COUMBE v R

Court of Criminal Appeal of the Northern Territory of Australia

Asche CJ, Martin and Angel JJ

11, 12, 13 September and 16 October 1990 at Darwin

APPEAL - CRIMINAL LAW - PRACTICE AND PROCEDURE - Murder - verdict unsafe and unsatisfactory - role of appellate court - whether retrial should be ordered

CRIMINAL LAW - APPEAL - Verdict unsafe and unsatisfactory - murder - intent - whether intention to kill or cause grievous harm proven beyond reasonable doubt - circumstantial evidence - motive - motive, if relied upon to be proven beyond reasonable doubt

EVIDENCE - Of intent - circumstantial - motive

Cases followed:

Bradley (1989) 41 ACR 297
Chamberlain v R (No 2) (1984) 153 CLR 521
Morris v R (1987) 163 CLR 454
Mutual Life Insurance Co of New York v Moss (1906) 4 CLR 311
R v Jellard [1970] VR 802
R v Murphy (1985) 4 NSWLR 42
Whitehorn v R (1983) 152 CLR 657

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Solicitor for appellant:	NT Legal Aid Commission
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Solicitor for respondent:	Solicitor for NT

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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. CA 7 of 1990

ON APPEAL FROM THE
SUPREME COURT OF THE
NORTHERN TERRITORY

No. SCC 117 of 1989

BETWEEN:

GREGORY MARK COUMBE
Appellant

AND:

THE QUEEN
Respondent

CORAM: ASCHE CJ, MARTIN AND ANGEL JJ

REASONS FOR JUDGMENT
(Delivered Tuesday 16 October 1990)

ASCHE CJ: I agree generally with the reasons given by Angel J. In particular I consider that the suggestion he makes as to how the appellant's behaviour and actions could be construed on the day in which these events happened is one which in my view is either the real and most likely explanation, or at least closely approximating to it. On that view the appellant could not have been guilty of murder and, like Angel J., I am not satisfied that the jury were directed to the hypothesis he puts forth. That is not to be taken as a criticism of the summing up of the learned trial judge, which, if I may say so, was fair and proper. The

concatenation of circumstances before him rather buried the point which we, with the assistance of learned counsel sifting carefully through the evidence, have been led to elucidate. The advantage of a thorough review of the evidence for two days in an appeal court with the benefit of hindsight is a luxury which a trial judge does not have. Nor should that advantage be deployed in taking passages out of context or finding some casual lapse of expression lurking in a summing up where the substantial meaning is not in doubt; and we have not done so here. What has been demonstrated here is that the jury, acting reasonably on the material before them, should have entertained a sufficient doubt to have entitled the accused to an acquittal on the charge of murder.

In Morris v The Queen (1987) 163 CLR 454 at 473 a Court of Criminal Appeal is enjoined to "make an independent assessment of the evidence both as to its sufficiency and its quality", (per Deane, Toohey & Gaudron JJ). At 472-3 in that case their Honours say:-

> "The test as expressed in Chamberlain [No. 2] by Gibbs CJ and Mason J., suggests that a verdict which in the view of a Court of Criminal Appeal is unsafe or unsatisfactory is necessarily a verdict that is unreasonable, or is not supported, at least upon the requisite standard of proof, by the evidence. For our part, we would think that there might be verdicts falling within the concept of miscarriage of justice, as that expression is used in the common criminal appeal provisions, by reason of some defect or weakness of the evidence even though on the evidence it was open to the jury to

be satisfied of guilty beyond reasonable doubt, as, e.g., where there is some feature of the evidence which raises a substantial possibility that the jury may have been mistaken or misled: see Davies and Cody v the King (38). Whether or not this be so, it is clear that the question whether a verdict is unsafe or unsatisfactory involves a Court of Criminal Appeal undertaking an independent examination of the relevant evidence to determine whether it was open to the jury to be satisfied beyond reasonable doubt as to the guilt of the accused. That function is not discharged merely by a consideration of whether there was a sufficiency of evidence to sustain a conviction, for it is clear that a verdict may be unsafe or unsatisfactory notwithstanding that there was evidence sufficient to entitle a reasonable jury to convict.".

