HIGH COURT OF AUSTRALIA

Barwick C.J., McTiernan, Menzies, Windeyer and Owen JJ.

PEMBLE v. THE QUEEN
(1971) 124 CLR 107
25 May 1971

Criminal Law

*Criminal Law—Murder—Recklessness—Whether foresight of consequences necessary—Directions to jury—Manslaughter—Unlawful Act—Assault—Whether apprehension of likely consequences necessary—Duty of judge to direct on acqittal where defence does not seek acquittal. Criminal Law—Appeal to High Court from Supreme Court of Northern Territory—Powers of High Court—To substitute verdict of guilty of manslaughter for guilty of murder—Northern Territory Supreme Court Act 1961 (Cth), s. 47 (4).**

Decisions

May 25.
The following written judgments were delivered:-
BARWICK C.J. The appellant was charged on indictment in the Supreme Court of the Northern Territory of Australia with the murder on 25th September 1970 at Darwin of Josephine Crosbie. He was tried at Darwin on 1st December 1970 and convicted of murder by a jury of twelve, the trial occupying only one day. He now appeals to this Court as of right against his conviction pursuant to s. 47 (1) (a) of the Northern Territory Supreme Court Act 1961 (Cth). The grounds of his appeal are misdirection and non-direction of the jury by the learned trial judge. The case presents unusual features which necessitate a recital both of the basic facts and of the course of the trial. I will first give the appellant's account of the happenings on 25th September 1970, the day of the shooting, drawn from his statement in court and from his statements to investigating police which were proved in evidence. The appellant did not give evidence on oath. (at p110)

2. The appellant and the deceased had been cohabiting for some period before the fatal day. However, some days before that day the deceased had apparently decided to terminate their relationship and to separate from him, a course which the appellant neither approved nor relished. The appellant made overtures to her with indifferent or perhaps I should say fluctuating success. But a definite break had come in their relationship a day or so before 25th September. On that day the appellant spoke to the deceased's father at the Darwin hotel. He told the appellant that the deceased had not come home the previous night. The father said to the appellant: "That daughter of mine is no good. She wants shooting." To which he replied: "Leave her alone Dad, she's only young." The father responded: "She'll come home with her arm or leg broken the way she is carrying on." After leaving the deceased's father the appellant had a couple of games of pool and then tried to find the whereabouts of a man through whom he hoped to obtain employment. A little after seven in the evening he arrived at a hotel called "The Dolphin" where he saw the deceased, her sister and her father. He

offered them a lift out to the Fannie Bay Hotel in his car but was told by the deceased that they were going to Berrimah. The appellant went to Fannie Bay where he arrived about 8 o'clock in the evening. Just after he got there the father's remark about shooting played on his mind; "that he (the father) had said that he felt like shooting her himself". He was possessed of a single shot .22 gauge rifle which he had with him in his car which was at this time about 600 yards from the Fannie Bay Hotel. He then cut down both the length of the barrel and the butt of the rifle with a hacksaw for the purpose of enabling him "to creep up behind the deceased". Having left the car and the rifle in it, he went closer to the hotel where he saw the deceased and a man. The deceased was sitting on the mudgard of a car parked outside the hotel. He hadn't expected to see the deceased at the Fannie Bay hotel because he thought she had gone to Berrimah as she had said she was intending to do. When he saw the deceased on the car outside the hotel he decided to frighten her by use of the rifle in some fashion. He returned to the car, obtained the rifle, cocked it and approached the deceased from behind carrying the rifle in his hand about level with his shoulder and pointing upwards with his finger on the trigger. He didn't know the rifle was loaded, a bullet could have been left in it when he was last shooting geese. When he was a couple of feet from her he yelled out the deceased's name to attract her attention but then stumbled and the rifle discharged. He said he had no intention of hurting the deceased, that he loved her and that whilst he now realized it was a stupid thing to do he only meant to frighten her. (at p111)

3. In fact the bullet from the rifle entered the back of the deceased's head and lodged in the midline of the frontal part of the brain roughly equidistant between the two ears. She was quickly removed to hospital: but she was dead in the sense that her heart was not beating nor was she breathing when the body arrived at the hospital. A massage of the heart revived her for a short time but she died by the end of the evening or in the first minutes of the next morning. (at p111)

4. I will not trouble to fully detail the evidence given by the eye witnesses because there is no question that there was adequate evidence upon which the jury could find that the appellant shot the deceased with intent to kill her or at the very least to do her grievous bodily harm. However these witnesses saw the appellant holding the rifle with an extended arm pointing it at and very close to the back of the head of the deceased. They saw no stumble and heard no cry from the appellant. (at p111)

5. It is important that I now give an account of the course of the trial. In his opening address to the jury counsel for the appellant said this:

> "But we all know by now that the accused stands charged with murder. You have not yet been told that you have a right to find him guilty of manslaughter. Indeed you have the right to do three things at the conclusion of this trial: you have the right to find him guilty of murder; you have the right to find him not guilty of murder but guilty of manslaughter; and you have the right to acquit him of both murder and manslaughter. Now let me hasten to say at the outset that I am not asking you to acquit the accused of manslaughter, you are being asked to find him not guilty of murder but guilty of manslaughter. It is a right which is open to every jury sitting on a murder trial regardless of the evidence, but I am putting it on a much firmer basis than that: I am putting it to you, and will be putting it to you that on the evidence the just verdict in this matter is, 'Not guilty of murder but guilty of manslaughter.' Now, I will venture for present purposes on a definition of both murder and manslaughter. On the question of murder, Gentlemen, I think for your present purposes you may regard it as the killing of one person by another, accompanied either by an intention to kill or by an intention to commit grievous bodily harm or by reckless indifference as to the consequences of the act complained of. As to manslaughter, it is considerably less easy to define. A lot of great jurists have had a lot of goes at defining manslaughter and it would seem that the best the law can really do is to put manslaughter into various categories. We can say generally that it is an act which is a killing, it is homicide, it is a killing which is punishable according to law, but which does not amount to murder, and that is a very general definition. For present purposes I would suggest to you as a matter of law - and this has long been established - that if, during the course of an unlawful act a person is killed, and if that unlawful act is not committed in such circumstances which made it murder, well then the person committing it is guilty of manslaughter. And these are legal matters, matters of law about which his Honour will direct you, but I simply ask you at this stage to bear them in mind, because it will be put to you that here there is clear evidence of an unlawful act on the part of the

accused, that is, attempting to frighten a girl with a loaded rifle, or, if you like, pointing a loaded rifle at a girl. I cannot sensibly argue that that is not unlawful. And as a result of that unlawful act, as a result of an intervening circumstance about which he has already told the police, that is his stumbling, this led directly to the girl's death, but it was unaccompanied, it will be put to you, by any evidence, by any intention either to kill or to inflict grievous bodily harm, and therefore, on that evidence, my submission to you will be that a just verdict, and a verdict which will ensure that the accused, of course, will be punished, is that he should be found not guilty of murder but guilty of manslaughter." (at p112)

6. Later he said:

"Now as I said the defence is really already before you. The accused himself will make a statement reiterating what he has already told the police. And in this regard his story has been and will be consistent that he did not intend; that he had been drinking and there will be independent evidence put before you that at the time he was drunk, at the time of his admission to the hospital. And this is a factor which you are entitled to take into account, in determining whether he was capable of forming this intention, you are entitled to take into account that he was drunk and that his senses were dulled and certainly he presented a most lethal picture. A drunken man in charge of a cocked loaded rifle. And I emphasize, that he certainly put himself in a position where he should be punished, but I again emphasize, that he has not in my submission, put himself in a position whereby he should be convicted of murders." (at p113)

7. In his final address to the jury, counsel for the appellant said that this was his last chance to try to convince the jury that "the just verdict which you should bring in is not one of guilty of murder but one of guilty of manslaughter". This theme counsel reiterated from time to time. On one such occasion he said: "I am not asking you to let the accused go free, because he realizes he has caused the death of someone: he realizes that he has committed an illegality in so doing. What he says is 'I didn't murder her'." Finally he said: "So let us be perfectly clear we are not asking you to set him free; we are asking you to find him not guilty of murder but guilty of the lesser crime of manslaughter." (at p113)

8. In his summing up the trial judge had these things to say:

"I agree with Mr. Barker's definition of murder as he announced it and using his own words 'the killing of one person by another person with the intention on the part of the killer to kill' or alternatively it is the killing of one person by another with the intention to commit grievous bodily harm on that person and alternatively again it is the killing of one person by another in circumstances where the killer has a reckless indifference as to the consequence of his act." (at p113)

9. His Honour said that the Crown case was that the facts could fit any one of these three categories of murder. He said that the defence was:

". . . that the accused was still in love with the girl, that he did not know or expect her to come to the Fannie Bay Hotel that night. He thought that she was going to Berrimah and when he saw her sitting on the car bonnet he thought he would go up behind her and frighten her by presenting a gun at her but he did not know that the gun was loaded, that in the process of going up behind her he stumbled and the gun fired and that the bullet entered the back of the girl's head killing her."

