SUPREME COURT OF QUEENSLAND

CITATION:	*R v Scott* [2011] QCA 343
PARTIES:	**R** **v** **SCOTT, Philip Tonal** (appellant)
FILE NO/S:	CA No 2 of 2011 SC No 1531 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	29 November 2011
DELIVERED AT:	Brisbane
HEARING DATE:	24 June 2011
JUDGES:	White JA, Margaret Wilson AJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL_ MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where appellant convicted of murder – where appellant pleaded guilty to manslaughter but plea not accepted in discharge of indictment – where appellant fatally shot son-in-law – where appellant initially told lies to police but later confessed to manslaughter – where trial judge gave adaptation of *Zoneff* direction – where appellant claimed primary judge insufficiently directed jury that lies relevant only to determining credibility – where appellant claimed trial judge failed to put defence case adequately to jury – whether a miscarriage of justice occurred *Dhanhoa v The Queen* (2003) 217 CLR 1; [2003] HCA 40, cited *Edwards v The Queen* (1993) 178 CLR 193; [1993] HCA 63, considered *R v Chevathen & Dorrick* (2001) 122 A Crim R 441; [2001] QCA 337, cited *R v Mitchell* [2008] 2 Qd R 142; [2007] QCA 267, cited *R v Mogg* (2000) 112 A Crim R 417; [2000] QCA 244, cited *R v Sheppard* [2010] QCA 342, considered *RPS v The Queen* (2000) 199 CLR 620; [2000] HCA 3, cited

Simic v The Queen (1980) 144 CLR 319; [1980] HCA 25, cited
Zoneff v The Queen (2000) 200 CLR 234; [2000] HCA 28, considered

COUNSEL: J J Allen for the appellant
D C Boyle for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **WHITE JA**: On 1 December 2010 after an 11 day trial in the Supreme Court the appellant was convicted of murdering Peter Brady at Rainbow Beach on 30 June 2008.

[2] The appellant had pleaded guilty to manslaughter when arraigned on the charge of murder before the jury panel. The Crown did not accept that plea in discharge of the indictment.

Grounds of appeal

[3] In lieu of the grounds of appeal in the notice of appeal the appellant sought and was granted leave to amend those grounds as follows:

> "(1) the learned trial judge failed to properly direct the jury as to the use that might be made of evidence of lies by the appellant during his first interview by police;
>
> (2) the learned trial judge failed to adequately put the defence case to the jury."

The evidence at trial

[4] The deceased, who was aged 39, was married to the appellant's daughter. They had two young children aged eight and five. The marriage had come under considerable strain as Mrs Brady had told her husband that she was interested in someone else. On 4 May 2008 the deceased left the family home at Rainbow Beach which they owned jointly. He lived in his work van and then in a rental property in the area.

[5] The appellant was aged 75. He had transferred the title to his home to his daughter with the agreement that he would continue to reside in it for as long as he wished; that Mrs Brady would not use the property as collateral; and that she and her husband would pay the rates, with the appellant being responsible for all other outgoings.

[6] Mrs Brady and her husband had each consulted solicitors about their separation and property settlement. The children were to remain with Mrs Brady and both parents were concerned that their wellbeing was kept to the forefront of their discussions. Even so, the break up was far from harmonious. By the end of June they were in the process of settling the division of the matrimonial property. They proposed selling the house at Rainbow Beach and dividing the proceeds evenly after repaying a loan of $80,000 to the appellant. That loan had allowed them to pay out their mortgage to the bank.

[7] Initially, after separation but before she obtained legal advice, Mrs Brady had discussed "his" house with the appellant as she was of the belief that it would be put into the matrimonial pool of assets for division. Subsequently she received legal advice and conveyed to her father that his house "would not be touched".[1] It was the Crown case that concern for his house and for his daughter's material well-being was the motive for the appellant to kill his son-in-law.

