 kg.

[47] The gun was finally examined by Dr Vallati, a private forensic ballistics expert called in the prosecution case. He found the trigger pressure varied between 1.13 kg and 1.36 kg, within the normal range for a .22 rifle of this type given its age of at least 40 years; it was a safe working pressure although import regulations require guns to have a trigger pressure of between three and a half to four kilos. He conducted drop tests and found it was liable to accidental discharge from the butt falling onto hard surfaces at 20 cm.[6] He dismantled and then reassembled the gun without finding anything of concern about its safety. He next performed the strike test with a rubber mallet; this is not a test which he finds helpful because of the number of variables. He also tested it by using his hand, karate-chop style, (instead of the mallet), to strike the gun. When struck with the hand, the rifle discharged one in five times. He struck the gun with the mallet five times and the gun did not discharge. He dismantled the gun again 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. 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 also some spring pressure in the trigger bar itself, within the woodwork of the rifle. The trigger pressure pulls the sear out of

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5 The angle of the path taken by the bullet through the brain did not suggest that the deceased's death was caused in this manner.

6 See fn 5.

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.

(e) The deceased's state of mind

[48] After the deceased married, he had an affair with the appellant's adult daughter, Susan Stevens, in 1995 and 1996. The deceased separated from his wife and lived near Ms Stevens at the Sunshine Coast for some months in 1996; the deceased asked her to marry him but she refused and he returned to his wife. Ms Stevens gave evidence that this extra-marital relationship with the deceased resumed after the birth of his son in 1996 and continued for about six months. At the time of his death the relationship was only one of friendship. The deceased continued to visit her over the years. She gave birth to a child in September 1997.[7] Their intimate relationship resumed for about six months in 1998. The deceased continued to visit her through August 1999 when she was living at Landsborough. She returned to live with her parents in August 1999. From that time until June 2000 she saw the deceased from time to time and he was always intimating that he wanted to resume the relationship. A few weeks before his death she visited the work premises and he asked her to go out with him again. He had previously told her that he was looking at purchasing Stotts.

[49] Lisa Cartmill, a friend of the deceased and his widow, said that in March or April 1999, when she commented to the appellant on how patient he was with his children, he told her that his head was always "whirring, whirring". At Christmas 1999 he was in hospital with bowel trouble which was stress related. She thought that in the six months prior to his death he "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. She understood he was talking about "the business and everything". Probably 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 he told Ms Cartmill that he still loved Susan Stevens; that he felt a person got 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.

[50] The deceased's widow gave evidence that she and the deceased had a happy relationship. He was excited about his new business plans, although he was concerned about finalising his relationship with the appellant and the coming 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 $54,000 boat and loved fishing and other outdoor activities. During and after the stressful period in their relationship when he had an affair with Ms Stevens, they attended counselling and on one occasion he severely injured his hands, punching a

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[7] There is no evidence as to the identity of the father of the child.

wall. The deceased had purchased Stotts which was on four acres of land with a house for $410,000. The deceased's father provided $300,000 on the basis that the deceased would pay it back if and when he was able although he was hoping to pay it back at a rate of $1,200 or $1,400 per month. The deceased and his wife were also borrowing $129,000 from the National Australia Bank which required the deceased and his wife to each take out additional life insurance. They also had a loan on a house at Gordon Park which they rented. The repayments totalled about $4,000 a month, although there was no need to repay the deceased's father and the rent from the Gordon Park house offset this.

[51] In 1996 the deceased spoke to his sister about his affair with Susan Stevens and on one occasion said that he could fix up his problems if he just drove off the road into a tree. She did not interpret this as a statement that he was suicidal but rather as mere words expressing frustration about his situation.

[52] The deceased's friend, Mark Kahler, shared a family barbeque with the deceased on the weekend before the death. The deceased was very excited about having his own business, house and property; he was very upbeat and confident. He was planning a fishing trip in the second half of 2000 to Fraser Island and enjoyed regularly using his new boat in Moreton Bay. He had spent three or four weekends in the late 1980s on shooting trips with the deceased and introduced him to firearms. He taught the deceased many safety aspects of firearms and he had observed him handling firearms with appropriate safety and respect.

