HIGH COURT OF AUSTRALIA

Barwick C.J., Gibbs, Stephen, Mason and Jacobs JJ.

LA FONTAINE v. THE QUEEN
(1976) 136 CLR 62
8 October 1976

Criminal Law

Criminal Law—Murder—Malice aforethought—Recklessness—Knowledge that death or grievous bodily harm will probably result from act—Direction as to murder by recklessness—Whether appropriate—Whether sufficient—Likelihood of death or grievous bodily harm ensuing—Probability—Possibility—Standard of proof—Guilt beyond reasonable doubt.

Decisions

October 8.
The following written judgments were delivered: -
BARWICK C.J. The applicant for special leave to appeal was charged before the Supreme Court of Victoria at Shepparton on 5th December 1975, with the murder on 14th September 1975, at Mount Beauty in that State of his brother, Kevin. After a trial of four days, the applicant was convicted of murder and sentenced to imprisonment for the term of his natural life. He unsuccessfully appealed to the Court of Criminal Appeal against his conviction. (at p65)

2. The circumstances of the case out of which the charge arose are both simple and contained in a small compass. The applicant, David, at twenty-four years of age was the eldest of four brothers, the others being Kevin (the deceased) twenty-one, Peter seventeen and Adrian eleven at that time. They were all in the loungeroom of their parents' home on the afternoon of Sunday, 14th September, watching television, their parents having been absent during that day. David went through the front door to the verandah of the house. Words arose between him and the deceased relating to David's conduct on the verandah. The deceased latched the flyscreen door, thus excluding David from entry through it to the loungeroom. David went to the rear of the house, went to his bedroom, obtained and loaded his .22 automatic rifle with a single round; entered the loungeroom carrying the rifle pointed in the general direction of the deceased, then reclining on a couch or settee. As he entered, David said to the deceased, "I am going to bloody put a hole in you". David brushed aside the effort of Adrian to dissuade him, and upon the deceased rising and walking awkwardly, because of an ankle injury, towards him, David released the safety catch and discharged the rifle. The bullet passed near to the deceased's heart. He died very shortly thereafter. (at p66)

3. There is a full, accurate and clearly expressed statement of the facts evidenced before the jury in the reasons for judgment of Lush J. given in the Court of Criminal Appeal. I include it here as being adequate for the purposes of these reasons of mine:

> "The evidence may be summarised as follows. The day of the killing was a Sunday, and the accused, the deceased and two other brothers, Peter and Adrian, were on that day living at their father's house at Mount Beauty. During the morning the applicant, the deceased and Adrian went shooting together, after some bickering between the deceased and the applicant over matters connected with the shooting excursion. After shooting, they went to a gathering apparently organised by or on behalf of the local football club, at which there was a barrel of beer. At this gathering, the applicant drank eight or nine glasses of beer. The deceased and Adrian wanted to leave, and there was further bickering between them as to whether the deceased could drive the car which they were using. The reason for this was that on the previous day the deceased had severely sprained an ankle. In the end, the applicant drove the other two brothers home and they all had some lunch at home. The applicant then returned to the football club gathering and, arriving there at about one o'clock, remained until the barrel was empty at about two o'clock. The applicant was then involved in discussion with friends about the possibility of obtaining further supplies of beer, but eventually went home. After he had been to a neighbouring house in a further attempt to assist a friend to obtain some more beer, the applicant returned again to his home and there was further bickering apparently initiated by the deceased about the extent of the applicant's drinking. At a time which appears to have been shortly after four o'clock, all four brothers were in the livingroom of the house, where the television set was operating. The applicant cooked some steak, some of which he ate, and he possibly offered some to the others. One of the applicant's friends then came and reported that he had been unable to get the supplies of beer which he had been hoping to get, and invited the applicant to go into his house next door. The applicant said that he would be there in a minute, and proceeded to urinate on to the lawn or garden while standing on the verandah near the main or front entrance to his own home. This apparently incensed the deceased, and a further argument developed before or during which the deceased fastened the wire screen door of the house from the inside, the applicant being outside. After an exchange of words, the applicant asked the deceased to give him his cigarettes, and the deceased looked for them but informed the applicant that they were not there. The applicant then said that they must be on the kitchen table and he proceeded to the rear of the house. He entered the house by a different door from that which the deceased had fastened, obtained a rifle and a round of ammunition, inserted the round in the breach of the rifle and entered the livingroom. The deceased was watching the television set, lying on a couch at the opposite end of the room from the door through which the applicant entered, the length of the room being about eighteen feet. The applicant had the rifle at his hip and pointing at the deceased, and he said, 'I am going to bloody put a hole in you'. The youngest of the brothers, Adrian, who was watching the television set from a chair near the wall on the side of the room on the applicant's right as he faced the deceased, attempted to grasp the rifle and pushed it across to the applicant's left. The applicant pushed him away and told him to sit down, which he did. The deceased rose from the couch and moved one or two steps towards the applicant, and the other brother, Peter, also got to his feet and stood in a position beside the deceased. The deceased advanced further, and the applicant, who had brought the rifle down from the position into which it had been pushed by Adrian, took a step backwards and the rifle was then discharged. The deceased was at this time apparently in the middle of the room, and the applicant near the door through which he had entered. It is possible that his backwards step had taken him slightly outside the door. The bullet struck the deceased near the heart, and he died within a very short space of time. After the shooting, the applicant remained in the vicinity of the house for some time. He was seen and spoken to there by a number of people who gave evidence relating to his condition. He was quiet and withdrawn, and a doctor who was called to the scene described him as 'away in a black world of his own'. In the presence of a neighbour, he looked at the body of the deceased and said, 'I am sorry, Kevvy; you had it coming to you.' The applicant made a record of interview with the police between ten p.m. and midnight on the day of the shooting. In the course of this interview, the following questions and answers were recorded:
>
> 'Q. When Adrian grabbed the rifle, what happened then?

A. I more or less pushed him away and I took it off safety and shot from the hip. Q. What was your intention when you shot at Kevin with
the rifle? A. To shoot near him and to scare him.
Q. When you fired the rifle as you said from your hip, where did you have the rifle pointed at this time? A. To the right of the room.
Q. Kevin, where was he at this stage? A. He had jumped off the couch and stumbled towards me.
Q. What do you mean by stumbled? A. He had a sore leg and couldn't walk on it properly, and as soon as I fired, he more or less stumbled into it.' On the following day, the police filmed a re-enactment of
the shooting, in the course of which the applicant, speaking of the deceased at a time immediately before the shot was fired, said, 'He was hobbling towards me, to the left and right.' At the time of the shooting, the applicant was aged twenty-four, the deceased twenty-one, their brother Peter seventeen, and their brother Adrian eleven. The learned judge left the case to the jury upon the basis that it was open to them to convict of murder if they found that the applicant had intended to kill the deceased, or if they found that he had intended to inflict grievious bodily harm upon him, or if they found that he had discharged the firearm at the deceased knowing that the shot would probably or more than likely cause his death or serious bodily injury, and that at the time he was indifferent whether death or serious bodily injury would be caused to the deceased and even if he wished that it might not be caused. He also left to the jury alternative verdicts of manslaughter on the basis of unlawful and dangerous act and negligence in the handling of the firearm." (at p68)

4. The principal ground of the application to the Court of Criminal Appeal was that the trial judge had unnecessarily and inappropriately left to the jury the possibility of a verdict of murder by recklessness. The direction was said to be unnecessary and potentially confusing because as a practical matter that basis of murder was not an issue in the case. The direction was said, in any case, to be inappropriate because of the drunken condition of the applicant at the time of the occurrence. (at p68)

5. The trial judge phrased his direction in the sense that, to make out reckless indifference, the applicant must be found to have appreciated that there was a probability that if he went ahead and fired the rifle, death or serious bodily harm would result. He did not limit the probability of harm to a probability of harm to the deceased: on occasions he spoke of a realisation on the part of the applicant that, by firing the rifle in the circumstances, the applicant was exposing the deceased to an appreciable danger of some really serious harm. (at p68)

6. In the particular circumstances of the case, the only likelihood of harm of which the applicant could be found to be conscious or aware was harm to the deceased. His other brothers were beside him: no one else was in the room. But in an appropriate case the probability of harm need not be limited to harm to the deceased. If in all the circumstances there is otherwise material on which to base a verdict of murder by recklessness, a realisation of likely harm to anyone is sufficient. Cf. Stephen's Digest of The Criminal Law, 9th ed. (1950), pp. 211-213, where harm to "some person" if spoken of. Some passages in the summing up in Reg. v. Sergi (1974) VR 1 would seem to limit the relevant likelihood of injury to injury to the deceased. Some expressions in the judgment of the Court of Criminal Appeal seem to be to the like effect. But these are explicable by reference to the facts of the case. If not so intended, they unduly narrow the scope of the relevant reckless indifference. (at p69)

7. Having regard to the terms of the summing up, the present is not a case in which to discuss whether it is sufficient if the accused is found to have appreciated a possibility as distinct from the probability of serious harm if murder by reckless indifference is to be made out. (at p69)

8. The majority of the Court of Appeal was of opinion that murder by recklessness was not a practical issue

in the case and that the direction of the trial judge in that respect was unnecessary. But the Court was unanimously of the opinion that none the less there was no miscarriage of justice; that any jury properly instructed would almost certainly have returned a verdict of murder. (at p69)

9. The only defence which the applicant appears to have made on his trial was that his only intent in discharging the rifle was to frighten the deceased. Some endeavour was made during the trial to explore the possibility that the rifle had discharged without pressure on the trigger: but, clearly, no such case was available on the evidence. (at p69)

10. The applicant neither gave nor called any evidence. In addition to the passages from his signed record of interview quoted in Lush J.'s narrative, the applicant there to the question, "What was your intention when you shot at Kevin with the rifle?" answered "To shoot near him and to scare him". (at p69)

11. With due respect to those of a contrary view, a direction as to murder by recklessness was both necessary and appropriate in the circumstances of the case. The risks of misunderstanding such a direction must be recognized and the direction should not be given where there is no material in the case to warrant the giving of a verdict on the footing of it. I would refer, without repeating what I said, to Pemble v. The Queen (1971) 124 CLR 107, at pp 118-120 . I agree with what was said by the Victorian Court of Criminal Appeal in Reg. v. Sergi (1974) VR, at pp 9-11 as to the necessity for the facts of the case in a practical sense to raise an issue of murder by reckless indifference before any appropriate direction is given. (at p69)