[8] The deceased and his wife worked at their Rainbow Beach house sorting out and removing property on Sunday, 29 June. Mrs Brady spoke to her father that night to let him know that she was "okay" and that she had left the property. She had spent the previous three nights staying with him.

[9] The deceased, after mentioning it to his wife, returned to the house late on Monday afternoon, 30 June, to remove the rest of his property. Mrs Brady returned home from work and assisted him to move some chattels before going inside. Neighbours heard two gun shots and raised voices and then the deceased calling out for help. The deceased staggered from the property and ran along the road. A neighbour who knew him came to his assistance. He told the neighbour and subsequently another witness that he had been shot by the appellant. Other neighbours came to assist and, eventually, the ambulance arrived shortly after 6.00 pm. The deceased fell into unconsciousness and died at the scene. The forensic pathologist called at the trial noted that a bullet had penetrated the deceased's lower left back and exited his right upper chest causing internal injuries resulting in blood loss which caused his death. There was no gunpowder burn to the skin which indicated a space greater than 50 centimetres between the gun and the deceased. The wound track was consistent with the deceased bending over at the time he was shot.

[10] Police found a shell catcher containing two discharged nine millimetre shells on a street corner opposite near where the deceased died. Those shells were later identified as having been fired from the appellant's gun.

[11] At the trial there was no dispute that the appellant had shot the deceased with his nine millimetre pistol. The issue was whether he intended to kill him or to do him some grievous bodily harm. Important to the Crown case was the appellant's conduct following the shooting. He was, apparently, unaware that his daughter was in the house and she did not see him. The appellant left the scene without rendering any assistance to the deceased or ascertaining his condition. He disposed of the shell catcher; swapped the barrel of the pistol for another and disposed of the one that was used for the shooting. It was recovered in a rusty condition about a year later at the appellant's son's property at Glenwood, where the appellant had travelled following the shooting. The appellant arrived at his son's home at around 7.00 pm on 30 June in his four wheel drive vehicle. He appeared normal and, so far as the son was concerned, he understood him to have come solely for a social visit. The appellant joined in playing games with his grandchildren until about 9.00 pm when telephone calls were received from several family members that Peter Brady had been shot and was dead. The son spoke to his father privately mentioning that one caller thought that he, the appellant, was involved. After a moment the appellant said, "Between you and I I did it".[2] They returned inside the house and had "a normal evening".[3]

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1 AR 244.
2 AR 212.
3 AR 213.

[12] The next morning the appellant said to his son words to the effect that he might hand himself in. The appellant was intercepted by police driving towards his home. Weapons were found in his vehicle including the nine millimetre pistol. When interviewed the appellant denied being at Rainbow Beach on 30 June and said that he could not remember the last time he was there. He maintained that denial even though police told him that he was seen by two witnesses walking near the house at about half past four in the afternoon. They also told him that his vehicle had been identified from a Main Roads automatic number plate recognition camera as the vehicle was travelling on the Tin Can Bay Road away from Rainbow Beach at about half past six the previous evening. The appellant then terminated the interview.

[13] In a second interview, the following day, 2 July, the appellant admitted shooting the deceased. He said he went to the house at Rainbow Beach to

> "give him [the deceased] a fright of his life, put the fear of God into him and talk to him, it will stop him, maybe think about what's he's doing to his children and his marriage and he'll sort himself out … I had no intention of ever – ever hurting Peter."[4]

He said late on the afternoon of 30 June he had parked his car quite a long way from the house at the National Park ranger's car park. He had waited in a toilet in the shed on the property for a long time before he heard the deceased come in. He related

> "Peter saw me and yelled something at me and swung around and he picked something up and I fired a shot. Not at him but at the right-hand side of him. I always look to see where the shot's going to go, you know. I fired a shot to his right-hand side … I fired another shot to the other side. There may be a hole in the shed wall or something … I said, 'Stop, Peter, we've got to talk.'"[5]

The appellant said to police that they went outside the shed area and then

> "I fired to go where the fence was and he jumped sideways as he was running away and it went right through into the thigh. I thought I hit him – I thought I hit him in the arm."[6]

He added:

> "And I know I did kill him but I didn't murder Peter, I didn't go down there with intention of hurting him, I wanted him to – I wanted to fear him up and make him face me and sort of things – sort things out and talk because I wanted the two of them back together."[7]

[14] The appellant explained that he did not give any assistance to his son-in-law because there were so many people about and he did not realise that he was badly hurt, thinking that he had only hit him in the arm. He reiterated that he did not murder his son-in-law and that he just wanted the family back together again.