[53] Steven Colvill had been a best mate of the deceased since childhood. He went crabbing with the deceased on the weekend before his death; the deceased had his first cold beer and said that he felt "like the King of the world". He was happy because he had got what he aimed for in purchasing Stotts. They commonly talked about suicide when it came up on the news and the deceased always said suicide was "gutless".

[54] The deceased's widow, sister and most of his friends were unaware of any resumption of the relationship between the deceased and Susan Stevens after he returned to his wife in 1996.

[55] 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."

[56] Mr Gatt, a friend of the deceased who lived nearby, spoke to him on 21 June 2000 and asked whether he had work available for him. The deceased told him to sit tight, he had something in mind, and they would speak again on the following Friday.

The prosecution and defence cases

[57] The prosecution relied at trial and on this appeal on the following circumstantial facts to support the jury's verdict. The appellant was alone with the deceased when the deceased died. The deceased was shot, whilst seated in the deceased's office, at close range with the appellant's gun and ammunition ordinarily stored in the appellant's office. The appellant's account of how the deceased came to be shot was unlikely. The appellant's words to the 000 operator were evasive. The appellant was at the premises where the deceased died for a longer period than he was

prepared to admit and had given an implausible explanation as to why he did not arrive until 5.15 pm, having earlier said he arrived just after 5.00 pm. The deceased was not suicidal or depressed and was planning many activities for his promising future; he had everything to live for. The appellant had a motive to intentionally kill the deceased, namely betrayal by a younger business partner whom he had helped and nurtured.

[58] The defence contended at trial and on this appeal that the case was circumstantial and that the prosecution could not satisfy a reasonable jury beyond reasonable doubt that the deceased did not die by his own hand, or by misadventure when the appellant, thinking the deceased was about to suicide, grabbed the gun, which was prone to discharge if hit, causing it to discharge and kill the deceased. The appellant primarily emphasises that the motive evidence was weak; the strength of the body of evidence which supported the possibility of the deceased having committed suicide; the consistency of the appellant's account and conduct and Dr Vallati's evidence suggesting that the gun may have discharged when the appellant grabbed it.

[59] The learned primary judge gave a fair and balanced summing up to the jury based on these differing contentions and no complaint is or could be made about the directions given. His Honour correctly reminded the jury that because the case was a circumstantial one they must be satisfied on the facts found that the guilt of the appellant was not only a rational inference but also the only rational inference that the circumstances enabled them to draw; if there was any reasonable hypothesis consistent with innocence it was their duty to find the appellant not guilty.

Is the verdict of guilty of murder unsafe?[8]

[60] This Court's task in reviewing the evidence is not merely to assess whether there was sufficient evidence to sustain a conviction but to consider whether the evidence was sufficient to entitle a reasonable jury to convict through an assessment of the quality of the evidence. An appellate court must not substitute its own assessment of the evidence for that of the jury if a reasonable jury could on the evidence have reached that verdict. The test is not simply whether this Court has a reasonable doubt but whether it was open to a reasonable jury, on a view of the facts which it was entitled to take, to be satisfied beyond reasonable doubt of the guilt of the appellant: see *Morris v The Queen*,[9] *Chidiac & Asfour v The Queen*,[10] *M v The Queen*[11] and *Jones v The Queen*.[12]

[61] The evidence of motive was not strong. The learned primary judge in summing up the defence case fairly referred to defence counsel's submission that the evidence of motive did not support an intention to kill and observed:

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8 Section 668E(1) *Criminal Code* provides that this Court "shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice…"

9 (1987) 163 CLR 454, Mason CJ, 461-462, 465; Deane, Toohey, Gaudron JJ, 472-473; Dawson J, 478-479.

10 (1991) 171 CLR 432, Mason CJ, 444; Dawson J, 452; Toohey J, 457-458; Gaudron J, 458-459; McHugh J, 461-462.

11 (1994) 181 CLR 487, Mason CJ, Deane, Dawson, Toohey JJ, 492-495; Gaudron J agreeing at 508; Brennan J, 504-505.

12 (1997) 191 CLR 439, Brennan CJ, 442-443; Gaudron, McHugh, Gummow JJ, 450-452; Kirby J, 468.