Later he referred to some of the evidence including the accused's statement not made on oath. He said:

> "Now there are several parts of the statement that you should note, and it will be available to you, but at p. 8 he was asked, 'Did you cut the rifle down so that you could creep up to Josie at the hotel without being observed? --- Yes, I just wanted to frighten her, I didn't creep up, I walked up to her.' Now that is in accordance with the eye witnesses' statement, both eye witnesses said that they saw the man just walk up. 'Did you speak to her prior to the rifle going off? --- Yeah, I yelled out to her, 'Josie' and that's when I stumbled.' So that he stumbled, according to himself, at the last minute, at the last second, he called out to her and then he stumbled, and then the rifle went off. At p. 9, he was asked, 'What would your state of sobriety be like? --- Pretty sober, but I was a bit tired.' 'How much would you say you had to drink that night? - - - About half a dozen stubbies or so, may have been a bit more.' But he still said that he was sober, pretty sober, and he says at p. 8 again that he did not know the rifle was loaded, but it must have been - the bullet must have been in the rifle for at least a week. At the bottom of p. 8 he says, 'About a week ago I went out for some geese, I shot the rifle but didn't get any'." (at p114)

10. Later still his Honour said:

> "So really you have got pretty well the whole case, or the whole of his case at any rate, put to you in the record of interview and I suggest you study it and all the other exhibits will be with you in the jury room when you go and if you can fairly decide that the accused really did not intend to do anything more than frighten the girl, you should acquit him of murder. If, on the other hand, you are satisfied, beyond all reasonable doubt, that he intended either to kill her or do her grievous bodily harm or that he was so careless of her safety and security that he did not care, one way or the other, then you should convict him of murder." (at p114)

11. When asked by counsel for the appellant to give a direction as to manslaughter the trial judge said to the jury:

> "Yes well undoubtedly Mr. Barker" (counsel for the appellant at his trial) "is quite correct. That in any case you have the absolute right to bring in a verdict of manslaughter, if you are not satisfied beyond reasonable doubt of the charge of murder. Manslaughter is, as counsel has said, something less than murder. It has not been successfully defined at all by any of the judicial authorities that have attempted to do it but it is - it really lies in the field of lack of intent to kill. It must also lie in the lack of intent to do grievous bodily harm. It must also lie in the third ground that I mentioned to you so often, that is, he had no care whatever of her safety and security and just acted arbitrarily and with no thought at all for her protection and safety. And if you can conclude that that was the correct position then you should bring in a verdict of manslaughter."

To this direction no exception was taken and there was no request for any other or further direction. (at p114)

12. After a little more than an hour and a half of deliberation the jury returned to the court to ask a question. The question asked of his Honour was: "Would you give us a definition of the words 'couldn't care less'." There followed a discussion which I reproduce verbatim:

> "THE FOREMAN: Well, you gave us the three - wilful intent to commit murder and intent to do bodily harm or if he was in a position he couldn't care less whether he did it or not. HIS HONOUR: Well, I did not say that. There has to be a reckless indifference to the consequence of

> his act, are the words I used. Those are pretty well the words--- THE FOREMAN: Well, that is the definition that we put on it. HIS HONOUR: Oh, yes. Well, the words I read out are the words you used --- MR. BARKER: Yes, Your Honour. HIS HONOUR: And they are the conventional --- MR. BARKER: It is not without difficulty in this case. I wonder if Your Honour would perhaps direct the jury's attention to this, that the indifference to consequence must exist at the moment of the rifle being fired and not at the time that the accused was walking with the rifle. The question is whether if, at the time the rifle was discharged, he was indifferent as to whether - as to what would happen as a result and that the recklessness is not relevant to the time that he was walking along with the rifle, but only at the crucial time that the trigger was pressed. HIS HONOUR: Well, what do you say about that, Mr. Raby? Do you agree with that? MR. RABY: I think it goes a little further back in most cases - it goes back to what the general attitude of the accused was throughout that particular part of the proceedings. If he is reckless of the consequence as he is walking along to the car, for instance. MR. BARKER: I would submit most strongly this, Your Honour, it would be only relevant to this aspect - is the act of pressing the trigger for whatever reason it was pressed. HIS HONOUR: Yes. MR. BARKER: Whether at that time he was reckless to the consequences of the rifle discharged. That would seem to me to be the correct submission. HIS HONOUR: Yes. Well, I think that substantially is the question. Whether he had a complete indifference to the consequences of the act when he pressed the trigger. Now is that ---? THE FOREMAN: Yes, that answers our question, thanks very much."

About half an hour later the jury returned with a verdict of guilty not stating of what. But it was rightly taken by the clerk of arraigns to be a verdict of guilty of murder, that being the only count of the indictment. (at p116)

13. The submissions of the appellant are first that the defence was not put adequately to the jury in that the jury were not told that it was open to them to acquit the appellant, not in the sense that they might acquit if they were not satisfied of the Crown case beyond all reasonable doubt but in the sense that they were entitled on the facts consistently with their oath to find that the discharge of the gun was accidental and not accompanied by or the result of an exercise of the will of the appellant. Second, that the jury were not properly directed as to malice as an essential of murder. In particular they ought not to have been given the direction as to reckless indifference to consequence of an intended act because the facts of the case did not warrant a verdict on that footing. As an alternative submission, it was said that the direction as to recklessness was basically inadequate in that it neither called attention to the need to consider whether or not the appellant had foreseen the likely consequences of his contemplated acts nor gave any assistance to the jury in relation to the facts which might be relevant to the formation of a conclusion as to the appellant's state of mind in relation to those consequences. Third, that the jury were not given an adequate direction as to manslaughter and lastly and generally, that the charge to the jury so lacked clarity as to have been confusing to the jury. (at p116)

14. It may at once be accepted that the summing up was unusually brief, that it was in parts unclear and left considerable scope for elaboration. It followed what I consider an undesirable course of merely endorsing in matters of law crucial to the jury's consideration of the case what counsel had submitted. A summing up which follows that course, in my opinion, lacks that authority which a trial judge should exhibit in directing the jury as to the law. But the question is whether none the less the summing up was defective in essentials in the circumstances of the case. (at p116)

15. The trial judge did not in terms tell the jury they could not acquit the accused. He did tell them that the onus was upon the Crown and the extent of that onus. He said: "If you have any doubts you are to give the accused the benefit of the doubt." I am prepared to think that jurymen would take it from this direction that if they had any such doubt they should acquit. Therefore I would not be prepared to say that the summing up in this respect was essentially inadequate. But I have no doubt that the preferable course is for the trial judge to tell the jury expressly that unless satisfied to the requisite degree their duty is to acquit the accused. (at p117)

16. But in the passages I have quoted from the summing up it might be thought that the trial judge had told the jury that the only verdict which they could return was that of murder or manslaughter. If that were the right conclusion, the charge would have been fundamentally in error. But, in the context of this trial, I think it can be said that the jury would not have taken from the words used, a direction that they could not acquit for want of satisfaction of the Crown case. The language of the summing up in this respect was incautious, but,

in my opinion the conviction should not be set aside because of its use. (at p117)

17. I am of opinion that the defence actually made by the appellant was put by the judge to the jury, though without much assistance in their consideration of the facts. But, there remains for consideration, in my opinion, four very important aspects of the summing up. First, there is the question whether the direction given as to what some have called murder by recklessness was adequate. Second, there is the question whether the summing up as to manslaughter was adequate. Third, there is the question whether a finding of accidental death and a consequential acquittal was possible and whether a direction in that connexion was required and fourthly, there is the question whether the course of the trial rendered any of these directions unnecessary. (at p117)