12. My reason for thinking the direction necessary in this case is that the raising of the defence in the circumstances entitled the Crown to such a direction. The scene is aptly envisaged from Lush J.'s description of the event. The four brothers were in close proximity in a loungeroom of modest proportion. The deceased was before him when the applicant fired the gun. It must have been pointing in the general direction of the deceased. The applicant was experienced in the use of the rifle. He consciously released the safety catch before discharging the rifle. The deceased was moving towards him at that time. (at p70)

13. A defence that the deliberate discharge of a firearm in those circumstances, albeit not aimed at the deceased, was effected only with the intent to scare or frighten courts a direction as to reckless indifference to the consequences of the maturity of a risk of which at least the likelihood is foreseen. In this case, in my opinion, if an evenhandedness as between the Crown and the accused were to be maintained in the summing up, a direction was necessary as to the acceptance by the applicant of the appreciated risk of injury to the deceased so that the action of the applicant could be regarded as having been taken with a reckless indifference to the likelihood of injury to the deceased. (at p70)

14. Having examined its terms, I am of opinion that the direction actually given as to murder by recklessness was substantially correct. I agree entirely with the Court of Criminal Appeal and for the reasons there expressed that, even if the direction were considered unnecessary, it did not render the summing up as a whole unacceptable, nor did its inclusion tend to confuse the jury in their consideration of the more direct issues in the case. I also agree that no reasonable jury properly instructed could have failed to reach a verdict of murder upon all the material produced. Indeed, I ought to say that the applicant had the benefit of a summing up which did not disregard the slightest opportunity to explore possible interpretations of the facts favourably to the accused, some of which might be thought by many to be more than remote and to lack practical reality. (at p70)

15. However, after the application for special leave to appeal had been lodged with this Court, the summing up appears to have been subjected to further and intense scrutiny. As a result, a further ground for seeking special leave was notified, namely, that the learned trial judge failed to direct the jury or, alternatively, misdirected the jury as to the onus of proof and, in particular, as to the meaning of the words "reasonable doubt". (at p70)

16. This ground refers to a portion of the summing up in the early days of its lengthy and oft repetitive progress. It occupies forty-five pages of typescript, apart from eighteen further pages of discussion with counsel and of answering questions of the jury. (at p70)

17. The relevant passage of the summing up, actually recorded on the second page of the typescript record, is as follows:

> "The Crown, of course, has to establish its case beyond reasonable doubt. As you were told by the prosecutor himself, that does not mean beyond any doubt at all, but it must be beyond reasonable doubt. The onus of proof is thus much higher than the onus of proof in civil cases where, you may know (if you do not it does not matter) that there proof is on the balance of probability. In a case like this, where the evidence is arranged as it is, before you reach a view that something has been established beyond reasonable doubt you also have to be satisfied that there is no other rational conclusion which is consistent with the innocence of the accused. If there is another rational explanation it follows that there is a reasonable doubt. So if you want to do it this way, as an approach, when considering whether the case for the prosecution has, in any particular respect, been established beyond reasonable doubt contrast with that a design to find out the answer to that question, whether there is an explanation which is reasonable and rational which is consistent with the innocence of the accused. If there is you need to think harder as to what you should do. I say harder as to what you should do because there is a spread of situations that have been placed before you as to the circumstances in which the facts, as you find them, may amount to murder or to manslaughter, and eventually I will go through those."

Throughout the remainder of his summing up, the trial judge from time to time reminded the jury that they had to be satisfied beyond reasonable doubt without any reference to or repetition of what appears in the passage reproduced above. (at p71)

18. This Court has clearly laid it down that it is both unnecessary and unwise for a trial judge to attempt explanatory glosses on the classical and, as I think, popularly understood formula which expresses the extent of the onus resting on the Crown in its attempt to establish the commission of a crime: see Green v. The Queen (1971) 126 CLR 28 . The Court has also indicated the limited occasions on which, in a case depending on circumstantial evidence, the extended formula proposed by Alderson B. in R. v. Hodge (1838) 2 Lewin CC 227 (168 ER 1136) should be used: see Grant v. The Queen (1975) 11 ALR 503 . (at p71)

19. In the present case, no question of circumstantial evidence arose. The evidence of the discharge of the gun and the circumstances in which it occurred were the subject of direct eye witness evidence. Undoubtedly, the case was not one in which to complicate the summing up by resort to any formula except the traditional reference to the absence of reasonable doubt. (at p72)

20. The passage I have quoted was, in my opinion, erroneous. It seems to have resulted from a confused co-mingling of the traditional formula with the formula at times appropriate to a case depending on circumstantial evidence. That the direction ought not to have been given in those terms needs no elaborate exposition. A rational conclusion and a rational explanation cannot be equated in the administration of the criminal law with a reasonable conclusion and a reasonable explanation. The jury set for themselves the perimeters of what is, in these contexts, reasonable. (at p72)

21. The objection to the summing up does not end there. It was erroneous - and indeed confusing - to tell the jury that finding a reasonable and rational explanation of the facts consistent with the innocence of the accused merely imposed a more difficult task upon them, because of a choice of verdicts which remained to them. If they found such an explanation, the accused was entitled to an acquittal. The jury in that case could

not have been satisfied beyond reasonable doubt. (at p72)

22. But the real difficulty I have had in this case is not to discover the errors in the passage quoted from the summing up. The difficult question is to decide whether the summing up as a whole none the less was adequate. Did its terms, in the effect they may have had upon the jury, deny the accused a fair trial, the case against and for him being fairly placed before the jury with adequate assistance by the trial judge? (at p72)

23. The first question, I think, is to determine whether words spoken in terms of the record of the summing up would be so appreciated by the jury as to provide them with a false basis for deciding whether the Crown had proved its case. A cogent consideration to my mind in this connexion is the reaction of counsel for the defence to the hearing of that portion of the summing up. In a break in the summing up, his Honour, in discussion with counsel as to possible exceptions to the summing up, said: "... that the onus is not only on the Crown to prove this beyond reasonable doubt, but this onus does involve excluding the rational possibility that is consistent with the innocence of the accused ...", to which counsel responded: "... Your Honour did earlier use the formula that is commonly attached to the circumstantial type of situation and I do not complain about that. Your Honour did not put it in the general term." His Honour's response was: "Well I did not put it any further with a case like this because the jury would get into an artificial area if you instructed them on the theory of the differential inference." Counsel replied: "But when you come to this situation, your Honour, my main concern only was that because your Honour was rolling it up in this way that it was there very appropriate to have added that aspect of it." (at p73)

24. His Honour on the final remaining day of hearing on his charge to the jury gave them a reprise of what he had already told them and used the expression: "... has it been established beyond reasonable doubt that he was guilty of murder? If not, has it been established beyond reasonable doubt that he was guilty of manslaughter? If not, the verdict is not guilty." (at p73)

25. Now, whilst in the calm and inquisitive atmosphere of a court of appeal it may be said that there was present, by inference, every time a reference was made to reasonable doubt, the meaning which was given to the expression at the second page of the typescript record of the summing up, the trial judge did not at any stage so qualify his references to the onus of proof: nor did he at any stage remind the jury of his early, and, by the time he used the expressions I have quoted from the typescript record on the final day of the hearing, remote, exposition of a possible approach to their task of seeking satisfaction beyond reasonable doubt. I might add that I doubt that the jury, listening to the summing up, would appreciate the distinction between rational and reasonable in the confused context of the passage I have quoted from the summing up. Further, counsel was content with the summing up, seemingly relating the material on the second page as at least primarily referable to any merely circumstantial elements in the evidence. (at p73)

26. For these reasons, I do not think that the jury were likely to be diverted from the constant application of the onus of proof expressed in traditional terms to the evidence before them. (at p73)

27. However, I should add two things. First, that a time-honoured view is that the adequacy of a summing up ought not to be judged upon a subtle examination of its transcript record or by undue prominence being given to any of its parts. It should be taken as a whole and as a jury listening to it might understand it. The second is that, whilst in a case where a summing up is radically in error, the failure of counsel to object to it in terms calculated to afford the trial judge an opportunity to amend it in a relevant respect will not necessarily defeat an application for special leave, generally, such a failure on the part of counsel will be a considerable impediment to the grant of such leave. Here the ground now sought to be taken was not taken before the Court of Appeal. This Court should give no encouragement to the addition of such further grounds, unless the interests of justice undoubtedly demand their admission. They do not in this case. (at p74)

28. In my opinion, special leave to appeal should be refused. (at p74)

GIBBS J. David Francis La Fontaine was tried in the Supreme Court of Victoria on a charge of having murdered his brother Kevin. He was convicted and his application for leave to appeal was refused by the Court of Criminal Appeal. He now applies to this Court for special leave to appeal. (at p74)

2. Kevin La Fontaine was killed when he was struck near the heart by a bullet fired from a .22 rifle held by the applicant. At the time, Kevin and two other brothers were together in a small room and the applicant was near the door of the room or possibly just outside it. There was evidence on which the jury could have found that the applicant had put a bullet in the rifle, had released the safety catch and had pulled the trigger while holding the rifle at his hip. Kevin was then moving towards the applicant and was shot at close range. Before the rifle was discharged the applicant had said to Kevin, "I am going to bloody put a hole in you". However, in a statement to the police the applicant said that when he shot at Kevin his intent was to shoot near him and to scare him, and that he had pointed the rifle to the right-hand side of the room - presumably away from Kevin - and that Kevin more or less stumbled into the shot. The applicant had drunk a great deal during the day on which the shooting occurred. (at p74)

3. The learned trial judge directed the jury that the applicant would be guilty of murder if he had fired the rifle either with intent to kill Kevin, or with intent to do him serious bodily injury. He then told them that there was a third class of case in which the applicant might be found guilty of murder. He described this third class in the following words: "If he discharges a firearm at another person, knowing that the shot will probably or more than likely cause the death of or serious bodily injury to that other, and that at the time he was indifferent whether death or serious bodily injury would be caused to the other or even if he wished that it might not be caused." He also left it to the jury to consider a verdict of manslaughter. Since the jury found the applicant guilty of murder they must have considered that the rifle was discharged deliberately and not by accident. It was not disputed that it would have been open to them to find that the applicant fired with intent to kill his brother or do him grievous bodily harm. However, before the Court of Criminal Appeal, and again before us, it was submitted that it was wrong to direct the jury that they might bring in a verdict of murder on the basis of what was described in argument as "a reckless intent" and alternatively that the summing up on this point was inadequate. (at p75)