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4 AR 24; Exhibit F for identification comprised the transcripts of recordings played at the trial but not available for the jury deliberations. They were not in the Appeal Record but handed up at the hearing. The quoted passages were contained in the prosecutor's opening. The references in Exhibit F are at pp 6 and 7.

5 AR 24.

6 AR 24.

7 AR 25.

[15] The appellant told a similar story to a covert police officer purporting to be another prisoner who was sharing a cell with him.

[16] A witness had spoken to the appellant by telephone shortly after his daughter's separation to discuss the separation. The appellant spoke disparagingly of his daughter's conduct. He did not express any blame for the separation at the deceased, although when speaking to the covert police officer, he said his son-in-law had "turned bad … drinking far too much."[8]

[17] The appellant was an expert small arms shooter involved in the Gympie Pistol Club where he was a range officer. He was described by a club member as an excellent shot and had been "top gun" in the club for four years in a row some years earlier. Another witness, with whom the appellant shot socially on a weekly basis, recalled about two to three weeks before the killing, the appellant had asked him how to make a bullet untraceable.[9] Yet another witness described the appellant, before separation, saying that because of his age, if anyone harmed his family he had nothing to lose.

[18] Admissions were made at the trial that the appellant had attempted to contact Mrs Brady's male friend on his work telephone number in Melbourne at about 10.15 am on 30 June with a message to call him back. He spoke to his daughter at her work at about 12.50 pm the same day.

[19] The appellant neither gave nor called evidence.

Ground 1 - Failure to direct properly about lies

(i) Omission of "only" from direction

[20] The sole issue for the jury was whether the prosecution had satisfied them beyond reasonable doubt that the appellant had either an intention to kill the deceased or to do him some grievous bodily harm when he shot him.

[21] The prosecution did not seek an *Edwards* direction[10] that the appellant's lies in his first interview with police could be used by the jury as indicating a consciousness of guilt to murder. Those lies went only to the appellant's credit. The prosecutor reminded the trial judge that the approach in *R v Mitchell*[11] applied, that is,

> "… where … the offence charged is murder but there is the lesser offence of manslaughter available … it is of critical importance to identify what is in issue at the trial and what precise admission is established by the lie. If the accused admits doing the act which occasioned the death, the relevant consciousness of guilt must be to the offence of murder rather than manslaughter."[12]

In his address the prosecutor confined his remarks about the first police interview to observations about credit.[13]

[22] His Honour directed the jury about the appellant's lies as follows:

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8 AR 509.
9 AR 203.
10 *Edwards v The Queen* (1993) 178 CLR 193.
11 [2008] 2 Qd R 142.
12 At [26] per Williams JA.
13 AR 374.

> "You have heard submissions from the prosecution which attributes lies to the defendant. In his first interview with the police, he gave a version. If you find the defendant has lied, you may decide that that affects his credibility. However, you should bear this in mind: do not follow a process of reasoning to the effect that just because a person is shown to have told a lie about something, that is evidence of guilt.
>
> The mere fact that the defendant tells a lie is not in itself evidence of guilt. A defendant may lie for many reasons, for example, to bolster a true defence, to protect someone else, to conceal disgraceful conduct of his or her, short of the commission of the offence itself, or out of panic or confusion.
>
> If you think there is or may be some innocent explanation for the lies referred to by the prosecution, and that, of course, assumes that you accept they are lies, then you should take no notice of them in assessing credit."[14]

