

LING v. THE QUEEN

1981. Court of Criminal Appeal: Green C.J.,
Crawford and Everett JJ.

Aug. 19-21, Dec. 11, 1981.

Criminal Law — Evidence — Corroboration — When required or advisable — Evidence of accomplices and similar persons — Who are accomplices — Definitions and tests — Parties to criminal offences — Accessory after the fact.

Criminal Law — Evidence — Corroboration — When required or advisable — Evidence of accomplices and similar persons — Whether corroboration necessary — Caution to jury and failure to give.

Criminal Law — Evidence — Corroboration — What constitutes — Lie told by accused.

Criminal Law — Jurisdiction, practice and procedure — Miscellaneous powers of courts and judges — Evidence unsafe or unsatisfactory — Power of judge to direct acquittal.

Criminal Law — Jurisdiction, practice and procedure — Verdict — Before end of trial — Power of jury to bring in — No duty to tell jury of power.

Criminal Law — Jurisdiction, practice and procedure — Verdict — Power to withdraw case from jury — Where evidence unsatisfactory or conviction unsafe.

Criminal Law — Jurisdiction, practice and procedure — Verdict — Right of Crown and jury to — Jury Act 1899, (63 Vict. No. 32), s. 39.

Criminal Law — Appeal and new trial — Unreasonable verdict — Function of court — Test to be applied — Where evidence to support verdict.

Upon a submission of no case to answer the judge must let the case go to the jury if there is evidence on which they can come to a verdict of guilty, and he cannot take the case away from them because he thinks the evidence unsatisfactory, since the *Jury Act* 1899, s. 39, requires the issue joined between the Queen and the accused to be tried by a jury.

Reg. v. Prasad (1979), 23 S.A.S.R. 161, and *Reg. v. Galbraith*, [1981] 1 W.L.R. 1039, followed. *Reg. v. Mansfield*, [1977] 1 W.L.R. 1102, 65 Cr. App. R. 276, and *Wilson v. Kuhl*, [1979] V.R. 315, not followed.

If it is open to the jury to bring in a verdict before the end of a trial a judge is not bound to advise them to do so.

What kind of lie told by the accused will corroborate a witness considered: *Reg. v. Lucas*, [1981] Q.B. 720, and *Eade v. The King* (1924), 34 C.L.R. 154, applied.

Per Crawford J.:

- (a) It is a rule of prudence to warn a jury of the need for corroboration of the evidence of an accomplice, but the judge is not bound to do so in all cases.
- (b) For the purposes of this rule an accessory after the fact is not an accomplice; although the rule may extend to persons not liable to conviction on the same indictment if criminal liability may attach to them for their conduct in the same incident.
- (c) It is not within the powers of the Court of Criminal Appeal to set aside a conviction on the ground that the verdict was against the weight of the evidence unless a miscarriage of justice was thereby occasioned; *Hayes v. The Queen* (1973), 47 A.L.J.R. 603, followed; *Reg. v. Hill* (1981), 3 A. Crim. R. 397, explained.

APPLICATION FOR LEAVE TO APPEAL AGAINST CONVICTION.

Darrell John Ling was on 15th May, 1981, convicted at Burnie Criminal Sittings before Nettlefold J. of the manslaughter of Hilda May Hallett after having been acquitted of murder contrary to the *Criminal Code*, s. 158.

He appealed against his conviction on the following grounds (as amended):

1. The verdict of the jury of guilty of manslaughter was unreasonable and contrary to the weight of the evidence.
2. That the learned trial judge ought to have directed the jury to acquit the appellant at the close of the Crown case and in particular:
 - (a) that the learned trial judge erred in law in failing to rule that as trial judge he had the power to direct an acquittal at the close of the Crown case if in his opinion it would have been unsafe to convict the appellant notwithstanding that there was evidence of all the elements of the crime upon which the appellant was indicted or some other crime of which the appellant could have been convicted upon the same indictment; and
 - (b) that the learned trial judge erred in that he ought in the exercise of his discretion to have directed an acquittal notwithstanding the fact that there was evidence of all the elements of the crime upon which the appellant had been indicted.

- 2A. That the learned trial judge ought to have advised the jury at the close of the Crown case to stop the case and bring in a verdict of not guilty.
3. That the learned trial judge erred in law in that he failed to direct the jury that evidence as to a possible motive or possible motives for the appellant to kill the late Hilda May Hallett, while being capable of constituting corroboration of the evidence of the witness Garry John Smedley in relation to the crime of murder, was not capable of constituting such corroboration in relation to the crime of manslaughter.
4. That the learned trial judge erred in law in directing the jury that evidence that the appellant told police officers on 26th November, 1980 that the end of the barrel of his rifle was about a yard from the mouth of the late Hilda May Hallett when the said Garry John Smedley pulled the trigger was capable of constituting corroboration of the evidence of the witness Garry John Smedley if when the appellant made that statement to the police it was a lie.
5. That the learned trial judge failed to warn the jury of the danger of convicting the appellant on the uncorroborated evidence of the witness Garry John Smedley if he might reasonably have been regarded as having some purpose of his own to serve which might have led him to give false evidence against the appellant.
6. By reason of the foregoing there was a miscarriage of justice.