4. In Victoria the state of mind necessary to constitute the crime of murder is not defined by statute. The rules which the learned trial judge was required to apply were those of the common law. The law on this matter, so far as it is relevant, was stated in Stephen's Digest of the Criminal Law in the following passage which is set out in the judgment of Lord Cross in Reg. v. Hyam (1975) AC 55, at p 95 :

> "... Murder is unlawful homicide with malice aforethought. Malice aforethought means ... (a) An intention to cause the death of, or grievous bodily harm, to, any person, whether such person is the person actually killed or not; (b) Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused; ... "

At the time when Sir James Stephen wrote, in 1877, there was little authority to support his statement that knowledge that the act which in fact causes death will probably cause death or grievous bodily harm will provide the mental element that constitutes an unlawful homicide murder rather than manslaughter. However, it has since been accepted in the Supreme Courts of Victoria (Reg. v. Jakac (1961) VR 367 and Reg. v. Sergi (1974) VR 1 and South Australia (Reg. v. Hallett (1969) SASR 141, at pp 153-154 that the passage cited from Stephen's Digest of the Criminal Law correctly expresses the law, and that view is confirmed by the decisions of this Court in Pemble v. The Queen (1971) 124 CLR 107 and of the House of Lords in Reg. v. Hyam (1975) AC 55 . It must now be taken to be the law that a person who does an act knowing that it is probable that death or grievous bodily harm will result is guilty of murder if death does in fact result, even though he had no intention to cause death or grievous bodily harm. In Pemble v. The Queen (1971) 124 CLR,

at p 121 Barwick C.J. went further, and said that it is "sufficient that the death or grievous bodily injury of the person towards or in connexion with whom the accused contemplated an act or omission should be foreseen by him as possible", and the question whether the foresight required to make the homicide murder should be a foresight of the probability, and not merely of the possibility, of death or grievous bodily harm has given rise to some discussion: see Glanville Williams, Criminal Law - The General Part, 2nd ed. (1961), p. 59 et seq.; Howard, Australian Criminal Law, 2nd ed. (1970), p. 57 et seq. and Reg. v. Hallett (1969) SASR, at p 153 . Although it is unnecessary to decide this question in the present case, I am, with all respect, unable to accept that the foresight of a mere possibility of death or grievous bodily harm would be enough. There is a great difference between the state of mind of an accused who is prepared to risk the consequences of death or grievous bodily harm that he foresees as probable and that of an accused who does no more than take the chance that death or serious injury may ensue although it seems an unlikely consequence. The act of the former is much more worthy of blame than that of the latter. To treat knowledge of a possibility as having the same consequences as knowledge of a probability would be to adopt a stringent test which would seem to obliterate almost totally the distinction between murder and manslaughter. I therefore respectfully agree with the views expressed by McTiernan and Menzies JJ. in Pemble v. The Queen (1971) 124 CLR, at pp 127, 135 , that in cases of this kind an accused will not be guilty of murder unless he foresaw that death or grievous bodily harm was a probable consequence of his behaviour. (at p76)

5. It has become common to describe the mental state of an accused person who acts knowing that his act will probably cause death or bodily injury as one of recklessness or reckless indifference. Judges and textwriters alike have used those expressions: see Pemble v. The Queen (1971) 124 CLR, at pp 118, 127, 135 ; Howard, op. cit., p. 55 et seq.; Glanville Williams, op. cit., p. 60 et seq.; Russell on Crime, 12th ed. (1964), p. 41 et seq. Indeed the legislature itself has in some places adopted them. However useful those words may be as a compendious description of this mental state, they should not in my opinion be used by a judge when summing up to a jury in States where the legislation does not require it. To tell a jury that they may convict of murder when they are satisfied that the accused acted with recklessness or reckless indifference is to invite confusion between murder and manslaughter resulting from criminal negligence. In many, if not most, cases where the Crown alleges that the accused acted knowing that his act would probably cause death or grievous bodily har, it will also be alleged by the Crown, in the alternative, that the accused was guilty of criminal negligence. The expression "reckless" is also used to describe that very high degree of negligence which, if it causes death, amounts to manslaughter: see Andrews v. Director of Public Prosecutions (1937) AC 576, at p 583 ; Eugeniou v. The Queen (1964) 37 ALJR 508, at p 509 . It is not easy to explain to a jury the difference between the reckless indifference which, if it exists, may justify a conviction of murder and that recklessness which would warrant a conviction for manslaughter. The purpose of a summing up is not to endeavour to apprise the jury of fine legal distinctions but to explain to them as simply as possible so much of the law as they need to know in order to decide the case before them. The mental element necessary to justify a conviction for murder in circumstances such as the present is sufficiently stated in the words of Sir James Stephen. It cannot assist, and may confuse, the jury to add to those words the gloss that the state of mind thereby described is one of recklessness or reckless indifference. It is enough to tell them that it is only if the accused actually knows that his act will probably cause death or grievous bodily harm that he can be convicted of murder. The extreme gravity of his offence lies in the fact that he fully realized the probable consequences of his act and was prepared to take the chance that they would ensue. If he did not in fact foresee that death or grievous bodily harm would probably be caused by his act, he would not be guilty of murder even though a reasonable man would have foreseen that such a result was probable; in those circumstances he might however be guilty of manslaughter. (at p77)

6. It follows from what I have said as to the duty of a judge when summing up to a jury that I am in complete agreement with the views expressed in Pemble v. The Queen (1971) 124 CLR, at p 118 , and Reg. v. Sergi (1974) VR, at pp 9-10 , that a direction as to this sort of murder should only be given where the facts of the case make it a practical issue. In the present case, however, it was right to give a direction of this kind to the jury. Although, as I have already said, it was open to the jury to find that the applicant had fired the rifle with the intention of killing Kevin or doing him grievous bodily harm, it was also open to them to find that he had fired without such intention but knowing that his act would probably cause the death of, or grievous bodily harm to, his brother. If the jury acted upon the applicant's statement that he intended to shoot near Kevin and to scare him it would have been reasonable for them in all the circumstances of the case to draw the further conclusion that the applicant knew that it was probable that the bullet would strike Kevin and cause death or

grievous bodily harm. The fact that the applicant had consumed a great deal of drink was relevant, and indeed important, in considering whether he in fact foresaw the probable consequences of his act, but there was evidence which justified the jury in concluding that he was aware of the probable consequences of firing a shot near Kevin. (at p78)

7. I have given careful consideration to the charge which the learned trial judge gave to the jury on this question and have reached the conclusion that, taken as a whole (as it must be), it was correct and sufficient. No useful purpose would be served by discussing the charge in full detail but some passages in it are open to criticism and it is necessary to refer to them. At one stage the learned trial judge referred to counsel's submissions in relation to what he called "this third class of malice" and said:

> "He pointed out to you also that it required a definite and distinct intention; it involved recognizing the probability of injury; it involved a conscious reference to that possibility of injury and it involved a decision to carry on, regardless of the risk of injury."

Taken alone, this was a misdirection for, as I have said, the jury were entitled to convict of murder only if satisfied that the applicant had acted with foresight that death or grievous bodily harm was a probable consequence of his action; foresight that death or grievous bodily harm was a possible consequence was not enough. At another point the learned trial judge said this to the jury:

> "Of course the prosecutor says that if you reach the view that the intention of the accused was to frighten and not to kill but it nevertheless involved firing a weapon at close quarters, in the living room of the house with other people including the deceased there, that there was a probability or likelihood that if the bullet hit one of the people in the room, it could either kill them or cause serious bodily injury. That would justify your making use of the third kind of intent."

That also was in itself a misdirection, and quite a serious one, for it is knowledge of the probability of the consequences, not their probability alone, that is essential to ground a conviction for murder. However, in the course of his charge the learned trial judge correctly instructed the jury again and again that a conviction of murder on this basis required proof that the accused had fired the shot knowing that it was probable that it would cause death or serious bodily injury. There are at least five passages in the course of the charge in which this direction was repeated. After the jury had retired and had deliberated for a time they returned seeking further instruction which the learned trial judge gave them. He then said:

> "The third one (classification of intent) is that he discharged the rifle at the deceased knowing that the shot would more probably than not, or more likely than not, cause the death of or serious bodily injury to the deceased and that at the time that he did this he was indifferent as to whether death or serious bodily injury would be caused to the other. He even may have had an intention that it might not be caused. But if he knew, if you are satisfied beyond reasonable doubt that he knew that as a matter of probability, on a better than balanced basis, such serious injury would be caused, then that can justify your bringing in a verdict of murder if you are satisfied that he was capable of forming the intention or appreciation that he was indifferent as to whether the discharging of the firearm ultimately had that effect or not. That is consistent with his not wanting to kill the deceased but discharging the firearm at him knowing that there was a better than balanced risk that he could be seriously injured or killed."

This direction clearly brought out to the jury that it was the knowledge or appreciation of the probability of death or bodily injury that had to be proved. Perhaps the words "better than balanced" were not well chosen but in my opinion the charge, taken as a whole, left the jury in no doubt that it was necessary to be proved that the applicant had foreseen the probability of death or grievous bodily harm. (at p79)

8. It was suggested that if the applicant had intended to shoot near to his brother so as to frighten him it could not be said that he had acted with reckless indifference and therefore could not be held to be guilty of murder

and that it was a misdirection to say to the jury "He even may have had an intention that it might not be caused"; that direction, it was said, would only be correct if "wish" or "desire" were substituted for "intention". With all respect, I cannot agree with this suggestion. The fact that the applicant intended that the bullet should miss Kevin would not be inconsistent with a conviction for murder. If the intention to fire the shot was accompanied by knowledge that by firing the shot he would probably cause the death of, or grievous bodily harm to, his brother, that would be enough. The fact that he intended to fire in such a way that the bullet would not hit his brother would not mean that he lacked the mental state necessary to ground a conviction for murder; that would exist if he acted as he did with full knowledge that death or grievous bodily harm was a probable consequence. (at p79)

9. On behalf of the applicant there has been raised a further objection to the charge which was not taken at the trial, before the Court of Criminal Appeal or even in the notice of motion to this Court. This was that an inadequate or misleading direction was given on the subject of reasonable doubt. In the course of his charge the learned trial judge told the jury that the Crown had to establish its case beyond reasonable doubt. He repeated this statement on a number of occasions. However, early in his charge, after telling them that the Crown had to establish its case beyond reasonable doubt and that the onus of proof was thus much higher than the onus of proof in civil cases, he went on to say:

> "In a case like this, where the evidence is arranged as it is, before you reach a view that something has been established beyond reasonable doubt you also have to be satisfied that there is no other rational conclusion which is consistent with the innocence of the accused. If there is another rational explanation it follows that there is a reasonable doubt. So if you want to do it this way, as an approach, when considering whether the case for the Prosecution has, in any particular respect, been established beyond reasonable doubt contrast with that a design to find out the answer to that question, whether there is an explanation which is reasonable and rational which is consistent with the innocence of the accused. If there is you need to think harder as to what you should do. I say harder as to what you should do because there is a spread of situations that have been placed before you as to the circumstances in which the facts, as you find them, may amount to murder or to manslaughter, and eventually I will go through those."