18. I shall deal with the fourth of those matters first. There is no doubt that the course taken by counsel for the appellant at the trial contributed substantially to the form of the summing up. If the trial had been of a civil cause, it might properly be said that the trial judge had put to the jury the issues which had arisen between the parties. But this was not a civil trial. The decision of the House of Lords in Mancini v. Director of Public Prosecutions (1942) AC 1 following Lord Reading's judgment in R. v. Hopper (1915) 2 KB 431 and its influence in the administration of the criminal law must ever be borne in mind (see Kwaku Mensah v. The King (1946) AC 83, at p 92-94). Whatever course counsel may see fit to take, no doubt bona fide but for tactical reasons in what he considers the best interest of his client, the trial judge must be astute to secure for the accused a fair trial according to law. This involves, in my opinion, an adequate direction both as to the law and the possible use of the relevant facts upon any matter upon which the jury could in the circumstances of the case upon the material before them find or base a verdict in whole or in part. (at p118)

19. In Mancini v. Director of Public Prosecutions (1942) AC 1 provocation was not relied upon by defending counsel. In Kwaku Mensah v. The King (1946) AC 83 , provocation was not raised at the trial nor in the reasons in the appellant's case for the consideration of the Privy Council. But, there being material before the jury on which they could properly have found provocation so as to reduce the crime from murder to manslaughter, their Lordships considered the absence of any direction as to provocation when that matter was raised by counsel in argument before them for the first time; and for lack of appropriate direction set aside a conviction for murder. (at p118)

20. Here, counsel for the defence did not merely not rely on the matters now sought to be raised; he abandoned them and expressly confined the defence to the matters he did raise. However, in my opinion, this course did not relieve the trial judge of the duty to put to the jury with adequate assistance any matters on which the jury, upon the evidence, could find for the accused. I should mention in this connexion that this is an appeal and not an application for special leave to appeal. It is not a case where there has merely been a failure to seek or to object to a direction on a matter which could readily have been cured by the trial judge. But in so remarking I do not intend to suggest that a failure of a trial judge to direct a jury on a matter arising upon the evidence in the trial but either not relied on or actually abandoned by counsel, would not afford ground for the grant of special leave to appeal in an appropriate case. (at p118)

21. I now turn to the first of the matters which seem to me to remain for consideration in this case. Of course, it is not appropriate in every case to give a direction as to reckless indifference to the consequence of a contemplated act as an aspect of the crime of murder. Indeed, occasions for doing so where there is material from which an intent to kill can be inferred, must be unusual. A trial judge, in my opinion, must be careful in a case of that kind to examine the evidence closely to satisfy himself that that evidence could support a conclusion that the accused acted with reckless indifference. A direction as to that aspect of murder when there is not material to warrant a conclusion that the accused acted with reckless indifference is likely to cause confusion in the minds of the jurymen; and ought not to be given. However, in my opinion, in this case the jury, if they were unwilling to infer an intent to kill or to do grievous bodily harm were entitled to accept the view that the appellant foresaw the possible consequences of the discharge of the rifle if it discharged or was discharged whilst he was in proximity to the deceased; that he must have known that the rifle was loaded; and that he approached the deceased with the cocked sawn-off rifle in that frame of mind and that he pulled the trigger to discharge the weapon: or they could accept the appellant's statement that he stumbled with the rifle held aloft, at a time when he merely wished to frighten her. On either view they were entitled, in my opinion, to conclude that the approach to the deceased in such a fashion was an act done with reckless indifference to human life. I would reject therefore the submission that the case was not one in which reference to murder by recklessness could properly be made. (at p119)

22. I should mention that it was suggested at one stage of the appellant's argument of this case that murder can only be committed if there is present an intent to kill or to do grievous bodily harm. It was said that recklessness, however defined, would not warrant a conviction for murder where death resulted from it. But clearly that submission was misconceived. Malice as a necessary ingredient of the crime of murder is of course a state of mind of the accused, an actual state of mind. But a mind intending to kill or a mind reckless, in the sense I will mention, as to whether death or serious bodily harm results from a contemplated act or course of conduct is relevantly a malicious mind. All the various text writers to whose works I have referred and the cases to which they refer bear out the proposition that the requisite malice may consist of intention or recklessness in the proper sense of that term. If foresight of consequence is included in the concept of recklessness, there is good reason for including reckless indifference as malice in relation to a killing resulting from it even in more recent times when there is a greater insistence upon an actual state of mind in relation to the killing as indispensable to the commission of the crime of murder and imputed malice is not countenanced. (at p119)

23. But it is of paramount significance to observe that recklessness to be relevant involves foresight of or, as it is sometimes said, advertence to, the consequences of the contemplated act and a willingness to run the risk of the likelihood, or even perhaps the possibility, of those consequences maturing into actuality. This aspect of recklessness entails an indifference to a result of which at least the likelihood is foreseen. An awareness of the consequences of the contemplated act is thus essential. This aspect of the branch of the law relating to murder is of importance in reviewing the summing up in the present case. It is the state of the accused's mind in this respect about which the jury must be satisfied to the requisite extent. (at p120)

24. In my opinion, the summing up was in this connexion inadequate. Bearing in mind the relative ease with which the lay mind can pass from inadvertent negligence to recklessness, as advertent negligence, and can substitute objective tests of a reasonable man for the subjective requirement of recklessness, if the trial judge decides that the case warrants a direction on the matter at all, a summing up which leaves to a jury the possibility of a verdict of murder by recklessness must necessarily be both full and precise. Besides formally expounding the elements of the law in this respect with simplicity and precision, the summing up must assist the jury in connexion with the facts relevant to their consideration of that aspect of murder. (at p120)

25. The state of mind of the accused is rarely so exhibited as to enable it to be directly observed. Its reckless quality if that quality relevantly exists must almost invariably be a matter of inference. Although what the jury think a reasonable man might have foreseen is a legitimate step in reasoning towards a conclusion as to the accused's actual state of mind, a firm emphasis on the latter as the fact to be found by the jury is necessary to ensure that they do not make the mistake of treating what they think a reasonable man's reaction would be in the circumstances as decisive of the accused's state of mind. They need also to be reminded that the accused's circumstances are relevant to the decision as to his state of mind; for example his age and background, educational and social, his current emotional state and his state of sobriety. They should be expressly told that they need to be satisfied beyond any reasonable doubt that he must have foreseen, and in that sense did foresee, the consequences of the act he contemplated. It clearly is not enough to use the work "reckless" or the words "reckless indifference" to a jury in order to alert them to the state of mind which they must find to exist. No doubt to one familiar with a precise use of language a reckless indifference to consequence does involve an indifference to what is a known or foreseen consequence. But, in my opinion, it is far from adequate in the instruction of laymen as to the elements of the crime of murder merely to use a formula, such as has been done in this case, containing the expression "a reckless indifference" to consequence. It may be suspected that the jury in this case may have obtained from the several endeavours made in the summing up to indicate of what relevant recklessness might consist the notion of indifference to a foreseen consequence. But, I am not prepared to act upon any such impression which might be gathered from their intelligent questioning. In my opinion, the summing up was basically defective in not informing the jury and with the emphasis of which I have spoken, that actual foresight by the accused of the consequences of his acts was basic to the recklessness of mind of which they were told. I should add that it is in my opinion 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. I see no logical reason why in such a case as the present it should be probable, though of course, it must not be merely a remote possibility. It must be something which it is seen could happen so that if nevertheless the contemplated act is done it can be said that it was done with indifference to the fact that death or grievous bodily harm might ensue. (at p121)

26. Further, the summing up was, in my opinion, defective in that it gave the jury no assistance whatever in their consideration of the facts relevant to a conclusion as to the accused's state of mind. That that conclusion could only be founded on inference, including a consideration of what a reasonable man might or ought to have foreseen, emphasized the need for the jury to be given guidance in relation to the facts. On the ground alone therefore that the jury were not adequately directed as to murder by reckless indifference, in my opinion the conviction for murder must be set aside. (at p121)

27. However I should deal with other submissions of the appellant. I have dealt with the question whether the jury were sufficiently told of their right and duty to acquit for want of satisfaction of the Crown case to the requisite degree. The first submission of the appellant however claims that the jury should have been told that they should acquit the appellant if they accepted, or were sufficiently put in doubt by, the appellant's account of the discharge of the rifle. To summarize that account, the appellant intending to frighten the deceased presumably into changing her mind as to their relationship prepared the rifle to assist his purpose and when within a couple of feet of her, holding the rifle pointed aloft but cocked and in fact loaded (the appellant having taken no steps to see that it was unloaded), with his finger on the trigger sought to attract her attention, clearly as part of his plan to frighten her. At that moment he stumbled and the rifle discharged by means of his finger but by an involuntary pressure by it on the trigger. There was no other view of the facts more favourable to the appellant which the jury could take than those I have related. On this aspect of the case, they could only wholly accept or wholly reject the appellant's account. There were no questions of degree which permitted of an alternative view of the facts put forward by the appellant's statements. The state of the appellant's sobriety could only be relevant, in my opinion, to the credit the jury might give to his account of stumbling. (at p122)