> "You may think there is a good deal of substance in what [defence counsel] said. If it comes down to a matter of money, the evidence would tend to show, one might think, that the [appellant's] benefit from Australian Carbide Saws was, in the scheme of things, fairly small. The financial detriment of any move of the kind contemplated by the deceased, you might think, would be small to the [appellant]. Even if it had been somewhat greater, you might consider whether that would be sufficient to constitute a motive for the extreme step of murdering a friend and business associate: friend, because you will recall the evidence that the deceased was the master of ceremonies, at the request of the [appellant], at the wedding of the [appellant's] daughter in the month before the deceased's death."

[62] Dr Vallati's evidence raised the real possibility that the gun may have discharged if hit and the appellant claimed that the gun discharged immediately after he grabbed it to save the deceased, whom he thought was about to shoot himself. There was, however, other competing evidence from ballistics experts Bennett and Neville that the gun was safe and not prone to accidental discharge. A reasonable jury was entitled to prefer their account because their tests were done before Dr Vallati disassembled and reassembled the gun, something Bennett opined may affect the results of subsequent tests.

[63] The appellant's explanation to the police, repeated in his evidence at trial, had two aspects which could have been viewed as very significant weaknesses. The first, his claim that he was at the work premises for only a short time before he rang 000, was based on his arguably improbable explanation as to why it took him about 34 minutes to travel the few kilometres from Ashgrove to Newmarket. The second is his arguably improbable reaction to the deceased being shot in the head; on his account he spent some minutes giving the deceased mouth to mouth resuscitation and heart massage rather than immediately ringing 000. These two reasons were sufficient for a reasonable jury to reject the appellant's version.

[64] The preponderance of evidence about the deceased's state of mind, personal and business relationships, and future plans was sufficient to allow a reasonable jury to negative beyond reasonable doubt the possibility of suicide.

[65] A jury might reasonably have concluded that the appellant killed the deceased with the appellant's gun. Whether the appellant intended to kill or do grievous bodily harm to the deceased was an essential jury question. The evidence that there was discord between the appellant and deceased, his arguably unlikely explanation and that the deceased was shot in the head at very close range whilst seated, with no sign of a struggle, in the presence only of the appellant and with his gun and ammunition, was sufficient for a reasonable jury to conclude beyond reasonable doubt that at the time the appellant discharged the gun he intended to kill or do grievous bodily harm. Despite the weaknesses in the prosecution case relied upon by the appellant, there was sufficient evidence reasonably capable of being accepted by a reasonable jury to support the verdict of guilty of murder. It follows that the appellant's contention, that the verdict was not open on the evidence, fails.

Should the question of manslaughter have been left for the jury's consideration?

[66] There is another aspect of this case which, although neither raised as a ground of appeal nor embraced by the appellant when raised by me in oral argument during the appeal, nevertheless continues to cause me grave concern.

[67] The case was left to the jury on the basis that the only verdicts open were guilty of murder or not guilty of murder, the judge explaining to the jury the defence of extraordinary emergency[13] coupled with mistake of fact.[14] These defences were raised on the appellant's account that he grabbed the gun immediately before it discharged believing the deceased was about to suicide. The verdict of guilty or not guilty of manslaughter was not left to the jury although the prosecutor at trial initially contended that it should.[15] Defence counsel agreed with the learned primary judge that the case was one of murder or nothing. No doubt defence counsel determined that this course, which was consistent with the appellant's version, was in his client's best interests, maximising his prospects of a full acquittal and removing any risk of a compromise verdict. It is well established that the course taken by defence counsel in the conduct of the case does not relieve a judge from the duty to put to the jury any matters they might, on the evidence, find for the accused: *Pemble v The Queen*.[16] A verdict of manslaughter should ordinarily be left as a question for the jury when considering the elements of the charge of murder: *Gammage v The Queen*[17] and *Griffiths v The Queen*.[18]

[68] 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*),[19] 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.[20]

[69] 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 to manslaughter,

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13 Section 25, *Criminal Code*.

14 Section 24, *Criminal Code*.

15 Appeal book, 811.

16 (1971) 124 CLR 107, 117-118; see also *R v Guise* [1998] QCA 158; CA No 96 of 1998, 19 June 1998, p 6.

17 (1969) 122 CLR 444, Barwick CJ, 451; Kitto J, 453-454; Menzies J, 460; Windeyer J, 462-463; Owen J, 465-466.

18 (1994) 69 ALJR 77, Brennan, Dawson and Gaudron JJ, 80; Deane and Toohey JJ, 82.

19 "It is the duty of every person who has in a 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 to 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."