The argument advanced before us on behalf of the applicant was that in this passage the judge in effect told the jury that they would have a reasonable doubt only if they found that there was a rational explanation of the evidence consistent with innocence, and that the jury might have understood the words "reasonable doubt" in this sense whenever they were used in the course of the charge. (at p80)

10. This Court has not infrequently warned trial judges of the dangers of endeavouring to explain the traditional expression "beyond reasonable doubt", which, speaking generally, is well understood and needs no explanation. Where the case depends upon circumstantial evidence it is usual to direct the jury that they cannot convict unless they are satisfied that the circumstances are such as to be inconsistent with any reasonable hypothesis (or rational conclusion) other than the guilt of the accused (see Peacock v. The King (1911) 13 CLR 619, at p 634) but in other cases attempts to define "reasonable doubt" may obscure or distort the meaning of that phrase and lead to a misdirection, as in Green v. The Queen (1971) 126 CLR 28 . It is in all cases the duty of the trial judge to make the jury understand that a criminal charge has to be established by the prosecution beyond reasonable doubt, but as Windeyer J. said in Thomas v. The Queen (1960) 102 CLR 584, at p 605 "the best and plainest way" to give such a direction is to tell them that they must be satisfied beyond all reasonable doubt. (at p81)

11. The present case was not one of circumstantial evidence. There was no need to adapt the formula used in such cases and of course still less to invert it so as possibly to suggest that it is only if the jury find that there is a rational explanation consistent with innocence that there can be a reasonable doubt. However, having considered the charge as a whole I have reached the conclusion that although this particular passage is in itself open to objection, the jury would not have been misled by it, having regard to the other and proper directions which they received. They were repeatedly told that they had to be satisfied beyond reasonable doubt and when the learned judge gave them the further direction to which I have already referred he again

directed them to that effect. In my opinion when the jury retired they could have been under no misapprehension as to their duty. It is not without significance that at the trial counsel for the applicant expressly stated that he made no complaint about his Honour's "use of the formula that is commonly attached to the circumstantial type of situation" and that it was only after the notice of appeal had been lodged with this Court that it occurred to counsel that the summing up was defective in this respect. (at p81)

12. Of course the statement that if the jury thought that there was a doubt they would need to think harder was incorrect. However, there can be no doubt that the charge as a whole made it perfectly clear to the jury that what the judge meant was that if they were left in doubt as to whether the applicant had an intention to kill or inflict grievous bodily harm it would be necessary for them to consider whether he had fired the shot knowing that it would probably cause death or grievous bodily harm, and that if they were in doubt about that they would still have to consider the question of manslaughter. (at p81)

13. Many charges when subjected to close scrutiny will be found to contain misstatements which are corrected elsewhere in the charge. Notwithstanding the criticisms levelled at the charge in the present case I am satisfied that, taken as a whole, it was fair and sufficient. I would refuse special leave to appeal. (at p81)

STEPHEN J. The applicant La Fontaine, having fatally shot his younger brother, was found guilty of murder in a trial in the Supreme Court of Victoria before Griffith J. and a jury of twelve. His application to the Court of Criminal Appeal for leave to appeal failed. He now applies to this Court for special leave to appeal. (at p81)

2. The application before the Court of Criminal Appeal was concerned principally with the learned trial judge's charge to the jury in so far as it included a direction that the applicant might be found guilty of murder not only if he had intended to kill or to inflict grievous bodily harm but also in circumstances involving recklessness on his part. If he had fired at his brother knowing that to do so would probably, or more than likely, cause his death or serious bodily injury then, whether he was indifferent to those consequences or even if he wished that they might not ensue, that too would be murder. (at p82)

3. A majority of the Court of Criminal Appeal concluded that the nature of the evidence before the jury made it inappropriate to have included this direction in the charge to the jury but that its inclusion did not involve any miscarriage of justice. Had the jury been properly instructed the same verdict would almost certainly have resulted and there had been no risk of confusion between the ingredients of murder and those of the alternative verdict of manslaughter. The application for leave to appeal was accordingly refused. Anderson J., the third member of the Court of Criminal Appeal, agreed in the result but for quite different reasons since he considered that there had been no misdirection, the learned trial judge's direction being appropriate to the facts of the case. (at p82)

4. Before this Court the same aspect of the charge was again relied upon but to it was added a new objection to the charge not previously argued and which had not been the subject of any objection at the trial. It relates to the learned trial judge's direction concerning the necessary standard of proof of guilt required before the applicant may be convicted. (at p82)

5. The learned trial judge had, at an early stage in his charge to the jury, explained for the first and only time what was the particular meaning which the jury were to assign to the expression "beyond reasonable doubt" which he thereafter frequently employed in his charge. He stated in quite unobjectionable terms the ingredients involved in the possession of a reasonable doubt. He then went on to suggest to the jury that they might satisfy themselves whether or not there existed such a doubt as to guilt by asking themselves whether there existed any explanation consistent with innocence which was both reasonable and rational. (at p83)

6. This suggestion followed the elaboration by his Honour of his earlier observation that, before concluding that guilt had been established beyond reasonable doubt, the jury should be satisfied that there was no other rational conclusion consistent with innocence. His Honour continued:

> "If there is another rational explanation it follows that there is reasonable doubt. So if you want to do it this way, as an approach, when considering whether the case for the Prosecution has, in any particular respect, been established beyond reasonable doubt contrast with that a design to find out the answer to that question, whether there is an explanation which is reasonable and rational and which is consistent with the innocence of the accused."

Despite some garbling that appears to have occurred in transcription, the substance of what his Honour said is clear. It was, I think, such as might mislead the jury and might do so in a manner seriously prejudicial to the accused. It might suggest to them that it was for the accused to satisfy the jury of the existence of a reasonable and rational explanation consistent with innocence, failing which the jury could conclude that no reasonable doubt as to guilt existed. The jury were, I think, likely to have understood that they might ask themselves the question "Is there any explanation consistent with innocence which is both reasonable and rational?" and, if able to give a negative answer to that question, might then regard themselves as being satisfied beyond reasonable doubt. (at p83)

7. Later in the same passage the learned trial judge went on to say that if an affirmative answer was given to the question which he suggested the jury should ask themselves they would then "need to think harder as to what you should do". As subsequently appeared, his Honour had in mind that in such a case the jury would have to choose between murder and manslaughter and that their task would be the more difficult because it would involve the making of that choice. In fact an affirmative answer to the question suggested by the learned trial judge, whether there was an explanation consistent with innocence which was reasonable and rational, would not have made the jury's task "harder"; all they needed then to do would be to acquit the accused. However this particular error, textually associated with and perhaps induced by what preceded it, would not, I think, on its own have been capable of causing any miscarriage of justice; on a number of subsequent occasions the learned trial judge was at pains to make it perfectly clear that the possession of reasonable doubt in the minds of the jury must lead to an acquittal. Any confusion which it may have caused in the minds of the jury would, I think, have been wholly removed by what was subsequently said. (at p84)

8. This is not so in the case of the first error, that involved in the suggested method of testing the existence of satisfaction beyond reasonable doubt. Having once supplied an authoritative test of that state of mind and having left that test in the minds of the jury, to be applied by them to those matters upon which they had to pass, matters which his Honour went on to describe as depending upon satisfaction beyond reasonable doubt, there arises in my view a clear possibility that the trial may thereby have miscarried. What was said by this Court in Green v. The Queen (1971) 126 CLR 28, at p 31 is apt. There, as here, the learned trial judge had "made reference elsewhere in his summing up to the need to be satisfied beyond reasonable doubt but these references were, in our opinion, controlled by the definition of that expression which his Honour gave in the passage we have quoted". Here it was no precise definition that controlled the subsequent references to reasonable doubt but instead a suggested means whereby the jury might test the existence of such a doubt. (at p84)

9. This Court has on a number of occasions, many of which are reviewed in Green v. The Queen (1971) 126 CLR 28, at p 31 referred to the danger of attempting to explain or elaborate upon the content of the time-honoured formula of "a reasonable doubt". As Sir Owen Dixon said in Dawson v. The Queen (1961) 106 CLR 1, at p 18 , the attempts to substitute other expressions have never prospered. In Thomas v. The Queen (1960) 102 CLR 584, at p 595 Kitto J. said:

> "Whether a doubt is reasonable is for the jury to say; and the danger that invests an attempt to explain what 'reasonable' means is that the attempt not only may prove unhelpful but may

> obscure the vital point that the accused must be given the benefit of any doubt which the jury considers reasonable."