This direction closely followed the direction in the Supreme and District Court Benchbook.[15] The appellant submits that the trial judge ought to have included the following from the Benchbook:

> "If you conclude that the defendant deliberately told lies, that is relevantly *only* to his credibility …"

[23] The direction given by his Honour, as noted in the Benchbook annotations, is an adaptation of the suggested direction in *Zoneff v The Queen*[16] as modified by this Court in *R v Sheppard*.[17] In *Zoneff* the majority offered a direction relevant for the facts in that case. However, their Honours said it could be adapted to other cases in which there was a risk the jury might misunderstand the significance of possible lies even where the prosecution had not suggested that an accused told certain lies because the truth would implicate him or her in the commission of the offence.[18] Their Honours proposed the following direction:

> "You have heard a lot of questions, which attribute lies to the accused. You will make up your own mind about whether he was telling lies and if he was, whether he was doing so deliberately. It is for you to decide what significance those suggested lies have in relation to the issues in the case but I give you this warning: do not follow a process of reasoning to the effect that just because a person is shown to have told a lie about something, that is evidence of guilt."[19]

[24] In *Sheppard*, the prosecutor, although largely confining his address to lies as relevant to credit, made a clear suggestion that the appellant had lied to police "to distance himself from … the offence."[20] The trial judge directed the jury in the terms suggested by the majority in *Zoneff*[21], rather than an *Edwards* direction.

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14 AR 415.
15 No. 39.1
16 (2000) 200 CLR 234; [2000] HCA 28.
17 [2010] QCA 342.
18 (2000) 200 CLR 234 at [24]; [2000] HCA 28.
19 At [23].
20 At [12].
21 Set out at [15].

The President, with whom Holmes JA and Daubney J agreed, describing the case as "finely balanced", concluded that the prosecutor's statement was "a clear suggestion to the jury that the appellant lied to police out of a consciousness of guilt".[22] Accordingly, an authoritative *Edwards* direction ought to have been given and a *Zoneff* direction was neither adequate nor appropriate. Her Honour concluded, in the context of the "distancing" submission by the prosecutor, that:

> "… the jury may well have been encouraged by the judge's direction to the jury 'to decide what significan[ce] these lies … have in relation to the issues in this case' to reason, without first considering the matters authoritatively listed in *Edwards*, that the appellant lied to police out of a consciousness of guilt."[23]

For that reason the reference to "the issues in this case" proposed in *Zoneff* may have a tendency, in a particular case, to mislead the jury into impermissible reasoning and has been removed from the Benchbook.

[25] In this case there is no suggestion that an *Edwards* direction was warranted and the prosecution expressly did not seek it. All that is in issue is the strength of the direction and whether its dilution from that which is submitted to be necessary has led to an unfair trial. The consideration of that issue will be dealt with after explaining the other aspect of this ground.

(ii) Including "lies" in summary of prosecution contentions about intention

[26] The trial judge directed the jury that intention could be inferred, inter alia, from the conduct of the appellant after the shooting but did not, correctly, with respect, include the lies told by the appellant to police as part of that conduct. However, when summarising the prosecution case, his Honour said,

> "The prosecution contends you would be satisfied beyond reasonable doubt that at the time the defendant killed Peter Shane Brady, he intended to kill him or at least cause him grievous bodily harm. The prosecution says a consideration of all of the evidence, including the defendant's actions of taking the nine millimetre gun, its two barrels, ammunition, brass catcher over to Rainbow Beach that afternoon, parking some distance away from Peter Brady's house in the National Park car park, waiting in the toilet of the shed for a considerable period of time with the door closed until Peter Brady entered the shed, firing in the direction of Peter Brady twice, not going to assist Peter Brady, collecting his bag and leaving the scene, changing the gun barrel and disposing of it in his son's garden, *initially denying ever being in Rainbow Beach* that day and the lack of any remorse for Peter Shane Brady's death all support a conclusion that at the time the defendant shot Peter Brady, he intended to kill him or at least to cause him grievous bodily harm."[24] (emphasis added)

[27] The prosecutor had not relied on the lies of the appellant in his initial police interview as a fact which could be taken into account by the jury when reaching a conclusion about the appellant's state of mind. The appellant contends that having included the lies in this way it was essential that the jury be directed that they must be satisfied that the lies were not merely consciousness of guilt to manslaughter.