In undertaking that independent examination to which their Honours refer one must also keep in mind that a jury's verdict is not lightly to be disturbed and I note the remarks of their Honours Gibbs C.J. and Mason J. in Chamberlain v The Queen [No. 2] (1984) 153 CLR 521 at 534:

"It seems to us that the proper test to be applied in Australia is, as Dawson J. said, to ask whether the jury, acting reasonably, must have entertained a sufficient doubt to have entitled the accused to an acquittal, i.e. must have entertained a reasonable doubt as to the guilt of the accused. To say that the Court of Criminal Appeal thinks that it was unsafe or dangerous to convict, is another way of saying that the Court of Criminal Appeal thinks that a reasonable jury should have entertained such a doubt. The independent assessment of the evidence is performed for the purpose of deciding that question. The responsibility of deciding upon the verdict, whether of conviction or acquittal, lies with the jury and we can see no justification, in the absence of express statutory provisions leading to a different result, for an appellate tribunal to usurp the function of the jury and disturb a verdict of conviction simply because it disagrees with the jury's conclusion. We do agree that in many cases the distinction will be of no practical

consequence; it will be merely a matter of words. That will not generally be the case where questions of credibility are decisive. However, whether it matters from a practical point of view or not in a particular case, it is not unimportant to observe the distinction - the trial is by jury, and (absent other sources of error) the jury's verdict should not be interfered with unless the Court of Criminal Appeal concludes that a reasonable jury ought to have had a reasonable doubt."

It is my view that in this case, and in the way it was presented, the jury should have had a reasonable doubt on the charge of murder. I think the analysis of Angel J. (which I adopt) makes that clear, and to that I would add the actions of the accused immediately after the shooting. Though obviously in a drunken state he went immediately to the police and gave what sounds like an extremely frank account of what had happened. He does not seem to be a man of any great subtlety of thought - or indeed of expression, since his remarks to the police are punctuated by what may well be a record number of expletives to the page. (See e.g., p.443 of the Appeal Book). So I would acquit him of any Machiavellian motives. He seems to have gone there because it seemed to him the only place to go and his account does not sound rehearsed; nor does it sound like the account of some one who has just shot another person with the deliberate intent of killing her or doing her grievous harm. I appreciate that these are basically jury questions, but they add to my overall assessment that the jury in these circumstances should have had a reasonable doubt on the count of murder.

If, as a result of this reasoning, the verdict should be set aside, careful consideration should be given to the next step. It is plain enough that there must be a retrial on the counts of manslaughter and dangerous act. It is not suggested, and in my view could not be suggested, that there was here no evidence to support a finding on either of those grounds. There was a case to answer.

The more difficult question is whether there should be a retrial also on the charge of murder. In one sense it may seem illogical for an appeal court to find that, on the evidence in the court below, it was not open to the jury to be satisfied of the accused's guilt beyond reasonable doubt, and then order a retrial on the same issue. The obvious comment would be that the appeal court's finding would apply to any jury which might in future hear the case, and therefore there should be no retrial. That would be an oversimplification.

It seems to me that when an appeal court comes to this sort of conclusion it may do so for various reasons and the question whether or not to order a retrial on the issue depends upon those reasons. If the appeal court takes the view that the evidence was insufficient to support the verdict and no question of admission of further evidence appears then a retrial would be fruitless. If the appeal court considers that, while there was sufficient evidence to

go to the jury, the verdict was nevertheless unsafe and unsatisfactory it would not order a retrial if it considered that the position would be no different the second time around. That, I think, was the basis of the majority view of Gibbs C.J., Brennan and Dawson JJ. in Whitehorn v The Queen (1983) 152 CLR 657. Dawson J., with whose judgment the other two agreed, took the view that in the circumstances of that case it was not open to the jury to be satisfied beyond reasonable doubt of the guilt of the applicant and he expressed the view at 691 that

> "Since there would not appear to be any point in a retrial the conviction should be quashed."

Similarly in Bradley (1989) 41 ACR 297 the Queensland Court of Criminal Appeal concluded that a jury acting reasonably must have entertained a sufficient doubt as to the guilt of the applicant. No retrial was ordered and Thomas J. at 300 gave the reason:

> "As there is no ground for believing that the Crown could improve the quality of the available evidence, there should be no retrial."

See also Morris (supra).