20 Appeal Book, 814.

they 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.

[70] 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.

[71] I would allow the appeal, quash the conviction and order a retrial.

ORDERS:

1. Application for leave to amend the grounds of appeal and to adduce fresh evidence refused.

2. Appeal allowed, conviction quashed and a retrial on murder ordered.

[72] **DAVIES JA:** I have had the advantage of reading the reasons for judgment of the President. I agree with her Honour's reasons for rejecting the appellant's arguments with respect to the calling of fresh evidence and that the verdict of the jury was unreasonable.

[73] However during the course of argument in this appeal her Honour raised with counsel the possibility that the learned trial judge should have and failed to direct the jury on the possibility that the appellant was guilty of manslaughter pursuant to s 289 of the *Criminal Code*. Her Honour's invitation to counsel for the appellant to adopt such an argument was not taken up. In my opinion counsel was right not to do so.

[74] The Crown case at trial was based on circumstantial evidence which included the following:

1. the appellant was in the deceased's company before the deceased was shot. It was reasonable to infer that he had been at the premises substantially longer than he was prepared to admit to.
2. The deceased was shot at close range in the head.

3. He was killed with the appellant's gun which was usually kept beside a filing cabinet in the appellant's office at the premises. The ammunition for it was kept in the top drawer of that cabinet.
4. The appellant's description of the deceased's death when he rang 000 was evasive.
5. His subsequent explanation of how it occurred was implausible.
6. The deceased had no apparent motive to take his own life.
7. The appellant had a motive to kill the deceased.

[75] The defence case was based on the appellant's evidence which accorded, more or less, with statements he had given to police. This was that when he entered the deceased's office the deceased was holding the appellant's gun pointing above but close to his own head and waving it around. The appellant then lunged for the gun and it discharged shooting the deceased in the head.

[76] 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.

[77] 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."

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

[78] 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."

[79] 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.[21] I have already pointed out, that on

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[21] Cf *Varley v The King* (1976) 51 ALJR 243 at 245; *Griffiths v The Queen* (1994) 69 ALJR 77 at 79 column 1 E-F, 81 column 1 C; *Gilbert v The Queen* (2000) 201 CLR 414 at 419, 424; *R v Kane* (2001) 123 A Crim R 385 at 392, 399; *R v Williamson* [2000] 1 VR 58 at [45]; *R v Phan* (2001) 123 A Crim R 30 at 39, 40.

the appellant's case, there was no evidence on which the first of such inferences could be drawn.

[80] 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.

[81] This case may be distinguished from a case such as *Griffiths v The Queen*.[22] 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 but of effectively withdrawing from the jury an issue arising under s 23 of the *Criminal Code*.[23]

[82] 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.

[83] 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.

[84] **CHESTERMAN J:** I have read the reasons for judgment prepared by the President and by Davies JA. I agree with their Honours that the appeal brought on the ground that the verdict was unreasonable should be dismissed. I also agree with their Honours that the application for a new trial to allow the admission of fresh evidence should be refused.

[85] The remaining point is whether there should be a new trial to allow a jury to consider a possible verdict of manslaughter.

[86] The circumstances of the case are fully set out in the reasons of the President. Some further facts may, however, be noticed.

[87] The appellant was interviewed by investigating police officers at his business premises about an hour and a half after the fatal shooting. The interview was recorded. The appellant's account of the shooting was this:

> 'I've turned up for a meeting that we'd arranged. We'd been having problems with the business … I come in. I'm not exactly sure what I said but something like "How are you going?" He was sitting down in his office. … I don't know what he said … I went to the

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22 *Griffiths v The Queen* (1994) 69 ALJR 77 at 79 column 1 E-F, 81 column 1 C.

23 *Griffiths v The Queen* (1994) 69 ALJR 77 at 79 column 1 F.

> toilet … come back into the office. … I think I went straight into his office. He had the rifle sort of in an upright position. I think right hand on the barrel somehow or other, left hand over the end of it. I sort of stopped then stepped forward. He had … closed his eyes, the thing I remember is he closed his eyes. Now like as if he was sort of clinching. I actually was right up against the desk. I leaned forward to grab the gun. I did grab the gun. Bang. … I picked it up. No wait a minute. No I didn't. No I didn't. Murray's fallen back. I've gone round the side of the desk. The gun had sort of fallen on him. I've picked up the gun …'

[88] Later in the interview, in response to particular questioning, the appellant said that the deceased had 'one hand on the barrel, one hand on the stock or thereabouts' of the rifle. The appellant went on:

> 'I think I tried to something or other but as I say he sort of, I remember him clinching (his) face … and that's when I jumped forward … I would say it went off as I was grabbing it. I reckon I've had contact.'