In the present instance the vital point has been obscured. Perhaps the proper direction to be given cannot more succinctly be expressed than in the words of Windeyer J. when he said (1960) 102 CLR, at p 605 :

> "The House of Lords said in Mancini v. Director of Public Prosecutions (1942) AC 1, at p 13 that a direction 'as to reasonable doubt' must be 'plainly given'. The best and plainest way to give it is, I venture to think, to tell the jury that they must be satisfied beyond all reasonable doubt." (at p85)

10. This was not a case of circumstantial evidence and nothing that I have said is intended to cast doubt upon the desirability, in most cases involving circumstantial evidence, of the jury being directed that the circumstantial evidence must be not merely consistent with the accused's guilt but inconsistent with his innocence. I mention this only because of the similarity between what was here said to the jury and what is customarily regarded as appropriate where circumstantial evidence is in question. (at p85)

11. That at the trial no objection was taken to this aspect of the charge, at a time when it could have been, and no doubt would have been, corrected, is unfortunate. In undertaking the exacting task of directing a jury in cases in which the issues are complex a judge is entitled to the anxious assistance of counsel. Moreover the very fact that no objection is taken at the time will in some cases of itself suggest that, however a particular portion of the charge may read in print, it was not, in the context and circumstance of its delivery, such as to mislead those who heard it. I am, however, unable to conclude that this was such a case and that the failure to take objection at the appropriate time should deprive this present objection of its force. That this ground was relied upon for the first time before this Court has also been productive of unfortunate consequences and would, in appropriate circumstances, provide a reason for not now permitting it to be availed of. The particular nature of the error of law upon which this ground is founded is, however, in my view such as to preclude the taking of this course. I have concluded, although with reluctance, that there should be a new trial. (at p85)

12. In these circumstances it is proper that I should express my views upon the other objection taken on behalf of the applicant, that upon which the Court of Criminal Appeal was divided; that is, whether on the facts of this case it was appropriate to give any direction as to the third circumstance in which a verdict of guilty of murder may be found and, if it was inappropriate, whether there was nevertheless no miscarriage of justice. (at p85)

13. As to the latter aspect, were it necessary for me to decide the matter on this ground, I would be content to adopt all that was said by Lush J. in the course of his judgment in the Court of Criminal Appeal; I have no doubt but that in the circumstances to which his Honour refers there was no miscarriage of justice which could have resulted from the giving of the challenged direction to the jury. However I have in fact concluded that this was a case appropriate for the giving of the direction in question. In arriving at this view I have been guided by the observations of the Chief Justice in Pemble v. The Queen (1971) 124 CLR 107, at pp 118-119 . The present case is, in my view, such a one as his Honour referred to when he said of Pemble's trial that the jury, if unwilling to infer an intent to kill or to do grievous bodily harm, were entitled to accept the view that Pemble foresaw the possible consequences of the discharge of the rifle and, in acting as he did, displayed reckless indifference to human life. (at p86)

14. In the present case Anderson J., in the course of his judgment in the Court of Criminal Appeal, concluded that if the jury were not satisfied that the applicant intended to hit the deceased it was nevertheless open to them to find that he must have adverted to the likely consequences of firing as he did and was indifferent to

those consequences. The applicant deliberately fired from a doorway into a room in which were the deceased and his two other brothers; of these three persons two of them were upright near the middle of the room, facing the applicant and quite close to him; the jury may have found that one of these two, the deceased, was moving towards the applicant swaying from side to side as he approached. If the jury accepted as true the applicant's subsequent statement that he intended only to frighten the deceased they could in the circumstances conclude that he nevertheless possessed the necessary malice, consisting of advertence to what might prove to be the fatal consequence of firing the gun coupled with an indifference to the occurrence of that consequence. The ingredients necessary to constitute murder would then be present, notwithstanding the absence of a positive intent to hit the deceased. In these circumstances it was proper to give the challenged direction, great care being taken, as it in fact was, to ensure that the distinction between murder and manslaughter was brought home to the jury. (at p86)

15. I would, for the reasons stated in the earlier portion of this judgment, allow this appeal and order a new trial. (at p86)

MASON J. In my view this application for special leave to appeal should be refused. With one exception the grounds on which the application was based do not require lengthy consideration, the facts of the case having been comprehensively stated by other members of the Court. (at p86)

2. The first ground taken is that the learned judge, in informing the jury that they should be satisfied of the reasonable doubt of the accused's guilt, erroneously directed the jury that they should not convict if there was a rational explanation consistent with the accused's innocence, thereby equating a "reasonable doubt" with a "rational doubt". As to this, I agree with the Chief Justice in thinking that in the circumstances of this case this ground provides no basis for special leave. There is no occasion for me to add to what his Honour has written on this aspect of the case, except to say that the trial judge in directing the jury on the facts stated:"...you should satisfy yourselves that the rifle was aimed and that it was fired by pressing the trigger, after releasing the safety catch, before you would classify this as murder in the sense that you were satisfied beyond reasonable doubt." This direction - and there were other illustrations of a similar kind - made it clear to the jury that the judge was using the expression "reasonable doubt" in its usual sense. The particular situation under consideration did not predicate the existence of a rational explanation consistent with innocence; it illustrated, by reference to a view which the jury might take of the evidence, a failure by the Crown to establish with sufficient cogency an essential ingredient in this aspect of the Crown case. The direction plainly indicated what is meant by the expression "reasonable doubt" and that its meaning was not confined to the artificial and restricted sense in which, according to the applicant, it was used in the passage on which the applicant strongly relied. (at p87)

3. Green v. The Queen (1971) 126 CLR 28 turned on the view which the Court took of the entire summing up. It concluded that the jury would take from the judge's remarks an incorrect impression of what is meant by the expression "reasonable doubt". Here the jury would have gained a correct understanding from the charge viewed in its entirety. (at p87)

4. Likewise, without questioning the view that a direction as to the reckless element in murder should not be given unless it is a practical issue on the evidence, I agree that this was a case in which it was appropriate for the trial judge to give such a direction. The case for the applicant was that he shot, not at the deceased, but near him, so as to frighten him and not to wound him. Nothing in Pemble v. The Queen (1971) 124 CLR 107 requires us to take the view that a direction on the topic in question was inappropriate in this case or that the giving of such a direction rendered the charge to the jury defective. (at p87)

5. As an alternative to this ground of attack the applicant submitted that the direction was defective in that it failed to focus attention on the defence claim that the accused shot not at, but near, the deceased so as to frighten him. Expressed in these terms the point falls short of supplying a ground for granting special leave because it raises no matter of general importance or general principle. Unless it appears that there was a

failure to draw attention to some aspect of the defence case and that this failure was associated with a defect in the general directions by his Honour as to murder based on a finding that the accused was recklessly indifferent to the consequences of his act, no case for special leave is made out. (at p88)

6. It is convenient to consider first the suggestion that the applicant's case on this issue was not adequately put to the jury. In my opinion the submission is without foundation. The trial judge was at pains to review the evidence relating to, and the circumstances in which, the rifle was fired. Before doing so his Honour suggested to the jury that they should not convict the applicant of murder on the footing now under consideration unless they satisfied themselves "that the rifle was aimed and that it was fired by pressing the trigger, after releasing the safety catch". His Honour went on to point out that there was no admission by the applicant that he aimed the rifle at the deceased, but that there was some material in his record of interview, as indeed there was, from which the jury might infer that the applicant "shot from the hip at the deceased". On the other hand, his Honour drew attention to an answer in the record of interview which, as he put it, "tends to disavow aiming the firearm". The relevant question and answer were:

> "Q. What was your intention when you shot at Kevin with the rifle?
>
> A. To shoot near him and to scare him."

There followed a reference to succeeding questions and answers in the record of interview after which his Honour made the comment:

> "That tends to give the statement the colour that it was not deliberately aimed at Kevin but was pointed at or in the region of the room where Kevin was at very close quarters. I will mention this later in connection with manslaughter. But you see it is quite a decision that you need to go through, to conclude that the rifle was being aimed at the trunk of Kevin. The accused is saying he was going to fire close to him." (at p88)

7. In the light of this account of what his Honour had to say on this issue, it is quite wrong to say that the trial judge failed to put the applicant's defence to the jury. Indeed, the defence was put in some detail and the applicant had the benefit of the trial judge's advice to the jury that it would be unwise to convict unless they were satisfied, amongst other things, that the rifle was aimed at the deceased. (at p88)

8. It is no easy matter to survey the trial judge's direction on the law as it relates to the reckless indifference aspect of murder. It is a subject to which his Honour referred on no less than four occasions in his charge to the jury and to which he returned later after the jury had retired and when they sought assistance on the law as to murder and manslaughter. There was some degree of variation in what his Honour had to say on these occasions. However, subject to certain qualifications to which I shall shortly refer, the directions given to the jury correctly reflected the law on the point and conformed to the decision of the House of Lords in Reg. v. Hyam (1975) AC 55 . The jury were told that even if the applicant did not shoot with intent to kill or to cause grievous bodily harm he might properly be found guilty of murder if, knowing that there was a probability or likelihood that the firing of the gun would cause death or serious bodily injury to the deceased, he fired the gun being indifferent whether death or serious bodily injury was caused, and, as the judge added on two occasions, "even if he wished that it might not be caused". (at p89)

9. Had the judge not departed from this formula there could be no room for argument. However, there were some departures and it is necessary to look at them. In response to the jury's request for assistance on the law of murder and manslaughter, after they had retired, the judge, in speaking of the circumstances in which the jury could find the applicant guilty of murder, then said: "He even may have had the intention that it" (referring to death or serious bodily injury) "might not be caused". No doubt his Honour had intended, in

accordance with his earlier instruction, to use the word "wish" or "desire" for "intention", but inadvertently adopted the latter expression. Nevertheless, I cannot think that this distracted the jury from a correct approach to their task because the jury would have understood the comment in the light of the earlier observation, "even if he wished that it might not be caused", and because the comment was immediately followed by an observation that made it apparent that a verdict of guilty could not be justified unless the jury were satisfied that the applicant was "indifferent" as to the consequences, this being consistent with "his not wanting to kill the deceased". (at p88)

10. In the passage in question his Honour observed:

> "But if he knew, if you are satisfied beyond reasonable doubt that he knew that as a matter of probability, on a better than balanced basis, such serious injury would be caused, then that can justify your bringing in a verdict of murder if you are satisfied that he was capable of forming the intention or appreciation that he was indifferent as to whether the discharging of the firearm ultimately had that effect or not. That is consistent with his not wanting to kill the deceased but discharging the firearm at him knowing that there was a better than balanced risk that he could be seriously injured or killed."