The deceased had been living with the appellant at his house at Devonport in a *de facto* marital relationship with him. They had retired to bed on the night of 15th August, 1980, but left their bed when two men, Garry Smedley and Peter Bryan, came to the house to visit. While all four were at the premises, the deceased was killed by a bullet discharged from a .22 calibre rifle of the appellant. There was undisputed evidence by Dr Cummings, an expert, that in his opinion the rifle must have been discharged when the muzzle was in the open mouth of the deceased. Initially all three men told investigating police officers that, when they were in the kitchen of the house (not the room where the deceased was shot), they heard a shot, went to the room where they had left the deceased, found her sitting on a settee where she had earlier been seated and saw that she had been shot in the mouth. This account, of course, led to an inference that the deceased had caused her own death when none of the men had been present at the time. About two months later,

Smedley and Bryan made statements to police officers to the effect that it must have been the appellant who held the rifle and shot the deceased. The appellant, when interviewed again by the police and confronted with these allegations, said that Smedley had held the rifle at the time of the fatal shot.

At the trial it became obvious that Bryan was an extremely unreliable witness. In his evidence in chief, he said that at a time when Smedley was not in the room the rifle was in the appellant's hands when the shot had been discharged. In cross-examination, he conceded that he did not know who had held the rifle when the deceased was shot and who, in fact, had been in the room at the time. At the trial and at the hearing of the appeal, no reliance was placed on his evidence as to what had occurred at the time of the shooting. At the trial, no evidence was given nor was there any cross-examination suggesting that Bryan had fired the fatal shot; and the trial and this appeal were conducted on the basis that he had not and that, at the time of the shooting, the rifle was held, not by the deceased, but by either the appellant (claimed by the Crown) or Smedley (claimed by the appellant). Smedley's evidence at the trial was that he was in the kitchen at the time of the fatal shot. The appellant did not give sworn evidence, but, in an unsworn statement, said that, in his presence, the deceased was shot when Smedley was holding the rifle.

A. M. Blow for the appellant.

W. J. E. Cox Q.C., Crown Advocate, and *F. Cullen* for the Crown.

Blow. Grounds 3, 4 and 5 are based on want of corroboration, 2 and 2A on no case, and 1 on that the verdict was unreasonable and contrary to the weight of the evidence so there was a miscarriage of justice.

Corroboration is considered in *Davies v. D.P.P.*, [1954] A.C. 378.

The alleged motive was relevant only to murder, not manslaughter, which requires proof of criminal negligence: *Arch. Cr. Pl.*, 40th edn., par. 1347 (2). The jury may not have understood this.

Special care must be taken over lies said to be corroboration: *Reg. v. Collings*, [1976] 2 N.Z.L.R. 104, at p. 117; *Jones v. Thomas*, [1934] 1 K.B. 323; *Credland v. Knowler* (1951), 35 Cr. App. R. 48; *Reg. v. Clynes* (1960), 44 Cr. App. R. 158; *Popovic v. Derks*, [1961] V.R. 413; *Eade v. The King* (1924), 34 C.L.R. 154; *Reg. v. Kaye* (1960), 84 W.N. (Pt. 1) (N.S.W.) 39; *Reg. v. Colless* (1964), 84 W.N. (Pt. 1) (N.S.W.) 55; *Reg. v. Prater*, [1960] 2 Q.B. 464, [1960] 1 All E.R. 298; *Reg. v. Russell* (1968), 52 Cr. App. R. 147; *D.P.P. v. Kilbourne*, [1973] A.C. 729, [1973] 1 All E.R. 440.

The judge failed to warn the jury of convicting on Smedley's evidence: *Arch. Cr. Pl.* 40th edn., par. 1395.

The case should not have gone to the jury: *Reg. v. Young*, (1964) 48 Cr.App.R. 292; *Reg. v. Storey* (1968), 52 Cr. App. R. 334; *Reg. v. Falconer-Atlee* (1973), 58 Cr. App. R. 348; *Reg. v. Barker* (1977), 65 Cr. App. R. 287; *Reg. v. Mansfield* (1977), 65 Cr.App.R. 276; *Arch. Cr. Pl.* 5th cumulative supplement to 40th edn., par. 575; *Reg. v. Smith* (1865), 10 Cox C.C. 82; *Benney v. Dowling*, [1959] V.R. 237; *Zanetti v. Hill*, [1963] A.L.R. 165, (1962), 108 C.L.R. 433; *Reg. v. Prasad* (1979), 23 S.A.S.R. 161; *Reg. v. Papps* (1972), 4 S.A.S.R. 319; *Reg. v. Kalaitzidas* (1978), 20 S.A.S.R. 87; *Reg. v. Trotter* (1979), 22 S.A.S.R. 64; *Wilson v. Kuhl*, [1979] V.R. 315.

The judge should have advised or directed the jury to acquit: *Risely v. The Queen*, [1970] Tas. S.R. 41; *Harris v. Pandava*, (Unreported Neasey J., 10th June, 1975); *Reg. v. Lynch*, (Unreported C.C.A., 24th July, 1978); *Burton v. The Queen*, 1979 Tas. R. 193; *Pescud v. Jackson*, (Unreported Everett J., 1st October, 1979); *R. v. Tasker*, [1934] S.A.S.R. 95; *Gorman v. The King* (1944), 45 W.A.L.R. 80; *Reg. v. Brown*, [1949] V.L.R. 177; *Yager v. The Queen* (1977), 13 A.L.R. 247, 139 C.L.R. 28.