But the position will be different if the basis of the finding that the jury should have entertained a reasonable doubt is that certain matters were not put to the

jury, a certain way upon which they could consider the behaviour of the accused was not elucidated and a reasonable hypothesis was open to them inconsistent with the count of murder (and I refer to the remarks of Angel J.) and did not appear with sufficient clarity. If it is in these circumstances that one feels a jury should have had a reasonable doubt, then a second jury should have the opportunity to look at the case in a way denied to the first, and since there is a case to answer on the ground of murder (and I agree with the view of the learned trial judge) the whole case should go for retrial.

Although the appeal in R v Murphy (1985) 4 NSWLR 42 succeeded on different grounds to those in the present case I think the remarks of the Court at 70 contain the same principle which should apply to this case:-

> "This Court cannot speculate on what a jury would have done under certain postulated conditions. Proper regard for the rights of accused persons requires that the present conviction be set aside since the appellant may have been deprived of a chance of acquittal fairly open to him. We do not assent, however, to the submission that the due administration of justice demands that he now be acquitted without further trial."

Mr Ross QC, who appears for the appellant, has not attempted to argue any other alternative before us. He very properly takes the view that he could not urge Ground 7, i.e. that the plea was a nullity, and at the same time ask this court to enter a conviction for a lesser offence when

on his argument the whole trial was of no effect. If he had succeeded on that ground he says that he could only consistently seek a retrial of all counts. Although in fact he did not succeed I understand his approach. Nevertheless, had there been in my view no purpose in a retrial on the ground of murder I would not have felt constrained by Mr Ross's very proper attitude. But my view is that as there was a case to answer on the count of murder it is right and proper to have the matter determined by a jury.

Before concluding, I would wish to deal with a purported ground of appeal, which is somewhat out of the ordinary and which, I think, calls for some comment.

Ground 7 is stated in these terms:-

> 7. The plea was a nullity whereby a mistrial occurred owing to the following:-
>
> (a) Prior to trial the appellant instructed that he intended to plead guilty only to dangerous act (Count 3 on the indictment).
>
> (b) The appellant was told by his counsel that he had to plead not guilty to all counts.

I must confess that I cannot see how this can be a ground of appeal at all. If a jury, on proper evidence before it, finds a person guilty of a more serious charge, how can it matter that he pleads guilty or has been prepared to plead guilty to a less serious charge? How can that affect the jury's finding? It does not seem to be in any way contrary to public policy or the due administration of justice that he was found guilty of the greater charge despite the fact that he wished to plead guilty to the lesser. On the contrary, one would rather expect it to be public policy that if a person has committed a serious crime he should not escape the consequences by being allowed to plead to a less serious one.

I realise, of course, that as a matter of practicalities the Crown may and often will accept a lesser plea; but the basis for that should be, and I assume always is, that in such cases an experienced Crown Prosecutor exercises a proper discretion in the public interest. But, provided that he feels that the case is a proper one to go to the jury, it matters not that he may personally feel that the case is not a strong one. If the jury nevertheless convict, what injustice has occurred? The prosecutor has fulfilled his traditional role of placing the case before the proper forum and the only one that counts. It is likewise nothing to the point that a prosecutor would have been prepared to accept a plea to a lesser offence had he

been asked. Nor, so far as the ends of justice in reaching a proper verdict are concerned, would it be relevant that a prosecutor had resiled from an undertaking to accept a lesser plea. I hasten to say emphatically that no such conduct is suggested here; but, taking that as the extreme case, it would be a matter quite irrelevant to the issues at trial. It would be removed to a different tribunal as a question of professional conduct. Any sense of grievance which the accused might entertain could hardly justify his escaping prosecution for a more serious charge properly open on the evidence. The only exception to this might be if the accused had, on the strength of the undertaking, acted severely to his detriment as, for instance, destroying proofs vital to his defence or allowing witnesses favourable to him to depart to foreign shores from which they could not return. But this would be a very rare case.

In effect the appellant here is saying that he was deprived by the advice of his counsel of a chance that the Crown would accept a plea to dangerous act. I know that Mr Ross prefers to put it in a different way which is, essentially, that something unfair to the appellant has occurred or may have occurred and the verdict should therefore be set aside. But any unfairness to the appellant (if it can be so described) is only that of dashed expectations, and must be balanced by the unfairness to the public if a person, whom a jury of his peers has found

guilty of a particular charge, should escape the clear result of that verdict because of factors quite extraneous to the evidence given in the trial.