An intention not to cause death or serious bodily injury could only co-exist with an attitude of indifference as to the occurrence of that result if "intention" is understood in the sense of "wish" or "desire". (at p90)

11. Moreover, the advice that the jury should not convict the applicant of murder unless they were satisfied that the rifle was aimed at the deceased, advice which the learned judge repeated, was calculated to secure an acquittal on the charge of murder in the event that the jury found that the applicant intended not to harm the deceased and, in conformity with this intention, shot near, but not at, the deceased. When all these considerations are taken into account I cannot see that what his Honour said resulted in a misdirection to the jury. (at p90)

12. Another criticism which might be made of the directions given is that the trial judge spoke of the necessity for knowledge on the part of the applicant that there was a probability that "if the bullet hit one of the people in the room it could either kill them or cause serious bodily injury". It was, of course, correct to say that foresight of probable serious bodily injury to a person other than the deceased would ground a conviction for murder. Later, his Honour specifically related the required foresight to the probability of serious bodily injury to the deceased and his Honour was prudent so to do because on the facts the probability of serious bodily harm to anyone other than the deceased was remote. (at p90)

13. But his Honour should not have restricted the foresight of the probability of serious bodily injury to that which might result if a bullet struck the deceased, or for that matter another person in the room, for it is knowledge of the probability of death or serious bodily injury resulting from the applicant's firing the gun that is all-important. His Honour's statement literally overlooks an intervening step in the chain of events, the probability of the bullet hitting a person, more particularly the deceased. However, in the context of a discussion of reckless indifference as to the consequences of one's acts and the requirement that there should be knowledge of a probability of death or serious bodily injury resulting from that act it can hardly be supposed that the jury would have failed to relate the direction to the prospect of the bullet striking the deceased or to have failed to take this into account in deciding whether the applicant knew that his act would probably cause death or serious bodily injury. In this connexion it is of some significance that on the first two occasions when his Honour discussed the matter of the applicant's knowledge or foresight with the jury he did not limit it to the consequences which might flow from a bullet hitting the deceased or another person. He then correctly expressed it in terms of knowledge of the consequences of firing the shot. (at p91)

14. For these reasons I conclude that although there are some passages in the charge to the jury which are susceptible to criticism the charge viewed as a whole, as it should be, correctly and fairly put the issue to the

jury. Indeed, the criticisms are in one sense almost academic because, as I have said, the judge discouraged the jury from convicting the applicant of murder unless they were satisfied that the rifle was aimed at the deceased. I entirely agree with Lush J. in the Supreme Court when he said:

> "In my opinion it is, having regard to the terms of the charge, unlikely that the jury's verdict was based on murder by recklessness, but if it was it must have been upon a finding that the rifle was deliberately aimed and fired at the deceased at a range of a few feet, the applicant's intention

being to frighten ... See also Reg. v. Ryan &Walker

> (1966) VR 553, at p 565 where the Court said: 'In any event, on the evidence and having regard to the closeness of the range at which Ryan fired the shot, we are of opinion that a jury properly directed could not reasonably have failed to draw the inference that Ryan did in fact contemplate that death or at least grievous bodily harm was likely to result to Hodson; see Smyth v. The Queen (1957) 98 CLR 163 and Parker v. The Queen, per Windeyer J. (1963) 111 CLR 610, at pp 648-649 .'" (at p91)

15. I need hardly say that having regard to the terms of the charge I find it quite unnecessary to explore the suggestion made by the Chief Justice in Pemble v. The Queen (1971) 124 CLR, at p 121 that it is knowledge of a possibility, rather than of a probability, of the act causing death or serious bodily injury that is the relevant element in the case of murder involving reckless indifference. At this stage it is sufficient to note that it was not a view shared by McTiernan J. (1971) 124 CLR, at p 127 and Menzies J. (1971) 124 CLR, at p 135 and that it is at odds with the speeches of their Lordships in Reg. v. Hyam (1975) AC 55 according to which it is knowledge of the probable consequences that is the requisite element. (at p91)

16. In the result I would refuse the application for special leave. (at p91)

JACOBS J. Although the applicant was of cause entitled to the benefit of any defence which was open upon the evidence and was entitled accordingly to the benefit of any manner in which the Crown might not satisfy the jury beyond reasonable doubt, probably the first issue which the jury had to determine in a practical sense was whether the applicant took off the safety catch of the rifle and intentionally pressed the trigger. If he did not, he was not guilty of murder even if he knew that the trigger was very light and whatever possible consequence of killing or seriously injuring any one of those present in the room he may have foreseen. I shall return to this question later when I have referred to certain passages in the charge to the jury. (at p92)

2. If the jury concluded that the applicant intentionally pressed the trigger, the next question was whether the applicant intended to fire in the direction of the deceased. It does not appear that there was a separate issue on this question. Once the jury concluded that the applicant intended to press the trigger and fire the rifle there can hardly be any doubt that the jury would find that the applicant intended to fire in the direction of the deceased. No question now arises separately upon this issue. (at p92)

3. Then the question for the jury was whether the applicant fired in the direction of the deceased intending that the bullet would hit him. If they found that intent and an intent to shoot the deceased in the part of the body where the bullet lodged they could find an intent to kill. They could infer that the applicant knew that a bullet in the heart was certain to kill. The doing of an act with knowledge of a certain consequence is not required to be distinguished from intent to bring about that consequence. (at p92)

4. If the jury found that the applicant intended that the bullet would lodge in any part of the deceased's body and thereby cause him serious bodily injury they could find malice; but on this predicated intent the question what exactly is serious bodily injury, that is to say, whether the serious bodily injury must be such as is likely

to endanger life (see the differences of opinion in Hyam v. Director of Public Prosecution (1975) AC 55) does not require definitive attention if regard is had to the principle of constructive malice. It arose for determination in Hyam v. Director of Public Prosecutions because the doctrine of constructive malice was abolished in the United Kingdom in 1957 (Homicide Act, 1957 (U.K.)). In the present case the trial judge charged the jury in terms of intent to do serious bodily injury. He did not explain constructive malice in so many words but his charge was sufficient to place the issue of fact before them even though he did not tell them the legal basis of constructive malice. The Crimes Act 1958 (Vict.) s. 17 makes shooting with intent to do grievous bodily harm a felony. Intent to do serious bodily injury is certainly no less than intent to do grievous bodily harm. No objection is taken to the charge in this respect. (at p93)

5. There was, however, one matter which particularly required consideration by the jury and attention by the presiding judge. The applicant did not give evidence or make a statement from the dock but in his statement to police officers on the night of the shooting, when asked what was his intention when he shot at the deceased with the rifle, said "To shoot near him and to scare him". (at p93)

6. Except for this particular matter raised in the applicant's statement to the police officers there could be no argument but that all that would have been required by way of direction on the element of malice aforethought, assuming the jury concluded that the applicant intended to fire the rifle in the direction of the deceased, would have been a direction to the jury that they must be satisfied of intent to kill or to inflict serious bodily injury on the deceased. However, the applicant's statement led the trial judge to give the further direction to the jury on malice beyond the direction that it meant intent to kill or cause serious bodily injury. (at p93)

7. It requires particular note that the applicant's statement was not merely that he intended to frighten the deceased, an intent consistent at least with a concurrent intent to cause serious bodily injury to the deceased. If the jury "accepted" the applicant's statement - I express it in this way for convenience of writing but of course I mean if the jury is not satisfied beyond reasonable doubt that this version is incorrect - the jury could find that the applicant intended that the bullet would not hit the deceased at all. (at p93)

8. The question which arises and will require consideration is whether, if the jury "accepted" the statement of the applicant that his actual intent was to shoot near the deceased, understanding those words to mean that the applicant intended the bullet should not hit the body of the deceased, and to scare him they could nevertheless find him guilty of murder. (at p93)

9. The ascertainment of intent thus required a choice between alternatives which included shooting intending to hit the deceased and shooting intending not to hit, that is to say, intending that the bullet should pass near his body but not into his body. These alternatives did not particularly require attention to a possible view of the facts, that the applicant fired at the deceased knowing that the bullet would probably hit the deceased but recklessly indifferent whether the deceased was killed or seriously injured. On the other hand, if there could be murder where the applicant knew that it was possible that the bullet might hit the deceased and kill or seriously injure the deceased, and where the applicant knowing that possibility was recklessly indifferent whether or not the bullet did hit the deceased, then a direction on reckless indifference would not appear to be inappropriate. (at p94)

10. Recklessness in relation to malice aforethought is used as a compendious word to describe actual knowledge of the consequence of an act - I do not at this stage say whether the consequence must be probable or whether it is sufficient that it is possible - and positive indifference whether that consequence follows or not. Such a state of mind may amount to malice aforethought but recklessness in this sense is not failure to take care, even a failure to take care where at the time of his act the actor adverts to the possible consequences of his act. In other words, it is not a quality of the conduct. The recklessness is the necessary quality of the indifference to the consequences of the intended act - a positive indifference reckless of known consequences. It is a state of mind which rarely needs to be considered on a charge of murder. There is little

on reckless indifference in its relation to murder in English legal decisions but the relationship was recognized in Hyam v. Director of Public Prosecutions (1975) AC 55 and was possibly applied by Stephen J. in his charge to the jury in Reg. v. Serne (1887) 16 Cox CC 311 . An aspect was stated in his Digest of the Criminal Law by Stephen whose enunciation has been repeated in Archbold's Criminal Pleading Evidence and Practice. See now 38th ed. (1973), par. 2485.

> "Express malice. Express malice has been defined by Stephen in his Digest of Criminal Law, 9th ed., pp. 211-213, as including either of the following states of mind preceding or co-existing with the act or omission by which death is caused and it may exist where that act is unpremeditated: - (a) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not; (b) Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused."