The cases in respect of juries in England are *R. v. Larkin*, [1943] 1 All E.R. 217; *Reg. v. Eastwood*, [1961] Crim. L.R. 414; *Reg. v. Draper*, [1962] Crim. L.R. 107; *Reg. v. Healy*, [1963] 1 All E.R. 365, [1965] 1 W.L.R. 1059.

The division of function in civil cases appears in *Ryder v. Wombwell* (1868), L.R. 4 Exch. 32; *Giblin v. McMullen* (1868), L.R. 2 P.C. 317; *Hiddle v. National Fire and Marine Insurance Co. of N.Z.*, [1896] A.C. 372; *Herniman v. Smith*, [1938] 1 All E.R. 1, [1938] A.C. 305.

The verdict of the jury was unreasonable: *Reg. v. Mc Gibbony*, [1956] V.L.R. 424, [1956] A.L.R. 975; *Raspor v. The Queen* (1958), 99 C.L.R. 346; *Plomp v. The Queen* (1963), 110 C.L.R. 234; *Hayes v. The Queen* (1973), 47 A.L.J.R. 603; *Aladesuru v. The Queen*, [1956] A.C. 49; *Reg. v. Hill* (1981), 3 A. Crim. R. 397; *Reg. v. Privitera*, [1966] W.A.R. 12; *Reg. v. Dick*, [1966] Qd. R. 301; *Wray v. The King* (1930), 33 W.A.L.R. 67; *Jackman v. The King* (1914), 16 W.A.L.R. 8.

Cox Q.C. The evidence was sufficient and the jury properly directed. *Eade v. The King* (1924), 34 C.L.R. 154; *Credland v. Knowler* (1951), 35 Cr. App. R. 48; *Reg. v. Colless* (1964), 84 W.N. (Pt.1) (N.S.W.) 55; *Davies v. D.P.P.*, [1954] A.C. 378; *R. v. Ready and Manning*, [1942] V.L.R. 85; *Reg. v. Mason* (1869), *Aust. Dig.*, 2nd edn., vol. 8, 1267; *Khan v. The Queen*, [1971] W.A.R. 44.

Blow in reply.

Cur. adv. vult.

DECEMBER 11.

GREEN C.J.: This is an application for leave to appeal and an appeal against the appellant's conviction for manslaughter upon a

charge of murder. The grounds of appeal and the facts are set out in the reasons for judgment published by Crawford J. and Everett J.

Ground 2.

There was evidence before the jury at the close of the Crown case upon which they could lawfully have convicted the appellant. The question raised by this ground is thus whether a trial judge has the power to direct an acquittal notwithstanding that there is evidence as to each element of the crime charged which, if accepted, would prove that element. In England there was until recently a difference of opinion about that question.

In *Reg. v. Mansfield* (1977), 65 Cr.App.R. 276, [1977] 1 W.L.R. 1102, the Court of Appeal held that a trial judge may withdraw a case from the jury on the ground that the evidence before the jury is so unreliable that a verdict based upon it would be unsafe. It appears from the reasons for judgment at p. 281 that the court was conscious that its decision represented a change in the law, but apparently it felt that such a change was justified by the alteration in the power of the Court of Appeal which had been effected in 1966 whereby the court was no longer to be concerned with the question of whether there was evidence upon which a reasonable jury could convict, but, instead, was required to determine whether the verdict was unsafe or unsatisfactory. Although it was relied upon in *Reg. v. Mansfield* the decision of the Court in *Reg. v. Barker* (1977), 65 Cr. App. R. 287, appears to be inconsistent with that decision. At p. 288 of the note of the latter decision the Lord Chief Justice said:

"It cannot be too clearly stated that the judge's obligation to stop the case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the judge's job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks the witness is lying. To do that is to usurp the function of the jury and would have been quite wrong in the present case."

The court resolved the conflict in *Reg. v. Galbraith*, [1981] 1 W.L.R. 1039. Lord Lane C.J. said, at p. 1042:

"How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly

convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred.

"There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

The second of "the two schools of thought" referred to in that passage was that which the Lord Chief Justice described at p. 1040 as adhering to the view that a trial judge should stop the case "*only* if there is no evidence upon which a jury properly directed could properly convict". (His Honour's emphasis.)

It appears that in Australia there exists a similar difference of judicial opinion as to the approach which a trial judge should take when ruling upon a submission of no case to answer. I understand that it has been a long standing practice in Victoria for trial judges to direct an acquittal on the ground that a conviction would be unsafe notwithstanding that there is a case to answer. My understanding would appear to be confirmed by the approval by McGarvie J. in *Wilson v. Kuhl*, [1979] V.R. 315, at p. 319, of the decision in *Reg. v. Mansfield* (*supra*). In Tasmania the practice as far as I know has been in accordance with that laid down in *Reg. v. Galbraith* (*supra*). The position in South Australia was clarified by the decision of the Supreme Court (*In Banco*) in *Reg. v. Prasad* (1979), 23 S.A.S.R. 161. At pp. 162 and 163 King C.J. said:

"It seems to me that to say that a judge can direct a jury to bring in a verdict of not guilty when there is evidence capable in law of supporting a conviction is to infringe one of the basic principles of trial by jury. It is fundamental to trial by jury that the law is for the judge and the facts for the jury. If there is no evidence which would justify a conviction then, as a matter of law, there must be an acquittal. That decision is for the judge and the jury must accept and act on his direction on that question of law. If, however, there is evidence which is capable in law of supporting a conviction, a direction to the jury to acquit would be an attempt to take from them part of their function to adjudicate upon the facts. That, as it seems to me, would be contrary to law."