In deference to the able argument of Mr Ross I should set out the facts upon which he relies. Some of these facts are contested by the appellant's former legal advisers; but it is not necessary to explore that because I have come to the firm conclusion that, even taking the most favourable version for the appellant, they cannot form the basis for any appeal. In fairness to the former legal advisers of the appellant I make it clear that I accept these facts only for the purposes of this argument, and regard them otherwise as unresolved.

In essence, the appellant says that he made it quite clear to his legal advisers that he wished to plead guilty to a dangerous act. It appears that an approach was then made to the learned Crown Prosecutor handling the case inquiring of his attitude if the appellant were to plead guilty to that count. Not surprisingly the Crown Prosecutor said that he would consider the matter only if a specific offer was made. The matter was taken no further and in discussions with the appellant, his advisers told him he should plead not guilty; giving various reasons for this which seem to me quite proper in the circumstances. On arraignment, the learned Crown Prosecutor took the unusual

course of presenting not only the count of murder but the counts of manslaughter and dangerous act as separate counts in the indictment. The learned trial judge queried this course and received the rather cryptic comment from the prosecutor that "the Crown takes a certain view of this case and perhaps I needn't say more in view of the present circumstances".

I conclude that the learned Crown Prosecutor, having been informed that the appellant might plead guilty to a lesser count, was giving the appellant the chance to do so. Had he pleaded guilty to either manslaughter or dangerous act the learned Crown Prosecutor would then have considered whether to accept that plea in full satisfaction. The learned Solicitor-General, who appears for the respondent in this appeal, concedes as much, though he stresses that no undertaking was given that such a course would necessarily have been adopted. Mr Ross concedes that no undertaking was given. The appellant says that on arraignment he wished to plead guilty to dangerous act but was told by his legal advisers that he must plead not guilty to all three counts, i.e., murder, manslaughter and dangerous act. He did so. The trial proceeded and he was convicted of murder.

None of this seems to me to establish a ground of appeal. Whatever views the learned Crown Prosecutor had or

was prepared to put into action were quite irrelevant to the conduct of the case before the jury. Whatever hopes the appellant had that a plea of guilty to dangerous act would be acceptable to the Crown were quite irrelevant to the jury's investigation of whether he was guilty of murder or manslaughter. Even if the appellant had pleaded guilty or, during the trial, had conceded his guilt to dangerous act, that was still irrelevant to the jury's investigation of his guilt of murder or manslaughter. The appellant gave evidence; and one must assume that that evidence, or the presentation of his case absent his evidence but based upon his instructions, would have been no different whatever plea he made. I cannot therefore accept that the situation about which the appellant complains had any bearing on the case presented to the jury by the prosecution, or on the proper exercise of their function by the jury, or in any way interfered with the due administration of justice or in any way created a situation of unfairness to the appellant in the presentation of the case or involved any impropriety affecting the presentation.

I cannot therefore accept that the plea was a nullity, and I do not consider that there is any substance in this ground of appeal.

For the reasons previously given I would allow the appeal, set aside the conviction of murder and order a new trial.

MARTIN J: I have had the advantage of drafts of the reasons for judgment from the Chief Justice and Angel J. For the reasons which they give, with which I am in general agreement, I concur in the orders proposed by them.

ANGEL J: This is an appeal from a conviction of murder. On 21 March 1990, the jury retired for almost five hours before returning its verdict of guilty.

The grounds of appeal include a ground that the verdict is unsafe and unsatisfactory "as no reasonable jury viewing the evidence reasonably could properly have convicted the appellant of murder." It is convenient to deal with this ground before considering the other grounds as it necessitates the court assessing all the evidence with a view to deciding not whether this court has a reasonable doubt, but whether the jury ought to have had a reasonable doubt, and whether the conviction is therefore unsafe or unsatisfactory notwithstanding that there was evidence upon which a jury might convict.

The charge of murder arose from a shooting incident which occurred on 17 April 1989 at a residence at Katherine owned by one Mr Nick Riccio ('Nick'). "It was not", said Sergeant Mason who attended the scene, "a normal - a normal kept home." Indeed it was not. Living there midst chaos on

the day in question were Nick - quite rightly described by the learned trial Judge to counsel in the absence of the jury as 'that drunk'; Nick's brother Gerry, given it would seem, to conducting himself in a manner sufficient to give rise to deeply felt suspicions that he had interfered with an under age girl; Peter Barrett, known as Peewee, who was to the knowledge of all given to drinking methylated spirits and who told anyone who cared to listen that he was the appellant's step father; and Nick's one-time partner Errol McIntyre who, apart from being given to drinking to excess, bore resentment towards Nick (which was reciprocated) over some past business dealings. Within this milieu, there lived the appellant and his girlfriend (the deceased) and the deceased's two children, Neil aged 13 years, and Bernadette aged 12 years. The deceased was known by various names and I shall refer to her as Bonnie.