I shall refer presently to the cases decided in those places in Australia where the law of murder is still the common law. (at p95)

11. It is to be observed that Stephen expressed the principle to include knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person. In my opinion this expression of the principle is correct. The need for a direction on this form of malice would arise for example in cases where the accused said or suggested that though it be found that he knew that his act of shooting at the victim would probably kill or seriously injure the victim his only actual intent was to get away or to prove to himself that he was brave enough in his own mind to do the act, or, it must be added, to frighten the victim, and that, that being the only intent actually in his mind, there was not an intent to kill or seriously injure. The law then says that there may nevertheless be malice in the absence of the actual intent to kill or seriously injure in such circumstances if there was a reckless indifference to what he knew to be the probable consequences of his act. Intent to kill or seriously injure, although it may be inferred as a fact from the doing of an act with knowledge of its probable consequence of death or serious bodily injury to the victim, is not the same as knowledge of the consequences of the doing of such an act. On the one hand intent may exist even though the knowledge of the actor is that the death of the victim is improbable. If a man were to fire a pistol into a dark place intending to kill another he would be guilty of murder even though he believed that the odds were greatly against him killing that other. It is the actual present intent which is sufficient. The actual present intent need not be the only intent. If in the examples which I have given in the earlier part of this paragraph there was, in addition to the intent to get away or to prove himself, an actual present intent to kill or seriously injure then the act is murder. On the other hand if the intent is not actually present, there is no intent in law. To say that there is in law an intent in such circumstances is to apply a legal presumption that a man intends those consequences which he knows to be probable but there is no such presumption. The question is one of fact. However, there may still be malice in the special circumstances of knowledge of probable consequence and reckless indifference to that consequence. (at p95)

12. I recognize that an alternative classification is to make no distinction between doing an act intending that a consequence will follow and doing an act expecting, but not certain, that a consequence will probably follow. See, for instance, the classification by Mr. T. W. Smith as law Reform Commissioner in Victoria in his Report on the Law of Murder, p. 3. So long as the expectation is of the probable consequence, the difference in classification does not appear to me to matter. However, if the relevant expectation was of a merely possible consequence, the word "intend" would be inappropriate. No man can be described as intending what he does not expect to happen unless he actually intends it to happen. (at p96)

13. I come now to the position if the jury "accepted" the fact that the applicant fired in the direction of the deceased intending that the bullet would not hit him. Could they find him guilty of murder? It appears to me that they could only do so on a basis that it was sufficient in law that the applicant foresaw that the possible as distinct from probable consequence of the act was that the bullet would hit the deceased and was recklessly indifferent whether or not it thus caused his death or serious bodily injury. That, however, is not in

my opinion sufficient to constitute murder. It could be said that he was reckless in the sense that appreciating the risk he decided to take that risk. But it is not murder to do an act which is risky to the life of another simply because the risk, the possibility of causing death or serious bodily injury of the other, is known to be probable. There must be indifference to known probable, not merely possible, consequences, and that indifference must be reckless. It is not appropriate to introduce into this use of the words "possibility" and "probability" connotations appropriate to the determination of questions in other fields of law such as satisfaction of a burden of proof or of adducing evidence. In the present context we are dealing with the state of a man's mind, with that state of mind which the word "malice" connotes. To say that a man knows in his mind that a consequence of his act is probable is to say that he believes that the consequence will happen or that he expects that it will happen even though he would be prepared to concede that it is not certain that it will happen. To say that a man knows in his mind that a consequence of his act is possible though not probable is to say that he believes that the consequence will not happen or that he expects that it will not happen even though he would be prepared to concede that it may happen. There is a great difference in moral and social content between the first state of mind and the second just as there is between the first state of mind and that of a man who knows that a consequence is possible but who has formed no opinion at all as to the degree of possibility. The difference between the first state of mind and the other two states of mind should be preserved in the law of murder. The words "malice aforethough" can be misunderstood if each of them is given a meaning different from the meaning which they bear in the law of murder. "Malice", it is well accepted, does not refer to the emotive state of the actor and "aforethought" does not mean "existing at a distinctly prior time". Nevertheless, a dislike of the possible confusion that the words may cause must not be allowed to obscure the fact that for a crime to be murder there must be a particular state of mind more wicked than an intention to take a risk with an appreciation that the risk is of death or serious bodily injury to another, an intention which may or may not be able to be described in pejorative terms depending upon the social usefulness of the intended action. (at p97)

14. Now that the death penalty has been abolished, or virtually abolished, there is not the same importance in physical consequence in distinguishing between murder and the more serious kinds of manslaughter. In the same way it could be said that there is no longer an importance in distinguishing the case of reckless indifference with knowledge of the probable consequence from the intentional taking of a risk or indifference to the risk when the actor positively adverts to the possible consequences in death or serious bodily injury to another of his taking that risk. This kind of consideration has led some to the view that all unlawful killings should be one offence with the variations of circumstances being reflected in sentence: (e.g. Lord Kilbrandon in Hyam v. Director of Public Prosecutions (1975) AC, at p 98). Though both murder and manslaughter can be very serious crimes I believe that society still places on the word "murder" a connotation of dreadfulness which is an important social sanction and that the sanction is watered down if anything (apart from the instances of constructive malice and certain Code provisions which have other social purposes) is added to the category of murder which does not involve an intent to kill or do serious bodily injury or what is practically the equivalent therof. (at p97)

15. I have attempted to avoid any use of the words "desire", "purpose", "motive", "wish" or "object". Once any word other than "intent" is used I believe that further precise definition is required in order to distinguish the exact sense in which the word is being used. If the use is synonymous with intent, there is no need to use it. If it is different then it introduces a concept different from intent and therefore not relevant as an ingredient of the kind of malice which involves actual intent. (at p97)

16. The mental element in the crime of murder is not a simple matter at all. It has been the subject of much writing over the last 150 years, ever since the utilitarianism of the Benthamist school and the legal positivism of that time sought an expression of the law in terms free from moralistic concept. Since Director of Public Prosecutions v. Smith (1961) AC 290 and now since Hyam v. Director of Public Prosecutions (1975) AC 55 there has been a fresh surge of writing. (See e.g. Glanville Williams, The Mental Element in Crime; R. Cross, "The Mental Element in Crime", Law Quarterly Review, vol. 83 (1967), p. 215; J. C. Smith, "Intention in Criminal Law", Current Legal Problems, vol. 27 (1974), p. 93; R. Buxton, "Malice Aforethought", Modern Law Review, vol. 37 (1974), p. 676; and M. Sornarajah, "Reckless Murder in Commonwealth Law", International and Comparative Law Quarterly, vol. 24 (1975), p. 846.) (at p98)

17. The difficulty in holding that anything less than an intent to kill may constitute the mental element for murder, an intent which can be condemned in absolute terms, is that then it is difficult, if not impossible, to leave out of account the baseness or goodness in moral or social terms of any aim, purpose of motive which accompanies the actual intent. The objection which can be made to the introduction of notions of moral turpitude through examination of aim, purpose and motive is that it may largely reintroduce into the legal concept of malice popular indeterminate connotations of that word. One way in which the objection has been met is by regarding reckless indifference to known consequences as a wanton lack of any morally or socially acceptable aim, purpose or motive. I find this acceptable in relation to murder only if the reckless indifference is to a consequence which is known to be probable, which is expected to occur. Reckless indifference to a consequence of death or serious bodily injury which is not expected to occur, but which it is appreciated may possibly occur, is in my opinion properly treated as manslaughter. If ultimate analysis should eventually make it necessary to recognize through examination of aim, purpose and motive the element of moral culpability (the "aim" explored by Lord Hailsham in Hyam v. Director of Public Prosecutions (1975) AC 55) or the "wicked, depraved, and malignant heart" of Blackstone's Commentaries 15th ed. (1809), vol. 4, p. 198, then I have found no better expression of the elements than that by Traynor J. in People v. Thomas (1953) 261 P. 2d 1, at p 7 who referred to "a base, anti-social motive ... with wanton disregard for human life". (at p98)

18. I find nothing in Reg. v. Jakac (1961) VR 367 or in Reg. v. Sergi (1974) VR 1 to the contrary of the principles which I have expressed above. Indeed in the latter case the trial judge charged the jury as follows (1974) VR, at p 7 :

> "If you find that Sergi intended to miss Condo and merely to frighten him, again you ask yourselves, 'Are we satisfied that was not done in self-defence?' If you are not satisfied that it was not self-defence, the verdict is not guilty of murder and of manslaughter. If you are satisfied that it was not self-defence, the verdict will be not guilty of murder, but you will have to consider whether you will find Sergi guilty of manslaughter ..."

This was in my opinion a perfectly correct direction. I would refer also to the passage in the judgment of the Court of Criminal Appeal (1974) VR, at p 10 :

> "It is necessary to guard against the danger that the jury, because words such as 'likely' and 'probable' are used loosely in common speech, may understand a charge which uses those words as meaning that malice aforethought is established if the accused realized or believed no more than that he was creating a substantial risk of death or grievous bodily harm. This misunderstanding may also arise from references to 'recklessness' if it is not made clear to the jury what is the particular kind of recklessness that is requisite. It needs to be made quite plain to the jury that in order to bring the case within the principle, the Crown has to establish that when the accused did the act which caused the death he realized or believed that it was more likely than not that death or grievous bodily harm would be the result, or, in other words, that he realized or believed that the odds were against the deceased escaping without at least suffering grievous bodily harm."

In substance I agree with what is there said but I would avoid the test of "more likely than not" or "odds against". What needs to be made clear in any exceptional case where the direction is needed is that the accused must have in his mind, must expect, that the victim will suffer death or serious bodily injury even though his mind is less than certain that this will be so. I think that this is conveyed by a direction that the accused knew that his act would probably cause death or serious bodily injury. (at p99)

19. In Reg. v. Hallett (1969) SASR 141 the South Australian Supreme Court considered whether the test was "probable" or "possible" consequence and concluded that the former was the correct test. There are passages in the reasons of Barwick C.J. in Pemble v. The Queen (1971) 124 CLR 107 which would support the view that foresight of possible consequences coupled with indifference to such possible consequences is sufficient

to support a verdict of murder (1971) 124 CLR, at pp 118-119, 121 . McTiernan J. and Menzies J. took the view that knowledge of the probable consequence was necessary. Windeyer J. and Owen J. did not express an opinion on this question. I do not think that the decision in Pemble v. The Queen (1971) 124 CLR 107 indicates a conclusion on the question presently being considered. (at p100)

20. In Kenny's Outlines of Criminal Law, 19th ed. (1966) the editor at par. 116a, pp. 164 et seq. refers on a number of occasions to foresight in an accused of the possibility or risk of death but it is important to note that those references occur in a paragraph dealing with the nature of the bodily harm which is the necessary ingredient in this kind of malice aforethought. (at p100)

21. Two further points require notice before I turn to the trial judge's charge. First, the presence in the room of the other two brothers though important in the factual situation was not significant on the question whether the acts and state of mind of the accused could in law consititue murder. This was not a case where the jury could find an intent to kill or seriously injure or, to use an abbreviated reference, a reckless indifference in respect of, a number of persons or any one of a number of persons without particular regard to the identity of any of them. In other words it was not a case of general or universal malice. Nor was it a case where the jury could find an intent to kill or seriously injure or, to use an abbreviated reference, a reckless indifference in respect of, a particular person other than the deceased. In other words it was not a case of transferred malice. Secondly, it was not suggested that shooting near the deceased with an intent to scare him was a felony so the possibility of constructive malice on the applicant's own version of the facts was not canvassed. (at p100)

22. The first direction in the charge on malice was as follows:

> "We reach, then, the question of what is murder. Murder is committed when a person does a voluntary act which causes the death of another. At the time he does that act he may either intend to kill the other, (the deceased) or to intend to do serious bodily injury to the other (the deceased) or in this third class, which I shall relate to an event which included a rifle being discharged. If he discharges a firearm at another person knowing that the shot will probably or more than likely cause the death of or a serious bodily injury to that other, and that at the time he was indifferent whether death or serious bodily injury would be caused to the other or even if he wished that it might not be caused."