With respect, I agree. In my view, if a judge in the course of determining a submission that there is no case to answer, makes

value judgments or embarks upon an assessment of the weight of the evidence, he is performing functions which by law should be performed by a jury and he is thus unlawfully altering the basic character of a criminal trial. That follows from the *Jury Act* 1899, s. 39, which requires that all criminal issues joined in the Supreme Court shall be tried by a jury. In a criminal trial the issue which is joined by a plea of not guilty is whether the accused is guilty or not guilty. The determination of that issue involves finding facts, applying the trial judge's directions as to the law and sometimes, making value judgments. If a verdict is arrived at as the result of a judge instead of a jury performing those functions, it cannot be said that the issues joined have been tried by a jury.

I am not persuaded that the nature of the functions or the powers of this Court, or of any appellate court, have any bearing upon the functions or powers of trial judges. Broadly speaking, I can see no inconsistency at all in an appellate court which is responsible for exercising a general supervisory role in respect of criminal trials, being given powers which are not possessed by trial judges, including the power in appropriate cases to set aside a verdict notwithstanding that there is evidence upon which, as a matter of law, a jury could convict. Further, as a matter of statutory construction, I can see no reason why it should be thought that in the absence of express words, when Parliament confers certain powers on, or alters the functions of an appellate court, it is also intending to confer powers upon, or alter the functions of a court of first instance.

In my view, the law in this State is as laid down in *Reg. v. Prasad* (*supra*) and *Reg. v. Galbraith* (*supra*) provided that the statement in the passage from the Lord Chief Justice's judgment in the latter case set out above that "borderline cases . . . can safely be left to the discretion of the judge" is understood as referring to the determination of the question of into which category a particular case falls and is not read as meaning that in borderline cases a judge has a discretion whether or not to withdraw the case from the jury. The latter construction would, I think, be inconsistent with the tenor of the rest of the judgment.

It follows that this ground must fail.

Ground 2A.

Assuming that it is open to a jury to bring in a verdict of not guilty before the end of the trial, a trial judge has no duty to exercise a discretion as to whether or not he should advise a jury that they ought to do so. That conclusion is sufficient to dispose of this ground, but it would have been unsustainable in any event because, even if trial judges do have such a discretion, the trial judge in this case was not asked to exercise it.

Ground 3.

I agree with the other members of the Court that this ground has not been made out. It is true that the learned trial judge did not give a direction precisely in the terms set out in this ground, but none was required because his Honour's directions as to the extent to which Smedley's evidence was capable of being corroborated by evidence as to motive would have been understood by the jury as being applicable only to their consideration of whether the appellant was guilty of murder.

Ground 4.

For the reasons expressed by Crawford J., I agree that this ground has not been made out.

Ground 5.

I agree with the other members of the Court that the trial judge effectively warned the jury of the danger of convicting the appellant on Smedley's uncorroborated evidence and that no further elaboration of the reasons for that warning, other than that which he gave, was required.

I am not persuaded that the verdict was unreasonable or could not be supported having regard to the evidence. In a very thorough analysis Mr Blow of counsel for the appellant fully canvassed the grounds of appeal, but I am not satisfied that any error was made in the conduct of the trial, or that any miscarriage of justice occurred.

Insofar as this is an application for leave to appeal, it should be granted. The appeal should be dismissed.

CRAWFORD J., after stating the facts and course of the proceedings, continued:

I turn to the grounds of the appeal and application for leave to appeal.

The final ground was: "By reason of the foregoing there was a miscarriage of justice" and I read that with each specified ground.

I deal first with the three grounds relating to corroboration.

Ground 3.

"That the learned trial judge erred in law in that he failed to direct the jury that evidence as to a possible motive or possible motives for the appellant to kill the late Hilda May Hallett while being capable of constituting corroboration of the evidence of the witness Garry John Smedley in relation to the crime of murder was not capable of constituting such corroboration in relation to the crime of manslaughter."

In his summing-up to the jury, the learned trial judge directed the jury as to the matters which go to make a fatal shooting one of murder. He referred to the evidence of Dr Cummings that he was of

the opinion that the muzzle of the rifle was inside the mouth of the deceased at the time of the fatal shot and that it was a safe assumption that the deceased's mouth was open at the time when the projectile was discharged. The judge referred to the evidence of an expert that the rifle was in good mechanical condition and was not liable to accidental discharge and that the trigger pressure was heavy for that type of weapon. He commented on the evidence as to a possible suicide and said, "so presumably we can reject suicide as a cause of death". He said, "If the expert evidence to the effect that the muzzle of the gun was inside the mouth when the fatal shot was fired was correct, one of these three men put it in there". As I have said, Bryan was excluded as being such a possibility. He referred to the evidence concerning heavy pressure being required to discharge the rifle and said:

"It would appear, but it is a matter for you, that her death resulted from someone intentionally pulling the trigger of the rifle . . . provided the person who pulled the trigger knew the gun was then in a state where in response to the pulling of the trigger it would discharge, the inference would appear to me to be — but it is a question of fact for you — that when he pulled the trigger he intended to cause her death, or, in plain terms, committed murder."