Much of the evidence given by the adult occupants of the house at the time of the shooting is unsatisfactory, though the reason is plain to see. It is unclear precisely when the drinking started on the day in question, but almost certainly it was not later than early afternoon. The appellant, Bonnie, Nick and Errol drank beer. Others participated as the day and evening wore on. The drink flowed freely if not convivially. Bernadette who arrived home from school some time around 4.00pm, said that the adults drank "a medium amount". There is no way of knowing

accepting Gerry in preference to Bernadette over the issue. Bonnie resented Peewee drinking methylated spirits in his coffee. Nick and Errol had a disagreement over past business dealings. Nick struck Errol to the ground. The deceased assaulted the appellant in the kitchen. She punched him in the back and grabbed his hair. The appellant was not injured by this assault, and it appears he treated it more as in the nature of a nuisance. On this occasion, while the appellant was restraining the deceased, Neil threatened the appellant with some unidentified blunt instrument. Prior to that incident which occurred in the house, the deceased and the appellant had had an argument about her preference for roll your own cigarettes to tailor-made cigarettes. This trifling event erupted into unpleasantness in the car (during one of a number of trips to Katherine to buy more beer) which resulted in the appellant walking away from the car in order, it was said, to let the deceased cool down.

Nick kept a shotgun and a .22 rifle in his bed room. Their presence was known to some if not all the occupants of the house. On the day in question the fight between Errol and Nick and the undercurrent of hostility and ill feeling induced someone - and it is not clear who - to move the weapons to Gerry's room. From there they were moved to a utility parked outside the house. Bonnie, at some time in the course of the evening, removed the rifle from the

utility and took it back towards the house. There was ammunition in the utility and it appears that Bonnie placed some live cartridges in the magazine of the rifle. Bernadette was apprehensive about her mother and the rifle, and tried to disarm her. The appellant, learning of this scuffle, confronted Bonnie and wrestled the rifle away from her. Counsel for the appellant said that it was open on the facts for the appellant to have felt threatened by Bonnie's possession of the rifle, but I am quite satisfied that on the evidence the appellant did not feel under any threat in that regard. He said as much. A far more likely object of Bonnie's malevolent intentions (assuming she had any at that stage, and it must remain a matter of speculation) was Gerry. At all events, she was disarmed at a time when it is quite clear both she and the appellant were substantially affected by alcohol. She "stormed off" towards the back of the house. The appellant went to the utility, collected the shotgun and took both the shotgun and the rifle into the house with the intention, he said, of taking them to Gerry's room to lock them away.

He went into the lounge room. Bonnie and Bernadette were there. The shooting took place in the lounge room. Only two accounts of what occurred were given at the trial, one by Bernadette, the other by the appellant. The fact that Bonnie died at the hands of the appellant was never in dispute. That he fired the single fatal shot from the bolt

action .22 Marlin Rifle, exhibit H, was the subject of a formal admission at the trial by the defence.

Equally, other aspects of the shooting are not in dispute. The appellant had put the shotgun and the rifle on the floor leaning against a wall or a bar or a lounge, in a vertical position. The rifle had three live rounds in the magazine and the bolt was open. The deceased shouted loudly to the appellant in an abusive manner. She was undoubtedly angry and upset and drunk. She said words to the effect 'Well go on shoot me, you big hero'. The appellant at or shortly prior to this statement picked up the rifle, closed the bolt - thereby carrying a round from the magazine into the firing chamber and cocking the firing pin - lifted the weapon to his shoulder and pulled the trigger. Before doing this, Bernadette said that the appellant said words to the effect, 'If you want to die, here it is.' The appellant did not squarely deny having said these words but gave a different version or a number of different versions both in his subsequent statements to police and from the witness box. The appellant conceded that he said something to the effect, 'Well die then.'

Having shot Bonnie and seen her fall backwards on to Peewee's bed, bleeding from the neck, the appellant dropped the rifle to the floor and walked out. Shortly thereafter Neil walked into the lounge, saw the deceased and kicked a

hole in the wall. Neil and Bernadette cried and apparently went into shock.