He said that he would have been reaching for the 'stock part' of the rifle.

[89] In the statement which the appellant gave to the police but which he did not sign in the circumstances described in the reasons of the President the appellant gave this account:

> '16. I went to the toilet and then came back to Murray's office and came to his door walked in, I saw him with the gun. I don't know (how) to explain it.
>
> 17. He was sitting behind his desk straight in front of me when I first saw the gun. It was up in the air and no threat to me and I kept going. I can't remember for sure but the stock could have been resting on the desk but I'm not sure. I'm 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.
>
> 18. 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.
>
> 19. It was up on the desk I'm sure … and really I thought it was still above his head. The one thing I know for sure is he closed his eyes like a squint.
>
> 20. That was like the signal for me to grab the gun. I lunged forward and assume with right hand further forward than my left to get the gun. I know I contacted the gun and may have grabbed it and bang it all happened at once.'

[90] The appellant's evidence at the trial went along the same lines. He said:

> '… went to the toilet. Came back up. Went straight on from out the back straight into Murray's office, … I just bowled straight in,

> walked up to the desk and he's got the gun up. … I just bolted straight in, right up to the desk. Murray's got the gun up. It's sort of out in front of him, pointing a little bit above his head. … The right hand is down around the trigger mechanism. The left hand is more up towards the end of the wood … below the barrel. … His left hand moved up to the barrel slightly. There was a little bit of movement in his right hand. I … couldn't really say exactly what happened down there. I was concentrating on his face. 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. Murray flew over to his left hand side …'

[91] He was asked to describe the grip he had on the rifle and he said:

> '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 lunged out and I would have whacked into the gun and tried to grab it.'

He said that as he 'whacked' the gun it went off.

[92] 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.

[93] 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.

[94] His Honour said:

> 'The verdicts open to you on this indictment are guilty of murder and not guilty. Those are the only two verdicts open to you.
>
> … you may think the accused's evidence is credible and reliable and that it provides a satisfying answer to the Crown's case. If so, your verdict would of course be not guilty.
>
> Secondly, you might think that although the evidence called on behalf of the accused was not convincing, it leaves you in a state of reasonable doubt as to where the truth lies. If so, your verdict in that event as well will be not guilty.'

His Honour then directed the jury as to the elements of the offence of murder, stressing the need for the jury to be satisfied beyond reasonable doubt that the accused, before he could be convicted, must have intended to kill the deceased or cause him grievous bodily harm.

[95] His Honour turned to the question of criminal responsibility and directed the jury in terms of s 24 and s 25 of the Code. His Honour 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.
>
> 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 …'

[96] 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.

[97] 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.

[98] The prosecution case, though circumstantial, was reasonably strong notwithstanding the inconclusive state of the evidence concerning the appellant's motive for killing the deceased. The jury must have been satisfied beyond reasonable doubt, that the circumstances which Davies JA has summarised, proved that the appellant deliberately shot the deceased. The context does not permit a conclusion that the deceased died as a result of the negligent handling of the rifle.

[99] It is no doubt right that a trial judge should direct a jury with respect to any point to which the evidence gives rise and which might lead to an acquittal or conviction of an alternative, lesser offence. This is so notwithstanding that counsel for the prosecution or defence do not seek such a direction or actively oppose it. Nonetheless there must be a factual basis to be found in the evidence before any such direction can be given.

[100] In addition to the point I have addressed, that the jury's verdict expressly removes any basis for a finding of unintentional killing, the evidence of the accused, whether at trial or in his statement or interview, does not provide any basis in fact for a finding that the death may have been the result of criminal negligence. There is no evidence that immediately before the rifle discharged it was in the appellant's charge or under his control. The evidence is that the rifle discharged at the instant the appellant grabbed it, or grabbed at it. His grasp was directed at the stock not the trigger of the gun. It was at all times in the deceased's control and the appellant was trying to wrest it from him to save his life.

[101] On this point I agree with Davies JA. In my opinion the appeal should be dismissed.