He told the jury that it was open to them to bring in a verdict of murder or manslaughter by criminal negligence. He referred to whether they could be satisfied beyond reasonable doubt that it was the appellant who pulled the trigger and later said: "If you are not satisfied beyond reasonable doubt that he knew the rifle would fire . . . when he intentionally pulled the trigger . . . you could bring in a verdict of manslaughter by criminal negligence." Manslaughter on any other basis was not mentioned. The jury was adequately directed as to duty to take care and the standard of care.

The trial judge warned the jury that it would be dangerous to convict the appellant on the uncorroborated evidence of Smedley and that such corroborative evidence was to be evidence, not given by Smedley or depending in any way on the veracity of Smedley, which implicated the appellant in relation to the matter concerning which corroboration was necessary. He told the jury:

"Now as far as this case is concerned, what is the matter which requires corroboration? It seems to be clear that neither the deceased nor Bryan fired the fatal shot. That leaves two possibilities on the evidence, Ling or Smedley. If Ling fired the fatal shot, there is evidence quite independently of Smedley which would enable you to infer with what state of mind that was done. A murderous state of mind or criminally negligent state of mind. So it seems to me that the critical issue on which the Crown relies on Smedley, the suspect witness because he is

an accessory after the fact, is who pulled the trigger, Ling or Smedley. Now is there any evidence other than evidence which depends on the veracity of Smedley implicating Ling by showing that he and not Smedley pulled the trigger? Now the law says that the question whether there is any evidence capable of constituting corroboration is a question of law for the judge, but whether in fact the particular piece of evidence amounts to corroboration in the circumstances of the particular case is a question of fact for the jury. So I go to this question. What evidence is there here which is capable of constituting corroboration of Smedley's evidence to the effect that he did not pull the trigger which fired the fatal shot but by inference Ling did? Now there are only two pieces of evidence which I would direct you are capable of corroborating him on that. There are only the two and there are no others. The first piece is this. There is evidence that Ling entered into a *de facto* relationship with this woman after knowing her for a very brief time and they had lived together for a few months; and there is the evidence of the Catlins and in the police discussions with Ling which he felt she was causing him trouble and he did not have any affectionate feelings for her. And there is the evidence of the Catlins that he tried at one stage to get Ronald Catlin to take her back and hence he tried to terminate his relationship with the deceased. On the other hand, Smedley hardly knew the woman at all. And there is evidence other than Smedley's to the aspect that Smedley hardly knew her. So Smedley had no apparent motive for killing her, but, of course, he could have done so unintentionally in the course of some crude horse-play."

Later, the trial judge said:

"As to the motive evidence, as I understand Mr Slicer, he submits that it is really of no value at all, this corroboration. He says it does not show a motive for murder at all. He says the accused could have terminated that relationship without any real difficulty and in any event if he wished to murder her, would he do it with his twelve-year-old son in the house and with a man in the house whom he hardly knew, and he went on to say would he murder her for no reason and then ring up the police. And in any event you see Mr Slicer submits that that really is of no value as corroboration because there is a very real hypothesis here as he would have it, that this was in fact a motiveless killing: it was a motiveless killing by Smedley's part. And he puts it, you see, that Smedley's conduct, if he is guilty of the conduct which Mr Slicer submits he was, that that needs no motive to explain it, it is just a drunk's stupid behaviour. So he says, 'Put that motive evidence aside as evidence which is

satisfactory corroboration'; he says, 'It is just not satisfactory corroboration'."

The submission to this Court by counsel for the appellant was that the trial judge did not direct the jury that the question of motive went only to murder but not to manslaughter. He read *Arch. Cr. Pl.* 40th edn., par. 1347(2). He correctly pointed out that the verdict of manslaughter could be based only on criminal negligence and went on to submit:

"So in relation to the motive evidence it is my submission that his Honour erred in his direction to the jury and I submit that as a result it is possible that the jury may have attached greater weight to Smedley's evidence than they otherwise would have, or that they may have acted upon it less cautiously because of an erroneous belief that his evidence could be corroborated by motive evidence in relation to the question of manslaughter. If properly directed as to this point, it may well be the jury might have acquitted the accused."

The submission of counsel for the respondent was that the jury would have understood the judge's directions in relation to the motive as applying to the question of whether or not the crime of *murder* had been made out. He referred to his Honour's words cited above, "so Smedley had no apparent reasons for killing her but, of course, he could have done so unintentionally in the course of some crude horse-play" and submitted:

"... so that his Honour there was drawing a distinction in relation to the question of motive between a case of murder motivated by the animosity which he had briefly referred to on the one hand, and an unintentional piece of crude horse-play about which later his Honour ... told them that that might constitute the crime of manslaughter if certain conditions were made out. So that it would be our submission, firstly that his Honour's directions so far as motive was concerned would be understood by the jury, having regard to that explanation, as being directly related to the question of whether the accused committed the crime primarily charged on the indictment, that of murder."