The appellant walked to the Katherine Police Station. The police station is some half-hour walk from the scene of the shooting. The appellant was drunk when he arrived at the police station and was so described by all the police officers who were asked.

The appellant was arraigned on an indictment containing three counts: murder contrary to s.162 of the Criminal Code, manslaughter contrary to s.163 of the Criminal Code, and dangerous act contrary to s.154(1)(3)(4) of the Criminal Code. The learned trial Judge commented that it was most unusual for an indictment to contain alternative charges in descending scale of gravity arising out of the same events. It was unnecessary and unusual, he said, and in 30 years' experience with the criminal law he had never come across it. The experienced Crown prosecutor said that there was a reason for it, though he did not disclose the reason other than to say that he wished the appellant to plead to each count. The appellant pleaded not guilty to each count.

In the course of his summing up, the learned trial Judge informed the jury that in order to convict the appellant of murder they had to be satisfied beyond reasonable doubt:

1) that on 17 April 1989, at Katherine, the accused

2) did kill Bonnie

3) either intending to cause her death or intending to do grievous harm to her.

In light of the formal admissions, not surprisingly, his Honour the learned trial Judge concentrated upon the third element, that is, whether the appellant intended to cause Bonnie's death or intended to do grievous harm to her. That was a matter of inference. In the course of his interviews with the police after the shooting, the appellant had said that he did not think the gun was loaded. When he first gave himself up he was drunk and at the outset he said to Senior Sergeant Josephs, "I didn't know there was any fucking bullets in the gun."

On the following day, almost at the conclusion of a one and a half hour taped interview with Sergeant Lade, when asked whether there was anything further he wished to say, the appellant said: "Just say it was an accident, I think."

The jury by their verdict, in light of his Honour the trial Judge's direction, must be taken to have accepted that the Crown had proved beyond reasonable doubt that the appellant intended to kill or to do grievous harm to Bonnie. As I have said, the matter of intention is a matter of inference.

At the close of the Crown case, counsel for the appellant submitted there was no case to answer. The Crown case, it was said, was barren of any evidence from which one could infer an intention to kill or maim. The learned trial Judge, quite rightly in my view, rejected this submission and held there was a case to answer. The appellant had had the rifle in his possession prior to the shooting and thus an opportunity to see if it was loaded. An inspection of the open breach would have disclosed live cartridges in the magazine ready for loading into the breach by manipulation of the bolt. The appellant was an experienced kangaroo shooter with high power bolt action rifles, albeit that he had not shot kangaroos for some three years. The appellant had lifted the weapon to his shoulder and pointed it in the direction of the deceased only some ten feet away. He had pulled the trigger. He had not rendered assistance to the deceased or expressed any surprise at what had happened; this might be explained as flight, as indicative of not having been surprised at what happened. There was Bernadette's evidence of what he had said and his own evidence in the police interview, exhibit K:

> "COUMBE: ... I just lifted the rifle up and I said, "You want me to shoot you?"
> NIXON: And what did you do then?
> COUMBE: I just pushed the bolt forward and pushed it down. I didn't think there was any bullets in it.
> NIXON: You didn't check?
> COUMBE: No."

I think there was a case to answer and counsel for the appellant did not argue to the contrary.

I have anxiously considered the evidence in this case and come to the conclusion that the verdict is unsafe. I am acutely aware that it is not the function of courts to usurp the role of the jury, but there are a number of matters in this case which are cause for concern and my concern has not been dispelled after further consideration. I have reached a conclusion that the jury ought to have had a reasonable doubt as to murder.

The defence case at the trial was that the appellant at the time did not think there were any bullets in the gun. In the course of an interview (exhibit K), Sergeant Lade and the appellant had this exchange:

> "LADE: Did you stop and think at all prior to putting that firearm to your shoulder to check whether it was loaded?
> COUMBE: No.
> LADE: Didn't even enter your head to have a look at it?
> COUMBE: No.
> LADE: You obviously realise guns are dangerous?
> COUMBE: Mmm ...
> LADE: And you didn't, or you, did you check at any time to see whether there was bullets in it.
> COUMBE: No.
> LADE: So you just presumed there wouldn't be bullets in it?
> COUMBE: Yep.
> LADE: And what was that presumption based on?
> COUMBE: We'll(sic) she had the gun like that, when I walked around the corner to take it off her and if there would have been anything in it oh she would have shot me if there hada been anythin in there wouldn it."