28. Could a jury on these facts properly acquit the appellant on the footing that the deceased did not die by his act but by misfortune or misadventure? I think not. The killing of a human being in the course of committing certain unlawful acts is manslaughter. What unlawful acts are sufficient for this purpose are perhaps not yet precisely and fully defined or stated in decisions or in texts: but it may be taken that so far the view is held that to be relevantly unlawful the act must be in breach of the criminal law. Also there are statements that culpable or criminal negligence resulting though by accident in a killing will make that killing manslaughter. But I find no need in this case to consider that suggested basis for manslaughter. At least the statement of Humphreys J. in R. v. Larkin (1943) 29 CAR 18, at p 23 is acceptable and presently appropriate:

> "Where the act which a person is engaged in performing is unlawful, then if at the same time it is a dangerous act, that is, an act which is likely to injure another person and quite inadvertently the doer of the act causes the death of that other person by that act, then he is guilty of manslaughter." (at p122)

29. No doubt to point a loaded weapon at another is unlawful: it constitutes an assault. See Kwaku Mensah v. The King (1946) AC 83, at p 91 . But here, on the appellant's account, the rifle was not pointed at the deceased nor did she see him before she was shot. Do these facts prevent the appellant's conduct being unlawful in the relevant sense? For the purpose of considering the quality of the appellant's act of brandishing the cocked rifle with his finger on the trigger, the rifle must be taken, in my opinion, to be as it was, namely, loaded. The appellant's assertion that he did not know that fact will not in my opinion be in any respect definitive. I described the appellant's act as the "brandishing" of the gun. He had according to the account of the facts I have detailed, intended the deceased to see him holding the rifle in the position he described; he called out to attract her attention so that she would see him with the rifle so held. Therefore, I think that his act can properly be described as brandishing the rifle at the moment he stumbled. As I have said he did so intending to coerce her mind by the threat of violence towards the deceased which his menacing act and posture necessarily involved. (at p122)

30. In my opinion, the act of the appellant in so brandishing the rifle was an unlawful act of the kind which would make the subsequent killing manslaughter. In my opinion, at the least it constituted an attempt to assault her and was obviously dangerous to the deceased. Such an attempt is a breach of the criminal law. The appellant was at the moment of the discharge of the rifle doing an act which was immediately proximate

to the assault he intended. It but needed the deceased to turn her head to enable her to see him brandishing the rifle for the assault to be complete. No doubt there may be some illogicality in regarding an unintended killing in the course of some unlawful and dangerous acts as manslaughter: and much has been written on that aspect of the criminal law. But here the intent which makes the brandishing of the rifle, as an act proximate to an assault, an attempt to commit that crime is an intent towards the deceased herself; and the killing took place in the near accomplishment of that crime. I am convinced, therefore, that the appellant's act in so brandishing the rifle would deny the possibility of a verdict of acquittal in conformity with the oath of the jury even if they accepted the appellant's version of the facts. The killing could not have been accepted as occurring by accident or by misadventure. It could not be an excusable homicide. (at p123)

31. There may often be alternative views of the facts possible, or questions of degree, as for example, if so-called criminal or culpable negligence is put forward as a basis for a verdict of manslaughter, so that it may be necessary to take the opinion of the jury on the facts under proper direction as to what will suffice to make an act unlawful or the negligence criminal or culpable in or to the necessary degree. But in this case in my opinion there remained no question of fact or degree for the decision of the jury in relation to the possibility of a verdict of acquittal once it is supposed that they accept the appellant's statements. The question of a killing by misadventure could only arise upon an acceptance by the jury of the whole of the appellant's account. Whether or not on that account the act of the appellant was relevantly lawful so as to permit of acquittal was a matter of law. It must be for the judge to say whether on the appellant's account there was an attempt to commit the crime of assault. No question could arise that to brandish the loaded cocked rifle with the finger on the trigger within such close proximity as two feet of a human being was a dangerous act: and dangerous to the deceased. The question whether on the only possible view of the relevant facts, i.e., the account given by the appellant, the killing could be regarded as accidental was, in my opinion, a question of law. There could be no room, in my opinion, for the appellant's account to raise a doubt as to his guilt, except possibly in relation to an actual intent to kill or to inflict grievous bodily harm: in that connexion, on the one hand the summing up left it open to the jury to acquit if they had a doubt and on the other hand the jury did convict. The answer to the question whether upon the appellant's account of the happening the killing could be regarded as accidental must, in my opinion, be in the negative. Consequently, in my opinion, a verdict of acquittal on the ground of death by accident of misadventure was not open on the evidence and the trial judge was not required to direct the jury that they could acquit on that ground. This conclusion bears upon the propriety of the direction as to manslaughter with which I have already dealt : there is no need for me to pursue that matter further. (at p124)

32. The only other submission of the appellant to which I need refer is the third, namely that there was an inadequate direction as to manslaughter. Where a verdict of acquittal because the death was by misadventure would not be warranted on the evidence, a summing up which properly and adequately defines the elements of murder and adequately relates them to the facts of the case and which instructs the jury that if they are not satisfied to the requisite degree of murder, so defined, they may return a verdict of manslaughter may be adequate, without any elaboration of the elements of manslaughter. To say in such a case that manslaughter is in the "area of lack of intent to kill, lack of intent to commit grievous bodily harm and of lack of reckless indifference" properly defined, might possibly be a sufficient description of manslaughter, though I do not think it is in any case an advisable course to so instruct a jury. In the present case, the sentence of the summing up "it must also lie in the third ground that I mentioned to you so often, that is, he had no care whatever of her safety and security and just acted arbitrarily and with no thought at all for her protection and safety" is to say the least far from clear. Indeed, it could be read as saying that it was the presence rather than the absence of reckless indifference which opened the possibility of a verdict of manslaughter. But it may be that the jury in the words of the sentence, following as it did the immediately prior sentences may have imported or apperceived the words "the lack of" before the reference to the third ground, which I think would express what the trial judge intended. However, having said so much, and being of opinion that there exists at least one ground on which this conviction should be set aside, I find no need to express a final opinion as to the essential adequacy of this summing up as to the elements of manslaughter. But I should add that such a summing up would be essentially erroneous if such a verdict of acquittal were open on the evidence. In such a case, unlike the present, there may be occasion to define for the jury the nature of the unlawful act which will make a killing in its course manslaughter and to assist the jury in their consideration of the relevant facts in that connexion. And in any case, distinctions between manslaughter and death by misadventure would need to be drawn and explained and the elements of each elaborated. (at p125)

33. There remains the question of what order should be made consequential on the quashing of the conviction

for murder. (at p125)

34. Section 47 (4) of the Northern Territory Supreme Court Act 1961- 1968 (Cth) reproduces the terms of s. 5 (1) of the Criminal Appeal Act 1907 (Eng.). This Court therefore has the power instead of allowing or dismissing an appeal to substitute for the verdict of the jury a verdict of guilty of an offence other than that of which the jury found the appellant to be guilty if it appears to this Court that the jury must have been satisfied of facts which proved him guilty of that other offence. There is in the Supreme Court Act no counterpart to the proviso contained in s. 4 (1) of the Criminal Appeal Act 1907. Consequently difficulties which can arise in connexion with the use of such a proviso in a case where a court is not prepared to apply it cannot arise in this case. For a recent discussion of the use of this proviso and the practice of the Court of Criminal Appeal in the substitution of a verdict see Knight, Criminal Appeals, particularly Ch. 3, Div. 11, pp. 70-78. (at p125)

35. The jury in this case, upon the summing up of the trial judge, undoubtedly were satisfied that the appellant killed the deceased intending to do so, or to do her grievous bodily harm or not caring whether or not he harmed her. I shall assume because of the defects in the summing up that they did not conclude that he foresaw the consequences of what he proposed to do. Notwithstanding the deficiences of the summing up, it cannot be said that the jury accepted the appellant's version of the discharge of the rifle. Further, it is clear that they did not reject the case made by the Crown in the sense of entertaining a reasonable doubt. In these circumstances, I think it can properly be concluded that the jury must have been and indeed were satisfied of facts which at the least prove the appellant guilty of the crime of manslaughter. Those facts at the least are that the appellant not intending to kill or do grievous bodily harm came up behind the deceased with the loaded cocked rifle, finger on trigger, pointing the gun at her, and though not foreseeing the possible consequences of this act, did not care whether or not he did her harm. Their view as to whether or not he knew the gun to be loaded would not matter in considering what verdict could be entered on the other facts I have recited. (at p126)