He referred to the later passage from his Honour's directions cited above where his Honour referred to Mr Slicer's submission that the motive evidence did not show a motive to murder at all. He went on to submit:

"However, in the alternative, if your Honours don't accept that argument, we would submit that the relationship between all three persons which his Honour had described in giving those directions relating to the motive, that is to say, the relationship of the deceased to the accused man on the one hand, and the relationship of the virtual stranger, Smedley, to

the deceased on the other hand, was relevant to the question of . . . the identity of the person who had in fact engaged in the postulated . . . drunken horse-play, which was a hypothesis that the jury had to consider, and was, in any event, capable of amounting to corroboration. Now what we mean by that, your Honours, is that we submit that it was . . . it was very relevant to the jury's consideration that the question of who pulled the trigger when they considered the hypothesis of manslaughter in the sense of a drunken piece of horse-play with a weapon that was in fact loaded and which was negligently placed in the mouth of the deceased woman and negligently discharged by a voluntary and intentional act. It was relevant to the question as to who was it more likely to have been; was it likely that Smedley, who was a stranger to the deceased virtually — hardly knew the woman at all — should in front of her *de facto* husband have put a weapon which all parties may or may not have realized was loaded and which had very shortly before in fact been discharged and shown to be in working order because there was evidence that it had been fired into the floor by Ling; that wasn't, I don't think, disputed. Was it likely that Smedley would engage in that type of drunken activity? Why should he do so? What motivation could there have been or reason could there have been, having regard to that relationship, for him to have done that? And secondly, in terms of likelihood as to identity, was it likely that Mrs Hallett, the deceased woman, would uncomplainingly and without any apparent apprehension of danger or hostility from her surroundings, permit him to do so? You see, his Honour, although counsel had not really advanced any such hypothesis to the jury, had seen it as his duty to put to the jury the hypothesis that the weapon had in fact been placed in the mouth of the deceased and simply discharged, the puller of the trigger not appreciating the fact that the weapon was loaded but that in so acting he might have been acting with criminal negligence."

This submission was developed at some length.

In reply, counsel for the appellant submitted that, even if some of the evidence as to the relationship between the deceased and the accused compared with the relationship between the deceased and Smedley was relevant, it could not be said that all the motive evidence went to the question of corroboration in relation to manslaughter. He continued:

"For example the evidence that Mr Ling when he told the police that he had given Hilda three weeks to get out of the house because she was causing trouble, that surely doesn't go to suggest that she was more likely to have let Ling put the rifle in her mouth than Smedley. As I understand my learned friend's

proposition it is that the woman was more likely to have let Mr Ling put the rifle in her mouth because he was her *de facto* husband and likely to be trusted, whereas Smedley was a person that she hardly knew. Now the evidence of some dissatisfaction with the deceased on the part of the accused certainly is in conflict with that proposition, and all of what I have termed the motive evidence is in the same position, but I submit that the inference that the person more likely to have put the rifle in the mouth is the one regarded as a friend is not an inference that can be rationally drawn from the established facts. The deceased had a blood alcohol content of 0.29; this appears from p. 503 of the transcript, where the deposition of Mr Ryall is read and Dr Cummings gives evidence that that is equivalent to 29 seven-ounce glasses of beer within a one hour period. So it is, I submit, more likely that the deceased didn't know what was happening or didn't discriminate as to who was putting a gun in her mouth, but I submit that in the ordinary experience of people, of ordinary men, no matter how close people are, nobody trusts anybody to put a gun in his mouth, especially when the gun had been fired earlier that evening, and there is nothing to indicate whether the deceased knew whether or not the rifle was loaded."

From what I have set out of the learned trial judge's direction to the jury, it will be seen that:

- (a) The learned trial judge warned the jury that it would be dangerous to convict the appellant on the uncorroborated evidence of Smedley. This warning related to any crimes of which the jury might convict the appellant; i.e. to murder and manslaughter.
- (b) The judge posed the question, "What is the matter which required corroboration?" but did not directly answer that question. He observed that, on the evidence, only the appellant or Smedley could have fired the fatal shot and then told the jury that, if it was the appellant who fired the fatal shot, there was evidence independently of Smedley's evidence which would enable them to infer with what state of mind that was done — "a murderous state of mind or criminally negligent state of mind". I think that in stating these alternatives his Honour had in mind that, if the jury found that the appellant had fired the shot, the only possible finding in the circumstances must be murder if there was a requisite intent, or manslaughter (by criminal negligence on the basis that the man who fired the gun had put the muzzle in the mouth of the deceased and had pulled the trigger without taking care to see that the gun would not discharge on the pulling of the trigger).
- (c) He then pointed out that it seemed to him that therefore the

critical issue was who pulled the trigger, the appellant or Smedley, and he immediately posed the question whether there was any independent evidence implicating the appellant by showing that it was he and not Smedley who pulled the trigger.

- (d) Up to this point in the summing up he had referred to independent evidence which would enable the jury to infer the appellant's state of mind if it was he who fired the fatal shot and independent evidence to show that it was the appellant who fired that shot. Thus far, it should have been understood by the jury that he was speaking of the necessity for corroboration of identity and state of mind in relation to both murder and manslaughter.
- (e) The judge then posed the question as to what evidence was capable of corroborating Smedley's evidence to the effect that it was not he, but, by inference, that it was the appellant, who pulled the trigger.
- (f) His Honour told the jury that there were only two pieces of evidence capable of corroborating Smedley "on that" i.e. on the question of the identity of the man who pulled the trigger and then referred to the evidence of possible motive referred to in this ground of appeal. He referred to the evidence that the appellant and the deceased had lived together for a few months but that she was causing him trouble and he wanted to terminate his relationship with her. He contrasted that evidence with the evidence that Smedley hardly knew the deceased and so had no apparent motive for killing her but added "but, of course, he could have done so unintentionally in the course of some crude horse-play". I think that the jury would have understood that the judge was telling them that if there had been a murder, the independent evidence pointed to the appellant but, if there was a killing by criminal negligence, the fact that there was no evidence of Smedley having any motive to murder her had no bearing on whether, if the deceased had been killed by manslaughter, the man who pulled the trigger was the appellant or Smedley.