This passage is not specifically referred to in the learned trial Judge's summing up to the jury. It is trite that it is one thing for the appellant to think the gun was unloaded, another thing for him not to address his mind to whether the gun was loaded or not; loaded, that is, in the sense of having live rounds in the magazine when he took it up. When Lade asked the appellant: "So you just presumed ...", he misled the appellant into a conclusion and rationalisation therefor. A consideration of the evidence leads, I think, inevitably to the conclusion that the real issue was not whether he knew the gun was loaded or thought it was unloaded, but whether the appellant in the circumstances simply did not address the question as to whether the gun was loaded or not. He was affected by liquor. The deceased was abusing him and goading him, and he reacted. He plainly intended to hold the gun, to lift it, to point it, to work the bolt and to pull the trigger. All this was done in great haste. It does not follow that he intended to kill or maim the deceased. For the jury to reject the appellant's rationalisation about thinking the gun was unloaded does not carry with it as a necessary consequence that the appellant knew the gun was loaded. This was never explained to the jury.

Another matter that concerns me is that in the course of the appellant's conversation with the police, he said

(exhibit E): "I'll get a murder charge or attempted murder or something, eh?" This was said before the appellant was informed of Bonnie's death.

Later in the same interview, after he had been informed of the death of the deceased, he said (exhibit E): "I know for a fact if that aint murder I don't know what the fucking hell is."

Then later again (exhibit F), Sergeant Lade said: "So can I just explain a bit further to you. I know this may seem a bit silly at this time, but you are under arrest for assault causing grievous harm." To which the appellant said: "And murder." Sergeant Lade said: "No, at this stage, assault cause grievous harm. We are held(sic) you in custody until such time that you are not under the influence of alcohol." Appellant: "Yeah."

The transcripts of the interviews went into the jury room. The appellant did not know, or was not shown to know, the legal constituents of murder. Nothing was said to the jury about this and the jury may well have sought to infer intent from what the appellant said concerning murder.

Then there is the evidence of Bernadette. Her brother Neil had given evidence at the committal hearing that he was present at the shooting and the appellant had said: "You

wanted to die, now here's your chance", at the time of the shooting. Neil admitted these matters in cross-examination at the trial and agreed that he had given false "made-up" evidence before the Magistrate, and that he had done so because he had wanted the appellant to go to gaol. He and Bernadette denied that they had spoken to each other about what the appellant said. Of course, it was open for the jury to accept their denials. These two young children were in each other's company following the shooting, and human nature tells us it is highly likely that they discussed the events. If Neil, motivated by ill will towards the appellant, had the presence of mind to concoct a story before the Magistrate, it seems highly unlikely that Bernadette's account in the witness box was uncoloured by anything said or done by Neil. Neil's account bore a close resemblance to Bernadette's account and, if Neil was not present at the shooting and did not discuss the matter with Bernadette, a most remarkable coincidence seems to have occurred. Notwithstanding Bernadette's evidence and Neil's evidence, and notwithstanding the jury verdict, these matters remain unsatisfactory.

Counsel for the appellant at the trial cross-examined a Crown ballistics expert and sought to make much of the fact that the weapon was not checked for accuracy. As is apparent from his Honour's summing up, counsel for the defence addressed the jury on this, though his address is

not before us. I think this matter was quite wide of the mark. It was common ground that the appellant pointed the weapon at or in the general direction of the deceased from a distance of some ten feet. Bernadette did not suggest that the appellant carefully took aim at Bonnie, execution style, or aimed the gun at all. One remains with the impression that the jury, having rejected the appellant's statements that he believed the gun was unloaded, and having rejected a submission to the effect that the gun was perhaps inaccurate over a ten foot distance, inferred an intentional shooting.

Counsel for the appellant argued that the learned trial Judge should have directed the jury as to provocation. I cannot accept this argument. Provocation, if made out at law, excuses an intentional act. The appellant's defence was that the shooting was unintentional. Of course, this inconsistency does not of itself preclude a direction on provocation if reasonably open on the evidence, but I do not think provocation was reasonably open on the evidence. I think the appellant was provoked into pointing the gun, closing the bolt and pulling the trigger by the goadings of the deceased, but I agree with the learned Solicitor-General that there was no evidence of fear, panic, anger or resentment or sufficient evidence to warrant a direction. The appellant's case was deliberately run on the basis that he had no motive, that he was not angry, that he was not panic stricken. I am satisfied that the issue of legal provocation was not open on the facts.