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22 At [20].
23 At [21].
24 AR 422.

[28] There was no request for any redirection or correction.

Discussion

[29] The reason for directing a jury about the use that may be made of lies told by an accused person is to prevent impermissible reasoning which might lead to a finding of guilt on the strength of the lies alone when the prosecution relied on those lies as going only to credit. If the appropriate use of any lies told by an accused is conveyed to the jury in a way that would not lead to reasoning of this kind then the fairness of the trial is not at risk. In *Dhanhoa v The Queen*[25] Gleeson CJ and Hayne J said that it is only where there is a risk that the jury might misunderstand the significance of lies the jury accepts were told and engage in impermissible reasoning to guilt that an *Edwards* or even a *Zoneff* direction should be given.[26]

[30] McHugh and Gummow JJ emphasised that even if it were "better" to have directed on lies, or that there was "a possibility" that the jury may have impermissibly reasoned to guilt, to succeed on appeal an appellant must establish that it is a *reasonable* possibility that the failure to direct the jury "may have affected the verdict".[27]

[31] In *R v Chevathen & Dorrick*[28] the Court said that where lies are evidence of an accused's reliability or lack of it, it was incumbent to give "some direction to the jury warning them against the danger of misuse of the evidence".[29] Here the directions were adequate to convey to the jury that they should eschew reasoning to guilt of murder from the lies.

[32] On the second aspect of this ground it is necessary to look at what the trial judge said in his direction just before he summarised the prosecution case. He said:[30]

> "The prosecution also asks you to have regard to the fact that the defendant departed after the events in question, that is, left the scene, and changed the barrel of the firearm. Before you could use these matters as indicative of guilt, you would first have to find that the defendant departed the scene because he knew he was guilty of murder, not for any other reason.
>
> You must remember that people do not always act rationally and that conduct of this sort can often be explained in other ways, for example, as the result of panic, fear or other reasons having nothing to do with the offence charged.
>
> You must have regard to what has been said to you by the defendant's counsel as to other explanations for this conduct. All of these matters must be considered by you in deciding whether you can safely draw an inference from the fact of his departure from the scene and the changing of the gun barrel.
>
> Moreover, before evidence of the defendant's departure from the scene and changing of the gun barrel can assist the prosecution, you

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25 (2003) 217 CLR 1; [2003] HCA 40.
26 At [34].
27 At [38], citing *Simic v The Queen* (1980) 144 CLR 319 at 332.
28 (2001) 122 A Crim R 441; [2001] QCA 337.
29 At [32].
30 AR 420-421.

> would have to find not merely that it was motivated by a consciousness of his involvement in the unlawful killing of Peter Shane Brady, but that what was in his mind was guilt of the offence charged, that is, murder.
>
> An intention to kill or do grievous bodily harm is essential to whether he is guilty of murder. If, and only if, you reach the conclusion that his departure from the scene and the changing of the gun barrel has no other explanation, such as panic or fear or wrongful accusation, you are entitled to use that finding as a circumstance pointing to the guilt of the defendant of murder, which is to be considered with all of the other evidence in the case. Standing by itself it could not prove guilt of murder."

His Honour had earlier directed the jury in the passage set out above[31] that they may not reason to guilt because of the appellant's lies to police in the first interview.