It does seem therefore, as counsel for the appellant submitted to this Court, that the evidence of *motive* was put to the jury only as relevant evidence tending to prove that it was the appellant who pulled the trigger having a *murderous* intent and the jury would have so understood. This conclusion is supported by the passage from the summing up cited above in which the judge referred to the submissions of Mr Slicer, of counsel for the appellant. It will be seen that his Honour repeated counsel's submission to the jury that "this was in fact a motiveless killing and that the motive evidence was not satisfactory corroboration of that", and he did not criticise that submission in any way.

For these reasons, in my opinion, this ground is not made out.

Ground 4.

“That the learned trial judge erred in law in directing the jury that evidence that the appellant told police officers on the 26th day of November 1980 that the end of the barrel of his rifle was about a yard from the mouth of the late Hilda May Hallett when the said Garry John Smedley pulled the trigger was capable of constituting corroboration of the evidence of the witness Garry John Smedley if when the appellant made that statement to the police it was a lie.”

On 26th November, after Smedley and Bryan had told police officers that the version earlier given to the effect the deceased must have fired the fatal shot herself was untrue, the appellant was again interviewed by police officers. There was evidence that he was asked by Det. Sgt. Dean had he any further information regarding the death of the deceased and replied, “No I can’t: it was suicide.” The appellant was then informed that the police had received further information to the effect that it was he who had shot the deceased. The appellant replied, “No, you have got it wrong, she shot herself.” He was told that Smedley and Bryan had made statements which implicated him in the shooting. He said, “They’re framing me. I didn’t think they was like that. Now I will tell you the truth.” He was asked, “How did the shooting take place?” He gave an account that Smedley had requested to borrow the rifle, that he himself had gone from the house to his car, got the rifle, brought it back into the lounge-room, got some bullets from the bedroom, put one bullet in the gun and fired it into the floor to see that it worked, and that Smedley had taken the gun, put a bullet in it and said to the appellant that he (Smedley) ought to shoot the deceased for all the trouble she had caused the appellant. The appellant had replied, “You will never get away with it. Don’t be stupid.” The appellant then said to the police that Smedley “just shot her”. There was evidence that the appellant was formally interviewed and the interview was reduced to writing and that he appeared to read it, agreed it was correct and signed it.

The following is the relevant extract which contains the alleged lie — i.e. that the end of the barrel was about one yard from the victim’s mouth when Smedley allegedly fired the shot.

“A. She opened her mouth and he aimed the rifle at her and I saw him pull the trigger and he shot her in the mouth.

Q. How far was he from her at the time he pulled the trigger? A. He was about 3 yards away *and the end of the barrel was about a yard from her mouth.*

Q. How did Smedley aim the rifle? A. He held it out at full length in front of him.

Q. Would you demonstrate how this was done? I must remind you that you do not have to. A. Yeah, I will show you. (Handed rifle) I was behind him and he aimed like this with her mouth. I could see. I was right behind him . . . I thought he was acting the fool. (Rifle held in outstretched arms to front of Ling).

Q. Did you attempt to stop him in any way? A. No.

Q. At the time the rifle was discharged was Smedley still seated? A. Yeah.

Q. How was Mrs Hallett seated? A. Sitting and leaning back with her head on the couch."

I have italicised the alleged lie.

In his unsworn statement to the jury the appellant said:

"He" Smedley "put the rifle up in front of him and said, 'Open your mouth' to Hilda. I thought he was only joking. She must have thought he was only joking too so she opened her mouth. He held it there for a while and it went off. He was still sitting in his chair at the table and she was on the couch. *The end of the barrel would have been right where her mouth was.*"

[His Honour's emphasis.]

I have already referred to Dr Cummings' evidence that in his opinion that the muzzle of the rifle at the time of the shooting was within the open mouth of the deceased. It was open to the jury to find that, at the time of the record of interview, the appellant did not know of this opinion.

The learned trial judge in his directions to the jury, having referred to the evidence of motive, said:

"Now the only other piece of evidence which could possibly corroborate Smedley — and it is a question of fact for you whether in truth it does — but the only other piece of evidence that could possibly corroborate him — his evidence to the effect that Ling pulled the trigger is Ling's statement to the police to the effect that the end of the barrel was about a yard from her mouth when Smedley shot her. But the law requires you to exercise the utmost caution before treating that evidence, that reference to the muzzle being that distance away from her when Smedley shot her, as evidence corroborating Smedley. The law says this — that you could only treat that passage in that record of interview as corroborative of Smedley's evidence — the critical evidence of Smedley against Ling — if you find that passage in that record of interview satisfies two tests and two very stringent tests and I would like you to take a note of the two tests, or conditions. The conditions are these: that when Ling said that it was a lie: now let us be careful: we know exactly what a lie is. A lie is a statement of an alleged fact which the speaker knows to be false or does not believe to be true: that