I have already said that the critical element of the appellant's intent is a matter of inference. It was correctly so treated by the learned trial Judge. His Honour emphasised that not only was each element of the crime of murder to be proven beyond reasonable doubt by the Crown, but that in so far as intent was to be inferred it had to be inferred from facts, themselves proved beyond reasonable doubt. However, the learned trial Judge did not marry the facts to the law as regards drawing an inference and did not highlight to the jury the facts relied upon by the Crown, in order to infer an intention to kill or maim, and the facts relied upon by the defence from which it might be inferred that he had no such intention. As regards the latter, the defence was not fairly put to the jury, R v Jellard [1970] V.R. 802 at 804.

Although it is neither a rule of practice nor a rule of law that when the Crown relies on circumstantial evidence the jury must be instructed that before they can convict, the evidence must be not merely consistent with the appellant's guilt but inconsistent with his innocence, I think this is a case when such an instruction was necessary as a matter of fairness to the appellant. I think his Honour ought to have gone through the facts which were said to support the inference that he did not intend to maim or kill. Indeed, even if Bernadette's version of what was said is to be accepted, that is as consistent with an

intention to frighten as an intention to kill. It is also important that the Crown case was not put on the basis of recklessness, but one of intention to kill or maim. Although motive was not an essential element of the Crown's case, in the present case, if proven, it would clearly be "in the nature of circumstantial evidence as to the main question in issue", Mutual Life Insurance Co. of New York v Moss (1906) 4 C.L.R. 311 at 317. As Griffith CJ said:

> "... On charges of murder sometimes the question is whether or not the accused caused the death, and sometimes whether, if he caused it, he did so intentionally or accidentally. The existence of a motive may tend to show either that the person in question did the act simpliciter, or that he did it intentionally."

In R v Murphy (1985) 4 N.S.W.L.R. 42 at 59, 60 the court said:

> "In our opinion it is incorrect to direct a jury that the accused's motive is a "subsidiary fact" or a non-essential element in the case which does not require proof beyond reasonable doubt but may be proved to the jury's satisfaction or on the balance of probabilities. Motive is not merely a matter which may explain the accused's conduct. It is rather a fact directed to proof of the accused's guilt; as Chamberlain makes clear, before a jury can infer guilt from motive they must be satisfied that the motive asserted has been proved beyond reasonable doubt."

Here, the Crown cross-examined the appellant with a view to proving anger as a motive. Motive was not discussed by his Honour the learned trial Judge in his summing up to the jury and I think that together with the general marrying of proven facts said to support the inference from which intention might be proven, in this case it was appropriate and necessary for something to have been said about proof of motive since the Crown sought to rely upon it.

Having regard to all the evidence I think the truth of the matter is this, that the appellant, inflamed by drink and goaded and abused into action by the deceased, lifted the gun, closed the bolt and pulled the trigger without any regard as to the consequences and without any regard or belief as to whether the gun was loaded or not. Of course that is not the question. The question is not for this court to decide the facts but rather to consider whether in all the circumstances a reasonable jury ought to have entertained a doubt as to whether the Crown had established beyond reasonable doubt that the appellant intended to kill or maim the deceased. But what I have said is an hypothesis inconsistent with guilt of murder and I do not think the Crown excluded it beyond reasonable doubt to the satisfaction of the jury, because I am not satisfied that the jury properly addressed the questions that remained for them after disbelieving the appellant's assertion that he

believed the gun was unloaded. As I have said, it does not follow from that rejection that the appellant knew the gun was loaded and all the evidence points to a conclusion that his hasty action was taken without any thought as to whether the gun was loaded or not. This hypothesis, it seems, was never considered by the jury. At least it is far from clear that they did consider it.

For all these reasons I think the verdict is unsafe and unsatisfactory. I am satisfied the jury ought to have entertained a reasonable doubt as to whether the appellant intended to kill or maim Bonnie, and that a miscarriage of justice has occurred. Having reached this conclusion it is not necessary for me to deal with other matters agitated before the court.

I would allow the appeal and quash the conviction of murder. I agree with the learned Chief Justice that in this case a retrial should be ordered.