[33] It was unfortunate his Honour made a slip – for it was no more than that – in summarising the prosecution's contentions, but full directions had been given almost immediately before about the use of lies and, as a different category of evidence, directions how to evaluate *conduct* after the shooting. It cannot be demonstrated that there is any reasonable possibility that in slightly misstating the prosecution case the jury would have disregarded what his Honour had said earlier about lies and engaged in impermissible use of the lies.

[34] This ground fails.

Ground 2

Failure to put defence case adequately

[35] It was the defence case that the appellant did not aim at Peter Brady and that the bullet must have ricocheted off a hard surface into him. Thus it could not be shown that he had the requisite intention for a verdict of murder. In support of that contention the appellant placed emphasis on the evidence of the ballistics expert, Sergeant Robert Graham. That evidence was to the effect that Sergeant Graham had observed slight damage near the nose of the bullet which he recovered from a stainless steel sink and which was accepted to be the bullet which passed through the deceased.[32] Sergeant Graham said:

> "The actual nose end of the bullet, it appears to have struck something or gone – or perforated something to cause that damage. It doesn't seem to be what you would call a ricochet mark, it's because of that lip there, it's not consistent with that … I don't really know exactly how this area of damage was caused, but it's not what I would consider to be a ricochet mark because ricochets usually have a nice flat area. They don't have that – just that lip."[33]

[36] It was established that there were various hard surfaces around the yard, for example, a pile of wood, a wall, the gate and cement edging from which a bullet might have been deflected. Sergeant Graham had detected no damage on any of those surfaces but agreed that it was possible that a mark might not be left, or, at

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31 At [22].
32 AR 335.
33 AR 319.

least, a mark that was discernable. He agreed that the most that could be said of the damage to the bullet was that it was like a deflection impact consistent with coming into contact with some hard surface.[34] He was reluctant to agree that it was unlikely to have been a hard surface within the deceased's body, but, if the bullet had passed through cartilage only, he agreed that the cartilage was unlikely to be the source of the slight flattening on the bullet. Sergeant Graham agreed that if the bullet came into contact with a hard surface before hitting the deceased it may tumble or destabilise in its path and would give an irregular entry wound.

[37] In re-examination the prosecutor asked Sergeant Graham about the entry hole in the deceased's shirt. He responded:

> "Like I said, it was circular, had bullet wipe. There was no indication that the bullet was destabilised when it struck that shirt. It was – like I said, it was circular. If there had been keyholing or something like that it would indicate it had been tumbling prior to hitting the shirt. There was no evidence of that.
>
> … And you said that if a bullet - I think in answer to a question for my learned friend that if it hit something it would destabilise in flight and would tumble?- - It would destabilise, yes.
>
> And so you'd expect a different – all right. So what would you expect then if it hit the shirt?- - Well, a projectile can tumble, but the problem is that even though it's destabilised, it's still possible for it to hit nose first or base first and still leave a circular hole. It's just that it didn't happen in this situation. Whether it was destabilised or not, I just could not determine that. I couldn't conclude that it was destabilised from the examination of that shirt."[35]

[38] Dr Nathan Milne described the oval entry of the bullet wound in the deceased's back as indicative of the bullet striking at an angle rather than perpendicular to the body. He posited that the deceased may have been bent over and was hit by the bullet at the point where the skin was stretched so that when he straightened out again the diameter of the wound was reduced. Dr Milne said that would be a potential explanation for the wound being shorter than wide. He added:

> "Another possibility if the bullet hasn't been moving in a straight path; so, whether it had bounced off another object or passed through another object is a possibility."[36]

[39] Defence counsel commenced his address at quarter past four on 25 November and continued for about 15 minutes. He immediately dealt with the issue of the bullet suggesting that perhaps it ricocheted off the ground and entered the deceased's back, exited his chest and then travelled and landed in the sink on the other side of the street. The following morning counsel returned to the topic of the ricochet. He reminded the jury of Dr Milne's evidence that the wound shape was unusual and that there were three possibilities for the shape of the entrance wound: one, that he was struck at an angle; two, that he was struck bending over and third, that it was an unstable projectile. Counsel then said:

> "Now, like I said to you yesterday, have a look at that projectile. It's obviously hit something solid. It's obviously hit something that has

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34 AR 340.
35 AR 344.
36 AR 352.