36. In all these circumstances, having indicated my reasons for quashing the conviction for murder, the proper course in my opinion is to enter a verdict of manslaughter in exercise of the power given by s. 47 (4) of the Supreme Court Act. This course was taken in R. v. Hopper (1915) 2 KB 431 and Kwaku Mensah v. The King (1946) AC 83 . See also R. v. Roberts (1942) 28 CAR 102 . It is true that in those cases, it was the failure to give adequate directions as to provocation and its effect in reducing the crime from murder to manslaughter which opened the way to the substituted verdict. The present case however is in truth in my opinion a stronger case for entering a substituted verdict than was for example the case of R. v. Roberts (3). The course of substituting a verdict where an acquittal could not have been returned has been followed in Australia see for example Hughes v. The King (1951) 84 CLR 170 . (at p126)

37. In my opinion, therefore, the conviction for murder and the sentence passed theron should be set aside, a verdict of guilty of manslaughter should be entered and the case remitted to the Supreme Court of the Northern Territory to pass such sentence upon the verdict of guilty of manslaughter as may be warranted in the law for that offence. (at p126)

McTIERNAN J. The appellant was convicted in the Supreme Court of the Northern Territory of murder. The charge was laid under The Criminal Law Consolidation Act and Ordinance 1876 to 1960. Section 5 relates to the offence of murder. Section 17 sets forth the words to be used in drawing up a charge of murder. Section 16 relates to manslaughter. The elements of these offences derive from the common law applicable to them respectively. The indictment charged that the alleged offence was committed at Darwin. In his address to the jury, counsel for the accused said that they ought not to find him guilty of murder but that they might find him guilty of manslaughter. The evidence and the statement made by the accused in his defence called for directions by the trial judge as to the elements of the offence of murder, and the offence of manslaughter, and directions regarding the issue whether the firing of the gun was intended by the accused or an accident. (at p127)

2. The trial judge, in summing up to the jury, said:

> "I agree with Mr. Barker's (counsel for the accused) definition of murder as he announced it and it is in his own words 'the killing of one person by another person with the intention on the part of the killer to kill'. Alternatively, it is the killing of one person by another person with the

> intention to commit grievous bodily harm on that person. And alternatively, again, it is the killing of one person by another person in circumstances where the killer has a reckless indifference as to the consequence of his act."

The jury sought a further direction on the question of reckless indifference. The trial judge told the jury that "substantially" the question they had to consider was "whether he (the accused) had a complete indifference to the consequences of the act when he pressed the trigger". The foreman of the jury then said "that answers our question" and the jury forthwith retired to consider their verdict. (at p127)

3. Mr. McGarvie argued that the jury could reasonably have understood from these directions that, if they found reckless indifference on the part of the accused, they would be justified in convicting him of murder. This seems to me a probable suggestion. The jury ought to have been told that reckless indifference was not enough, unless the accused foresaw that death or grievous bodily harm would be a probable or likely consequence of the behaviour of the accused with the gun. The omission of such a direction was a serious defect in the trial. In my opinion, because of it, the verdict ought to be set aside. But I think that the Court ought to apply s. 47 (4) of the Northern Territory Supreme Court Act 1961, rather than order a new trial. The conditions requisite to enable the Court to proceed under this provision, in my opinion, exist here. It seems clear that in arriving at their verdict the jury found that the accused fired the shot which killed the deceased. Section 75 (1A) of the Police and Police Offences Ordinance 1923 of the Northern Territory provides as follows:

> "A person who, without reasonable cause, discharges any firearm - (a) in a public place . . . shall be guilty of an offence. Penalty Fifty pounds."

The finding of a verdict of murder involves the conclusion that the accused committed an act, resulting in the death of the deceased, which was punishable under this provision of the Ordinance. It was therefore an unlawful act. Besides, it was a dangerous act - this is obvious. The homicide charged by the indictment resulted from an act which was both unlawful and dangerous. It appears, therefore, that the jury could on the indictment have found the accused guilty of manslaughter. If there had been an adequate direction as to the elements of the crime of murder it is not to be supposed, having regard to the circumstances of the case, that they would certainly have found the accused guilty of murder. Instead of allowing the appeal and sending the indictment down for a fresh trial, it is better, in my opinion, to proceed pursuant to s. 47 (4) mentioned above. This means, in the present case, substituting for the verdict of "guilty of murder" returned on the indictment, a verdict of "guilty of manslaughter". In my view the case should be remitted to the Supreme Court of the Northern Territory only to pass such sentence on the accused as may be warranted in law for the offence of manslaughter. (at p128)

MENZIES J. In the conduct of a trial it is not necessary, and it is usually undesirable, for a judge, in directing the jury as to the law, to go beyond the limits of what it is necessary for them to know, and to undertake the task of expounding to them the whole of the law which he must have in mind in instructing them upon what they must find proved if they are to convict. (at p128)

2. In this case the learned judge conducting the trial of the appellant upon a charge of murder - to which he had pleaded not guilty - directed the jury with brevity upon the essentials of the case as they seemed to him to have emerged at the trial, and the question now, as it seems to me, is whether that direction was to any extent a misdirection. If it was, the appeal must be allowed and a new trial ordered, for there is no proviso allowing a conviction to stand if an appeal court should think that no miscarriage of justice has occured. (at p128)

3. The conduct of the prosecution, and of the defence, created certain problems for the judge. (at p128)

4. Thus it was the contention of the prosecution that there was but one point for the jury to consider, viz. whether the accused shot Josephine Crosbie deliberately. The learned prosecutor finished his address to the jury as follows:

> "Gentlemen, I am not going to go further in this. There is only one point for you to consider and that is: did he shoot her deliberately or not? If he shot her deliberately, beyond all reasonable

doubt, pointing the gun at her, then it is murder." (at p128)

5. For his part, learned counsel for the defence, having no doubt come to the conclusion that there was no chance of obtaining a complete acquittal, invited the jury to find the accused guilty of manslaughter but not of murder. His concluding words to the jury were as follows:

> "Now you can kick him, if you want to, with a verdict of murder. You might feel you have to. I am submitting to you that the just conclusion at which you will arrive is that you should acquit him of murder. And remember that you have a positive right to do so, no matter what the evidence. In my submission, you have a right coupled with a duty. So let us be perfectly clear : we are not asking you to set him free ; we are asking you to find him not guilty of murder but guilty of the lesser crime of manslaughter."

Earlier in his address counsel had said:

> ". . . a definition of murder for your purposes is the unlawful killing of one person by another where the killing is accompanied by an intention to kill, or an intention to commit grievous bodily harm, or an indifference to consequences. So that relating that to the present case you would have to find to convict him of murder that at the time the rifle was discharged Pemble had an intention to shoot the girl. It is as simple as that. And if you are unable to say that he had that intention, or if you find that he did not have that intention, well then the verdict, the course open to you, is to return a verdict of not guilty of murder but guilty of manslaughter, because the manslaughter in this case lies as a matter of law - again what I say to you is subject to his Honour's directions - and I am putting it to you that it lies as a matter of law in the doing of an unlawful act which is accompanied or causes a killing in such circumstances that it does not amount to murder, but none the less it is a serious crime which is visited by a penalty and I am not asking you to let the accused go free and the accused is not being asked to go free, because he realizes that he has caused the death of someone ; he realizes that he has committed an illegality in so doing. What he says is, 'I didn't murder her'." (at p129)

6. Thus counsel, it seems, adopted substantially common ground and invited the jury to determine as the issue critical to conviction for murder whether or not the accused had shot the girl deliberately. (at p129)

7. The jury convicted the accused of murder but did so, as appears fairly clearly, on a basis other than that the accused shot the girl deliberately. In answer to a question by the jury the learned judge directed them to the effect that, if it were to be found that the accused when he pressed the trigger of the rifle had a complete indifference to the consequence of doing so, the proper verdict would be murder. The jury, having thanked his Honour for that direction, retired and returned in a few minutes with a verdict of murder. (at p129)