This direction is both precise and correct. The trial judge proceeded, however, as follows:

> "Mr. Hampel pointed out, in his address to you, that this third class of malice is a complex and difficult thing. He pointed out to you also that it required a definite and distinct intention; it involved recognizing the probability of injury; it involved a conscious reference to that possibility of injury and it involved a decision to carry on, regardless of the risk of injury."

The trial judge followed this with a warning to be very careful before concluding that the case came within what he described as the third class or third category of murder. This does not affect the directions of law and there is no need for me to set out the passage. (at p101)

23. A little later the learned judge directed the jury as follows:

> "There is then this troublesome third class of intention, the discharge of a firearm (and I will fill in now the names of the actors) by the accused at or near the deceased knowing that the shot will probably or more than likely cause the death of or serious bodily injury to the other and that at the time the accused was indifferent whether death or serious bodily injury would be caused to the other or even if he wished that it might not be caused."

Later again his Honour said:

> "Of course the prosecutor says that if you reach the view that the intention of the accused was to frighten and not to kill but it nevertheless involved firing a weapon at close quarters, in the living room of the house with other people including the deceased there, that there was a probability or likelihood that if the bullet hit one of the people in the room, it could either kill them or cause serious bodily injury. That would justify your making use of the third kind of intent. But at all events, my suggestion to you is that you should satisfy yourselves that the rifle was aimed and that it was fired by pressing the trigger, after releasing the safety catch, before you would classify this as murder in the sense that you were satisfied beyond reasonable doubt. I have not given you a direction in law which involves your doing that; I have referred to these different classes of intent, but I want you to understand that that is a comment on the facts from my point of view. I have had to put it in a legalistic framework, but it is a matter for you as to whether or not you need to have evidence that the trigger was pulled, that the safety catch was off, and that that rifle was aimed before you can be confident of a verdict of murder. It might be said for the Crown, if the prosecutor had the opportunity to stand up in the middle of my charge, that the third category of intent does not involve the actual aiming or directing of the weapon at the victim. There are all kinds of situations which might involve debate about that, but I should be constrained as a matter of caution when applying such a complicated examination of intention as I regard the third class of intention, reckless indifference, I would be inclined to adopt the view, in this case, that unless you are satisfied that the rifle was aimed, that the trigger was pulled and that the safety catch had been put off by the accused then you should not, unless you are convinced by other facts, that you should not consider bringing in a verdict of murder in this case."

This direction is partly on the law but mostly it is a view on the facts which the trial judge was entitled to express but which he made clear did not bind the jury. The direction of law is mainly in the first two sentences. It is a direction that the jury could find what he called the third kind of intent from the circumstances set out in the first sentence. Whether or not the statement "if the bullet hit one of the people in the room, it could either kill them or cause serious bodily injury" is the statement of a matter relevant to reckless indifference, the statement generally is seriously defective because it does not refer to the state of mind of the accused when it lists the circumstances and refers to the probability or likelihood that if the bullet hit one of the people in the room it could either kill them or cause serious bodily injury. The immediately succeeding passage suggests by implication that even if the rifle was not aimed and was not fired by pressing the trigger after releasing the safety catch, nevertheless the jury could find murder; for the learned trial judge specifically states that he gives no legal direction that the jury must be satisfied of the aiming and firing by pressing the trigger before they could find murder. For reasons which I have already expressed I regard this as erroneous in law, and when it is coupled with the immediately preceding reference to probability or likelihood, unrelated to the state of mind of the accused, it could all be taken to mean that the gross carelessness of the acts done in the circumstances referred to could establish murder. There is no need to state that since this could be taken to be the meaning of his Honour's words, the direction was seriously wrong. (at p102)

24. This may have been corrected a little later when his Honour said:

> "So it would seem that the evidence given about dropping the rifle or about knocking the rifle does not bear very strongly on the matters with which you are concerned. The lightness of the trigger, of course, bears on it, to this degree, if for no other, that if anyone is to handle a loaded firearm at close quarters which, from experience, he knows to have a lightness on the trigger, then of course the more conscious he is of the danger of doing so the more careless or reckless is his act in running that risk. It is open to you to infer I suppose that the accused here had had that rifle long enough to know its characteristics. If that be so, you have to understand what kind of risk was being run in his going into a room with three other people there with a loaded firearm, a rifle with the armoury characteristics of this one. You will have seen that I have now started to trail off from the charges of murder and to enter the area of manslaughter. I hope that you will not think this is on the edge of deception, but it was done consciously so that you appreciate that

> the dividing line between murder and manslaughter is the stage at which you cannot assign to the actions of the accused when handling and firing the rifle: the possession by him of a specific intent to kill or to grievously wound or to recklessly and indifferently accept the risk of what involves probable injury of a serious kind or the causing of death to the accused."

How much of these directions related to murder and how much to manslaughter is not clear to me and with respect I do not think that it would have been clear to the jury. (at p103)

25. The following day his Honour resumed his charge. After hearing submissions of counsel, he recapitulated or restated the law and in the course of so doing said:

> "I told you also that in my view at any rate, to find the accused guilty of murder it would also be necessary for you to feel satisfied beyond reasonable doubt that the accused pulled the trigger of the rifle and that the safety catch was off. Any idea that the weapon was discharged otherwise than by pulling the trigger would seem to me not to fit in with the pattern of murder. On the other hand, in relation to manslaughter it would seem to me that if you were satisfied beyond reasonable doubt of the guilt of the accused, of manslaughter, then it would not matter how the firearm was actually discharged. I do not mean that you need not consider how it was discharged; I mean it does not seem to me - and this is only a comment - as to whether it was a result of some pressure applied to the trigger or some other way."

I interpose to say that this repeats the implication that the jury could find the applicant guilty of murder even if they were not satisfied that the applicant pulled the trigger. The words used can only be read as a comment on the way he, the trial judge, would view the facts. The learned judge proceeded:

> "Now, if I may, I will go through the points of law that I mentioned yesterday so that they come freshly to your minds as you re-enter the arena today. I am sorry if these sets of words are now becoming to sound over familiar. Cutting away the dead wood that need not be considered here, that is the fact of death and things like that, the kind of intent that a person needs to have to be found guilty of the crime of murder, and this intent must be proved beyond reasonable doubt, is either (a) the intention to have killed the deceased or (b) the intention to do serious bodily injury to the deceased. Or, (c) that he, the accused, discharged the firearm at the deceased knowing that the shot will probably or more likely than not cause the death of or the serious bodily injury to the deceased, and that at the time he was indifferent as to whether death or serious bodily injury would be caused to the deceased, even if he wished that it might not be caused to the deceased. Then you have the next area, which is manslaughter, and I will deal with that in a moment."

This direction is correct as was the first direction but it is not consistent with what had meanwhile been said and there is no specific correction of what had meanwhile been said. Nevertheless, if the situation rested there, it would be open to question whether this Court should intervene. But the situation did not rest there. (at p104)

26. The jury retired and returned four hours later, the foreman saying "We would like the law read again on the charges of murder and charges of manslaughter". The trial judge gave the following directions:

> "Murder is committed where a person does a voluntary act which causes the death of another - you might say that a voluntary act of firing a firearm, a decision which he makes freely, in a voluntary sense - and then you have to find in addition that there was a specific intention, one kind of intention which will result in a verdict of murder is that he intended to kill the deceased. Intend to kill, when you are talking about the use of firearms, means shot to kill. That is shot to kill in the sense of mortally wound the deceased. The second classification of intent is that he shot with the intention to do serious bodily injury to the deceased. The third one is that he discharged the rifle at the deceased knowing that the shot would more probably than not, or more

likely than not, cause the death of or serious bodily injury to the deceased and that at the time that he did this he was indifferent as to whether death or serious bodily injury would be caused to the other. He even may have had an intention that it might not be caused. But if he knew, if you are satisfied beyond reasonable doubt that he knew that as a matter of probability, on a better than balanced basis, such serious injury would be caused, then that can justify your bringing in a verdict of murder if you are satisfied that he was capable of forming the intention or appreciation that he was indifferent as to whether the discharging of the firearm ultimately had that effect or not. That is consistent with his not wanting to kill the deceased but discharging the firearm at him knowing that there was a better than balanced risk that he could be seriously injured or killed." (at p104)

27. Except for the sentence in italics and the word "could" in the last sentence the direction is correct although, as I have previously said, I do not think that a reference to "better than balanced basis" is desirable. However, the sentence in italics when regard is had to the earlier passages in the charge is open to grave objection. It may have been a slip of the tongue. His Honour may have meant "wish" and thereby have intended to reproduce the statement from Archbold and Stephen which I have earlier set out. However, in view of the earlier passages in the summing up, I am not sure whether it was a slip and I cannot be sure that the jury would regard it as a slip. I agree with the majority in the Court of Criminal Appeal that this was not a case where it was necessary to direct the jury on malice of this kind, and I would also agree that the charge is not necessarily defective because such a direction was given, or at least that the giving of the direction on this kind of malice was not a miscarriage of justice. However, the form of the direction was erroneous in law in the ways to which I have referred and, this being so, there can be no question of applying the proviso. Such errors in a case of this kind must be regarded as a substantial miscarriage of justice. (at p105)

28. For these reasons I would grant special leave to appeal, allow the appeal, set aside the conviction and order a new trial. (at p105)

Orders

Special leave to appeal refused.