> deformed its shape in a way that could not have occurred as it travelled through the body. How could – or what could that projectile have hit after it left Mr Brady's body to cause it to lie in its state on that sink on the other side of the road?"[37]

Defence counsel completed his address in about 30 minutes and shortly thereafter his Honour commenced summing up.

[40] Having summarised the prosecution case the trial judge then summarised the defence. His Honour said:

> "The defence also relies on the fact that the defendant made no attempt to disguise himself, he joked to people he came into contact with, argued with Peter Brady before the fatal shot, together with the ballistic evidence that the projectile has damage to it not consistent with just contact with Peter Brady, to support the contention that you would not be satisfied beyond reasonable doubt that the defendant intended to kill Peter Brady or do him grievous bodily harm."[38]

His Honour noted that defence counsel had submitted that it was relevant that the appellant was highly experienced with guns and a very good shot and he could have shot the deceased as he entered the shed. His Honour mentioned leaving the scene as being consistent with panic and then continued:

> "The defence also relies on the unusual trajectory of the bullet wound as not being consistent with a deliberate shot intended to kill or do grievous bodily harm."[39]

The appellant contends that these passages were insufficient to put the defence case fully and fairly and failure to do so has caused the trial to miscarry.

There was no request for a fuller statement of the defence case.

[41] In *RPS v The Queen*[40] the majority[41] said:

> "Before parting with the case, it is as well to say something more general about the difficult task trial judges have in giving juries proper instructions. The fundamental task of a trial judge is, of course, to ensure a fair trial of the accused. That will require the judge to instruct the jury about so much of the law as they need to know in order to dispose of the issues in the case. No doubt that will require instructions about the elements of the offence, the burden and standard of proof and the respective functions of judge and jury. Subject to any applicable statutory provisions it will require the judge to identify the issues in the case and to relate the law to those issues. It will require the judge to put fairly before the jury the case which the accused makes. In some cases it will require the judge to warn the jury about how they should *not* reason or about particular care that must be shown before accepting certain kinds of evidence."[42]

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37 AR 404.
38 AR 423.
39 AR 424.
40 (2000) 199 CLR 620; [2000] HCA 3.
41 Gaudron ACJ, Gummow, Kirby and Hayne JJ.
42 At 637.

[42] In *R v Mogg*[43], a case concerned generally with the adequacy of the summing up, Wilson J (as her Honour then was) said:

> "The form of a summing up can be expected to vary according to the nature of the case and the style of the particular judge. However, it will not assist the jury unless it identifies clearly and succinctly the issues of fact which the jury must decide in order to reach a verdict. It ought to contain a sufficient presentation of the defence case to enable the jury to comprehend and understand, from the terms of the summing up itself, what the defence case is …"[44]

[43] It is not contended that there was any want of balance between the way his Honour summed up the respective cases to the jury. Reference to the damage to the projectile adduced from the ballistic expert's evidence and the unusual trajectory of the bullet wound, sufficiently reminded the jury of the defence contention that that body of evidence would raise a reasonable doubt about the appellant's intention. That summary must be appreciated in the context that less than an hour previously defence counsel had summarised, quite succinctly, that issue in his address. It was unnecessary for his Honour to set out step by step the analysis of defence counsel in order to present a fair account of the defence case.

[44] This ground must fail.

Application of the proviso

[45] In view of the conclusions about the grounds advanced by the appellant it is unnecessary to deal with the application of the proviso raised by the respondent.

Order

[46] I would dismiss the appeal.

[47] **MARGARET WILSON AJA**: The appeal should be dismissed for the reasons given by White JA.

[48] **MULLINS J**: I agree with White JA.

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43 (2000) 112 A Crim R 417; [2000] QCA 244.

44 At [83]; 432.