8. An appeal court is not, of course, concerned to investigate the actual basis upon which a jury has returned its verdict, but the events which I have outlined emphasize that the conduct of a case by counsel does not impose any limit upon the course which the jury may take and cannot make superfluous a full and accurate direction covering all that must be proved before a verdict of guilty can be returned. (at p130)

9. Before examining the direction which was given here, it is necessary to state shortly the effect of the evidence. (at p130)

10. The accused and the girl who was killed had, according to his statement, previously lived together for nine months, but a break in their relationship had occurred. On the day of the death the accused saw the girl outside the Fanny Bay Hotel, Darwin, and had, in the back of his car, used a hacksaw to cut down his pea rifle both at the barrel and at the butt. Then, while the girl was sitting on the bonnet of a car, he came up behind her with the rifle cocked. He made a statement to the police and a statement from the dock to the

effect that he had not known that the rifle was loaded, that he had in mind to frighten the girl so that she would return to him, and that upon coming within a few feet of her with his rifle pointing up in the air he had called her name, that he had stumbled and that the rifle had gone off and so she had been shot. Witnesses for the Crown gave evidence that the accused came up behind the girl with the rifle pointing towards her and shot her in the back of the head. (at p130)

11. In the course of his charge his Honour told the jury that they started with the assumption that the accused is innocent until proved guilty and that the onus upon the Crown was to prove his guilt beyond all reasonable doubt. His Honour said that he agreed with a definition of murder given by counsel for the defence, namely killing with intent to kill or with intent to inflict grievous bodily harm or "the killing of one person by another person in circumstances where the killer has a reckless indifference as to the consequence of his act". His Honour then referred to the evidence and said : "Now under those circumstances it is a matter for you to decide whether you think this accused is guilty of murder, or something less." His Honour concluded by saying :

> ". . . if you can fairly decide that the accused really did not intend to do anything more than frighten the girl, you should acquit him of murder. If, on the other hand, you are satisfied, beyond all reasonable doubt, that he intended either to kill her or do her grievous bodily harm or that he was so careless of her safety and security that he did not care, one way or the other, then you should convict him of murder."

Counsel for the defendant thereupon asked for a direction as to manslaughter. Thereupon his Honour gave this direction :

> ". . . undoubtedly Mr. Barker is quite correct, that in any case you have the absolute right to bring in a verdict of manslaughter if you are not satisfied beyond reasonable doubt of the charge of murder. Manslaughter is as Mr. Barker said, something less than murder. It has not been successfully defined at all by any of the judicial authorities that have attempted to do it, but it is - it really lies in the field of lack of intent to kill. It also must lie in lack of intent to do grievous bodily harm. It must also lie in the third ground that I mentioned to you
>
> so often, that is, he had no care whatever of her safety and security, and just acted arbitrarily and with no thought at all for her protection and safety. And if you can conclude that that was the correct position, then you should bring in the verdict of manslaughter."

Later the jury returned, when the following interchange took place :

> "THE FOREMAN : Could you give us a definition of the words 'I couldn't care less'? HIS HONOUR : Well, how does this arise? THE FOREMAN : Well, you gave us the three - wilful intent to commit murder and intent to do bodily harm or if he was in a position he couldn't care less whether he did it or not. HIS HONOUR : Well, I did not say that. There has to be a reckless indifference to the consequence of his act, are the words I used. Those are pretty well the words - - - THE FOREMAN : Well, that is the definition that we put on it. HIS HONOUR : Oh, yes. Well, the words I read out are the words you used - - - MR. BARKER : Yes, Your Honour. HIS HONOUR : And they are the conventional - - - MR. BARKER : It is not without difficulty in this case. I wonder if Your Honour would perhaps direct the jury's attention to this, that the indifference to consequence must exist at the moment of the rifle being fired and not at the time that the accused was walking with the rifle. The question is whether if, at the time the rifle was discharged, he was indifferent as to whether - as to what would happen as a result and that the recklessness is not relevant to the time that he was walking along with the rifle, but only at the crucial time that the trigger was pressed. HIS HONOUR : Well, what do you say about that, Mr. Raby ? Do you agree with that ? MR. RABY : I think it goes a little further back in most cases - it goes back to what the general attitude of the accused was throughout that particular part of the proceedings. If he is reckless of the consequence as he is walking along to the car, for instance. MR. BARKER : I would submit most strongly this, Your Honour, it would be only relevant to

this aspect - is the act of pressing the trigger for whatever reason it was pressed. HIS HONOUR : Yes. MR. BARKER : Whether at that time he was reckless to the consequences of the rifle discharged. That would seem to me to be the correct submission. HIS HONOUR : Yes. Well, I think that substantially is the question. Whether he had a complete indifference to the consequences of the act when he pressed the trigger. Now is that - - - ? THE FOREMAN : Yes, that answers our question, thanks very much." (at p132)

12. To this charge a number of objections have been urged before this Court but to my mind the only objections of weight are two : the first that the observation that the matter for the jury to determine was "whether you think this accused is guilty of murder, or something less" was tantamount to a direction to convict of either murder or manslaughter ; and secondly, that the direction as to killing in the course of doing an unlawful act or by recklessness did not accurately distinguish between murder and manslaughter and did not accurately state the elements of the crime of murder when the mental element was not to kill or cause grievous bodily harm. (at p132)

13. As to this latter matter it is to be recalled that his Honour told the jury that the accused was guilty of murder if he was "so careless of her safety and security that he did not care, one way or the other" and that his Honour described manslaughter as follows : ". . . if he had no care whatever for her safety and security and just acted arbitrarily and with no thought at all for her protection and safety." In elaboration of the description of murder his Honour said, "There has to be a reckless indifference to the consequence of his act", and finally that the substantial question was "whether he had a complete indifference to the consequence of the act when he pressed the trigger". (at p132)

14. As I have said, counsel for the accused invited the jury more than once to convict him of manslaughter. In these circumstances there is a natural and strong tendency not to impute error to the judge when he said the matter for the jury to decide was whether the accused was guilty of murder or something less. Nevertheless I consider that even in the circumstances of this case this was a misdirection. The starting point is that once there is a plea of not guilty, the Crown must prove every element of any crime covered by the indictment before the jury can convict. Furthermore it is always in the power of a jury to acquit and that power cannot be denied: Gammage v. The Queen (1969) 122 CLR 444 . Moreover, counsel for the defence cannot effectively disclaim a defence open to the accused upon the evidence. The judge must submit that defence to the jury. Even less can counsel concede a matter of law to the disadvantage of the accused. The law is always for the judge as counsel for the defence rightly told the jury. Here, it appears to me, that a specific direction was necessary upon the verdicts open to the jury if they should believe the accused when he said (1969) 122 CLR 444 that he did not know the rifle was loaded, (1962) VR 137, at p 148 that he intended to do no more than frighten the girl, (1937) AC 576 that he had held the rifle pointing in the air, (1966) 1 QB 59, at pp 69, 70 that he had stumbled and the rifle went off and (1968) VR 481 that he had not meant to hurt her. That direction should have informed the jury not only that in those circumstances they could not find murder but also that whether or not they found manslaughter would depend upon their being satisfied beyond reasonable doubt either that the accused shot the girl while he was using the rifle to commit a dangerous assault or that in acting as he did he was guilty of criminal negligence. As to this I agree with the observations of Smith J. in Reg. v. Longley (2), where he said:

"The charge should also, in my opinion, have included corresponding directions in relation to manslaughter. It should have directed the jury that if they rejected the applicant's account of the wounding, but were not satisfied that he was guilty of murder, then before they could find him guilty of manslaughter they must be satisfied beyond reasonable doubt: (i) That he caused the death by using the gun to commit an unlawful and dangerous assault; or else (ii) that he caused the death by handling the pistol with criminal negligence, realising the danger he was creating and recklessly choosing to run the risk. And the charge should have gone on, I consider, to say that, since the Crown case of manslaughter rested on circumstantial evidence, the jury could not be satisfied of his guilt on either of these alternative bases unless, in their view, the facts proved were inconsistent with any reasonable hypothesis falling short of manslaughter." (at p133)

15. It is no longer sufficient to sustain a verdict of manslaughter to establish merely that the homicide occurred in the course of the commission of an unlawful act: Andrews v. Director of Public Prosecutions (1937) AC 576 ; Reg. v. Church (1966) 1 QB 59, at pp 69, 70 ; Reg. v. Holzer (1968) VR 481 . In the last-mentioned case Smith J., having summarized the law established by Andrews v. Director of Public Prosecutions (1937) AC 576 when referring to manslaughter by criminal negligence, by saying (1968) VR 481, at p 482 :

> ". . . the accused must be shown to have acted not only in gross breach of a duty of care but recklessly, in the sense that he realized that he was creating an appreciable risk of really serious bodily injury to another or others and that nevertheless he chose to run the risk."

went on to say, in relation to manslaughter by unlawful dangerous act:

> "In relation to the unlawful dangerous act doctrine, the unlawful act, it seems clear, must consist of a breach of the criminal law. The weight of authority, as it appears to me, is against the view that the accused must be shown to have acted with realization of the extent of the risk which his unlawful act was creating. Authorities differ as to the degree of danger which must be apparent in the act. The better view, however, is I think that the circumstances must be such that a reasonable man in the accused's position, performing the very act which the accused performed, would have realized that he was exposing another or others to an appreciable risk of really serious injury. The view which I have expressed, that realization of the risk created does not have to be proved against the accused, is a factor in persuading me that the degree of apparent danger must be that which I have attempted to define, and that it is not sufficient, as it was held to be in Reg. v. Church (1966) 1 QB 59 , to show there was a risk of some harm resulting, albeit not serious harm. I may add that although, under the doctrine of manslaughter by unlawful dangerous act, mens rea is necessary, this requirement, in my view, is satisfied by proof of an intention to commit the assault or other criminally unlawful act of which the accused has been guilty. On that aspect I would refer to Reg. v. Lamb (1967) 2 QB 981 ." (at p134)

16. If an accused person is to be convicted of involuntary manslaughter by reason of a killing in the course of doing an unlawful act, the jury must, upon a proper direction, find that the accused was doing an unlawful act. Unlawfulness cannot simply be assumed. In this case it is by no means certain that, until a point had been reached that the girl was frightened by what the accused was doing, the accused committed an assault. In Russell on Crime, 12th ed., vol. 1, p. 652, it is said:

> "The actus reus of assault thus consists in the expectation of physical contact which the offender creates in the mind of the person whom he threatens."

See too, State v. Barry (1912) 124 Pac 775 . (at p134)

17. With respect, it seems to me that the learned judge was in error in directing the jury that the killing occurred in the course of doing an unlawful act likely to harm, rather than submitting that matter to the decision of the jury with a proper direction of law. (at p135)

18. The conclusion which I have just expressed is sufficient to determine this case, but, I should add, that I do not think that his Honour succeeded in the very difficult task of distinguishing clearly between what may be described as a reckless killing constituting murder and a negligent killing constituting manslaughter. The difference, as I apprehend it, is that to do an unjustifiable act causing death, knowing that it is likely to cause death or grievous bodily harm, is murder, whereas to do a careless act causing death, without any conscious acceptance of the risk which its doing involves, is manslaughter, if the negligence is of so high a degree as to show a disregard for life deserving punishment. An instance of the former might be to kill a person in a street

by intentionally dropping a large block of stone from a high building into the crowded street below: an instance of the latter might be to kill a person in a street by carelessly letting fall a large block of stone from a high building into a crowded street below. It would not be a misuse of language to use the word "reckless" both in relation to dropping and to letting fall the stone, but that word without more in relation to the first would not, of itself, bring out the essential difference between the first and the second. The use of the words "recklessness" or "reckless indifference" of itself would not bring home to the jury that it is only a recklessness that involves actual foresight of the probability of causing death or grievous bodily harm and indifference to that risk which does constitute the mental element that must be found to support a conviction for murder. The difference between murder and manslaughter is not to be found in the degree of carelessness exhibited; the critical difference relates to the state of mind with which the fatal act is done. (at p135)

19. In my opinion the judge here did not make clear that for murder there must be established the coexistence with the act causing death of a state of mind described in Archbold's, Criminal Pleading, Evidence and Practice, 37th ed. (1969), par. 2483 as follows:

> "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 p135)

20. It is for these reasons that I consider that the appeal should be allowed, the conviction quashed and a new trial ordered. (at p136)

21. Since writing the foregoing I have become aware of the order which, it is proposed, the Court should make. Except as to setting aside the conviction and sentence for murder, I dissent from that order and have decided that I must undertake the burden of setting out my reasons for doing so. (at p136)

22. Although not so expressed, the substance of what is proposed is to substitute a verdict of guilty of manslaughter for the jury's verdict of guilty of murder. This Court, therefore, proposes to acquit the accused of murder in a case where the evidence would clearly warrant a conviction for that crime. Why is this course to be followed? Seemingly because the majority of the Court consider that a verdict of manslaughter would meet the requirements of justice in the particular case. It seems to me that the principles laid down by this Court in Gammage v. The Queen (1969) 122 CLR 444 ; should apply in this Court as well as in courts bound by its decisions. (at p136)

23. It is decided that the order to be made is warranted by s. 47 (4) of the Northern Territory Supreme Court Act. If it be so, I consider, nevertheless, that the power conferred by s. 47 (4) should not be exercised in a case where there was unanimity that the real issue was whether or not the accused shot the girl deliberately. I question, however, whether the subsection warrants the order. The jury's verdict was murder. We may conjecture, but we cannot know what were the actual findings of the jury beyond the killing itself. The jury may simply have found that the accused shot the girl with intent to kill her. I can find no basis for assuming that the jury must have been satisfied of facts which proved the accused guilty of manslaughter. Moreover, as I understand the matter, the Court is unanimous that the jury did not have a proper direction upon which to reach findings that would lead to a verdict of manslaughter. Furthermore, I find nothing in the section to warrant a direction to the Northern Territory Supreme Court to convict of manslaughter and to impose a sentence. The sub-section gives this Court the responsibility, should it choose to undertake it, both of substituting a verdict and passing an appropriate sentence. If this Court should consider that a verdict of manslaughter satisfies the requirements of justice in this case, surely it should both substitute that verdict and accept the lesser responsibility of imposing what it considers to be an appropriate sentence for the offence which it finds that the accused committed. (at p136)

24. The grounds of my dissent from the order proposed, however, go even more deeply into what I regard as principles fundamental to the administration of criminal justice. The accused pleaded not guilty, thus putting everything in issue. The learned trial judge told the jury that the matter for them was "to decide whether you think this accused is guilty of murder, or something less". This instruction, although it may perhaps be

explained as not meaning what it says, cannot be justified as a direction of law. To this matter I have made reference earlier and I do not propose to repeat what I then said. The point, which I wish to make now, is that this Court, in deciding as a matter of law, that a properly instructed jury could not, in good conscience, acquit the accused of any crime but must convict of murder or manslaughter, is adopting the learned trial judge's direction. It would be going beyond my purpose to discuss the different reasons advanced for this adoption. From what I have said it is obvious that I disagree with them. I say no more than that, however strong may be the evidence for a conviction, it is neither for a presiding judge at a trial, nor for this Court upon appeal, to decide that a jury must convict of one offence or another. In saying this, of course, I recognize that, in the exercise of the power conferred upon it by s. 47 (4), this Court can adopt the course there indicated if it appears to the Court "that the jury must have been satisfied of facts which proved" an appellant guilty of some different offence from that upon which he was convicted. The section, it is to be observed, preserves to the jury the responsibility of finding the facts in a criminal case. What facts of this description the jury found here, I do not know. The proposed order goes, as it seems to me, upon a somewhat different basis, viz. that as the jury could not, in law, have acquitted, it must, in finding a verdict of murder, have been satisfied of facts proving the accused guilty of manslaughter. I dissent on both points and with the use which it is proposed to make of s. 47 (4) of the Northern Territory Supreme Court Act. (at p137)

WINDEYER J. I agree in the conclusion of the Chief Justice and in the order he proposes. I shall add a few words, only to emphasize my concurrence. (at p137)

2. The appellant killed a young woman in circumstances that could fairly lead to a verdict of murder. The only explanation that he gave was that he had the rifle intending only to frighten the deceased with it and that he discharged it accidentally. This does not stand easily with his having first sawn the weapon to make it shorter, and later having cocked it carried it close to his victim keeping his finger on the trigger. His statement that he did not think the weapon was loaded hardly accords with what, in that event, would be a purposeless pulling back of the cocking piece when the bolt was not in the safe position but pushed home. That would not make the weapon appear more terrifying. It did make it deadly and his conduct dangerous, not the less so if he had cocked the piece without troubling to notice whether or not there was a round in the chamber. Although the evidence led for the Crown pointed strongly to murder, I agree that, because of criticisms that can be made of the manner in which the learned trial judge directed the jury, the verdict of murder must be set aside. This Court sitting to hear an appeal from a decision of the Supreme Court of the Northern Territory in a criminal trial, is not to consider, as other courts of criminal appeal are required to consider, whether or not there had been a miscarriage of justice. That question, arising upon the well-known statutory proviso, is difficult in any case in which a verdict follows an insufficient or mistaken direction by a trial judge ; for justice may miscarry simply because a trial was not in all respects correctly conducted. However that question cannot arise in this case. (at p138)

3. The accused was arraigned on an indictment for murder ; he pleaded not guilty : in an unsworn statement in the Court he denied any intent to kill : in a lengthy statement he made to the police he had sought to explain what happened. The effect of his statements was that he had accidentally killed the deceased when he was engaged in a dangerous and unlawful enterprise : that he had come close to the deceased in the course of an attempt to threaten her with a rifle. It is indisputable, if what he said be believed, that he had acted recklessly and with gross carelessness in his handling of the rifle : and that he had done so in angry animosity and unsteady from drink. He said that the rifle was discharged because, being drunk, he stumbled. But it was never suggested that his consumption of drink had impaired his knowledge of what he was doing or his intent to commit an assault by threats with the firearm that he had shortened for the purpose. Drink may have affected him, as he said, in his gait - but not in his mind. If so, it only aggravated his reckless negligence. (at p138)

4. In my opinion it could not be said this homicide was excusable. A homicide is excusable as accidental, by misadventure or misfortune, when the act causing death was not done while carrying out an unlawful and dangerous undertaking nor was it the result of culpable negligence. In the present case exoneration on the ground of misadventure was not rationally possible if the facts were as the accused said. His counsel rightly recognized that what he had said amounted in the circumstances to a confession that he was guilty of manslaughter. He, counsel, urged the jury to accept the accused's statement that he had not deliberately and with malice aforethought killed the deceased, and to acquit him of murder and to find him guilty of manslaughter. Of course this appeal cannot depend upon the form which advocacy took or upon the issue counsel presented to the jury. The issue for the jury was whether the accused was guilty or not. But if he were

to be found not guilty of murder then, in my opinion, it could only be upon the basis that the homicide was not proved to be murder but was certainly manslaughter. I cannot see any basis on which the jury, obedient to their oaths, could have acquitted the accused entirely. Of course it was for the jury to decide whether or not to convict, and if so of what offence. And in relation to manslaughter it was for them to say whether his conduct was grossly negligent : Akerele v. The King (1943) AC 255, at p 262 . But I cannot conceive that any jury could honestly say it was not ; and we are not I think required to assume that they might be false to their oaths. They convicted of murder. The facts pointed irresistibly to a punishable homicide - manslaughter at the least. I would allow the appeal, set aside the conviction of murder and substitute a finding of manslaughter. (at p139)

OWEN J. The appellant who was indicted before the Supreme Court of the Northern Territory on a charge of murdering a girl named Josephine Crosbie and was convicted, has appealed to this Court under s. 47 (1) (a) of the Northern Territory Supreme Court Act. In this circumstances of the present case an appeal lies as of right and it should perhaps be added that the Act contains no provision such as is frequently found in statutes dealing with appeals in criminal cases by which an appeal may be dismissed if the appellate tribunal considers that no substantial miscarriage of justice has occurred. (at p139)

2. It was not disputed that the girl was killed by a bullet fired from a cut-down .22 rifle which the appellant was carrying at the time when the shot was fired. For some time past he and the girl had been living together but she had recently left him. At the time when she was shot she was sitting on the bonnet of a car which was standing outside the Fannie Bay Hotel at Darwin. The appellant had gone to the hotel armed with the rifle which he had shortened by using a hacksaw to cut off portion of the barrel and of the stock. After the girl arrived and while she was sitting on the bonnet of the car outside the hotel, the appellant, according to the evidence called by the Crown, walked up to her, put the muzzle of the sawn-off rifle close to her head and shot her in the right side of the head close behind the right ear. At the trial the appellant made an unsworn statement to the jury in which he said :

> "Gentlemen of the jury, I have known the girl approximately twelve months. I lived with her nine months. Off and on, I was in love with the girl. The day that she was killed I had drinks with her father and sister at the Darwin Hotel. He said to me, he said : 'That daughter of mine's no good. She never come home last night and she wanted shooting.' I laughed and said : 'Don't be silly Dad', I said, 'She's only young yet.' That day I had quite a fair bit to drink at the Darwin Workers' Club, the Vic. and the Dolphin Hotel. I also had a flagon of wine in the car that I was drinking from. I seen Josephine at the Dolphin and she said that she was going out to Berrimah. I went to Fannie Bay Hotel, I had a few beers, I went and sat in the car, I saw the barrel and the butt from the rifle. I don't know why I done this ; I was drunk and pretty depressed. I left the hacksaw which I had carried in the car and the rifle sometimes I used in the bush. I then went back to the Fannie Bay Hotel and had some more beers. I seen Josephine there in the car. I remembered what her father had told me that morning. I thought I'd give her a fright and ask her to come back to me. After a while I walked to the car and got the rifle from the car and cocked it, I didn't know there was a load in the breech and it must have been left there from when I was shooting geese. I walked towards Josephine, as I got close I called Josie, I stumbled, the rifle went off, I got a shock, I ran away. I didn't mean to hurt Josie, I loved her. And I know - and I didn't expect to see her at Berrimah that night - at Fannie Bay that night, she said she was going to Berrimah. I know it was a stupid thing to do but I only meant to frighten her."

On several occasions during his address to the jury the solicitor appearing for the appellant disclaimed any suggestion that his client should be acquitted of both murder and manslaughter. He asked the jury to acquit his client on the charge of murder and to return a verdict of guilty on the charge of manslaughter. The case was thus fought on the basis that the only question was whether the appellant was guilty of murder or not guilty of murder but guilty of manslaughter and it was in this way that the learned trial judge charged the jury. A number of criticisms, some of them I thought well founded, were directed to various aspects of the charge but I think it necessary to deal with one matter only which, apart from any of the other submissions made to us, seems to me to make it proper to order a new trial. The unsworn statement made by the appellant to the jury was undoubtedly open to criticism on many grounds but its weight was for the jury. From it I think it would have been open to them to infer that the case was one of accidental and not of unlawful homicide or at least to have had a reasonable doubt about the matter, and notwithstanding the course taken at the trial by

the solicitor for the appellant I am of opinion that that issue should have been left to the jury. The attitude adopted by all concerned at the trial that a verdict of acquittal on both charges was not open seems to have been based upon the assumption that on the appellant's own statement he was approaching the girl, armed with the rifle, with the intention of frightening her ; that in so acting he was committing an assault ; and that if the rifle was fired accidentally as a result of the appellant stumbling in the course of that assault, he was at least guilty of manslaughter. But on the appellant's statement and from the fact that the bullet entered the girl's head behind her right ear, it may well have been that when he was approaching her she was turned away from him and was unaware of his approach. If so, the appellant would not, in my opinion, have been engaged in an assault upon the girl when the rifle discharged. As is pointed out in Russell on Crime, 12th ed. (1964), vol. 1, at p. 652 :

> "An assault, as distinct from battery, is a threat by one man to inflict unlawful force (whether light or heavy) upon another ; it constitutes a crime at common law when the threatener, by some physical act, has intentionally caused the other to believe that such force is about to be inflicted upon him. The actus reus of assault thus consists in the expectation of physical contact which the offender creates in the mind of the person whom he threatens. The mens rea consists in the realization by the offender that his demeanour will produce that expectation."

And at p. 653 :

> "As the gist of the crime lies in the effect which the threat creates upon the mind of the victim it is plain that on principle it can make no difference if the threatener in fact is quite unable to carry out the threat, provided the victim does not knowethis,dbut believes that the threat is about to be implemented."

In these circumstances and despite the course taken by the solicitor for the appellant, I am of opinion that the learned trial judge fell into error in telling the jury, as in effect he did, that the case was one either of murder or of manslaughter. To my mind, on the appellant's statement to the jury and following upon appropriate directions from the trial judge, including a direction as to the elements necessary to be proved in order to establish the crime of assault, a verdict of not guilty on both charges might have been found. (at p142)

Orders

Verdict of guilty of, and conviction for, murder and sentence thereon by the Supreme Court of the Northern Territory set aside and in lieu of such verdict and conviction direct that a verdict of guilty of manslaughter be entered and order that the matter be remitted to that Court to be further dealt with according to law.