is what a lie is. The first condition was that, when Ling said that, he was telling a lie. And the second condition is that you are very clear that, if it were a lie, it was the concoction of a guilty man and not a lie told by a man in a state of panic or a lie told for which there is some other reasonable explanation. So there are two elements. You would have to be very clear that it was a lie in the sense that I have defined a lie and you would have to be very clear that it was the concoction of a guilty man and not a lie told by a man in a state of panic or a lie told which has some other reasonable explanation. Now I will come to Mr Slicer's argument on that point as to what the significance of that passage is when I come to deal with the defence but I am just talking about the Crown case at the moment. The Crown is saying, as Mr Cox put it to you this morning, you heard him say that, he said, 'that's a deliberate lie'. He said the difference between the muzzle being in her mouth and the muzzle being that distance away is so great that it cannot be explained on the basis of honest error — cannot be explained on the basis that he was in another room and there was confusion or whatever, it cannot be explained on any basis short of a deliberate lie which he rushed to when he knew that the game was up and Bryan and Smedley had deserted him. Now that is Mr Cox's submission, the Crown's submission. We will come to Mr Slicer's tomorrow. But, if you find it was a lie, it is still not corroboration unless you find that the only reasonable explanation of the statement is that it was the concoction of a guilty man. Now it is open to you to find that it amounts to corroboration of Smedley's evidence on the critical issue that it was Ling who pulled the trigger because it is open to you to find that it was a lie and the concoction of a guilty man. All I have said to you is it is open to you to find that — you may find that — if you in your wisdom think it correct to find it — but I say this to you with emphasis: 'Make sure that there is no explanation of it short of a lie concocted by a guilty man and, if you cannot be sure that it has the character of a lie concocted by a guilty man, do not treat it as corroboration'."

Later in his summing up when dealing with the defence case he said:

"Then Mr Slicer turns to the . . . second piece of evidence which I have directed is capable of constituting corroboration and he goes to the alleged concoction in the record of interview and, as to that, he submits that, if you take all the relevant answers in the record of interview, which was a very long one, with a man who it appears is not — who has not been blessed by the good Lord with the highest intelligence, if you take all the answers, you take particularly the plan which the accused drew, the

distance the deceased was from where Smedley was sitting and the demonstration which the accused gave to the police, he said you should not find that that statement was a lie at all. He said, if you take the demonstration and then you scale off the plan, because he says he, Ling, gave to the police the seating of — at any rate — Smedley and the deceased. So you take his demonstration, scale it off the plan, he says as I understand him, you will find that the accused's demonstration would place the end of the muzzle . . . near or about where the pathologist said it was. Then he turns to the path of the bullet: he said, 'If you take the picture that Ling gives and compare it with the path of the bullet as described by the pathologist, the accused's account is consistent with that aspect of the forensic evidence', and indeed he went further to say that in his submission what the accused had said, fairly considered, is consistent with the forensic evidence."

It was submitted to us by counsel for the appellant that, if the statement that the rifle was about one yard from the deceased when it was discharged were a lie, it would not be a lie of such a nature as to be capable of constituting corroboration. He conceded, correctly, that there was no reason why the jury should not believe Dr Cummings' opinion. He conceded that it was logically possible that the appellant was telling a lie. He submitted, correctly, that facts which are equally consistent with the truth or untruth of the evidence which has to be corroborated do not constitute corroboration and referred to *Reg. v. Collings*, [1976] 2 N.Z.L.R. 104, per McCarthy P. at p. 117, where the learned president cited *Chiu Nang Hong v. Public Prosecutor*, [1964] 1 W.L.R. 1279, at p. 1284. This, of course, accords with the well known principle set out in *R. v. Baskerville*, [1916] 2 K.B. 658, at p. 665: "What is required is some additional evidence rendering it *probable* that the story of the accomplice is true and that it is reasonably safe to act upon it" and at p. 667: "corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true".

It was open to the jury to conclude that only the appellant was with the deceased in the room when the fatal shot was fired because of the inference to be drawn from Smedley's evidence and from what the appellant stated in his unsworn statement. It was open for them to conclude that, whether it was he or Smedley who pulled the trigger, he saw where the muzzle of the rifle was at the time of the fatal shot and that the putting of the muzzle of a rifle in a person's mouth is such an unusual circumstance that he would have observed that fact and remembered it, and further that he had lied to the police, realising that an inference could be drawn against him, a realisation revealed by his endeavour in his unsworn statement to

protect himself as far as he could, by not relating the unusual circumstance. Counsel for the appellant submitted to us that, if the appellant had told a lie to the police when he said that Smedley fired the shot, the worst that could be said about his statement as to how far the muzzle was from the deceased's mouth was that it might be thought by the jury to be a detail to help convince the police that he knew what had happened when Smedley, according to him, fired the shot. He then submitted that the appellant might have just as readily lied about this detail in an attempt to convince the jury of a proposition that was true, namely, that he did not fire the shot. It was also submitted that the appellant might have forgotten or not noticed how far the muzzle of the barrel was from the deceased's mouth, but made the statement as to the distance merely to "sound convincing and get himself out of the situation where he was wrongfully suspected of killing". He also submitted that the proper view to take of the statement was that it was not a statement which, if believed, would tend to shift the suspicion of the police away from the appellant to Smedley. He submitted that the supposed lie did not admit of the possibility of an inference that the appellant was guilty (a test proposed by Burbury C.J. in *Loneragan v. The Queen*, [1963] Tas. S.R. 158, at pp. 159 and 160). He referred to *Jones v. Thomas*, [1934] 1 K.B. 323, per Lord Hewart C.J. at pp. 327 and 328; *Credland v. Knowler* (1951), 35 Cr. App. R. 48, per Lord Hewart C.J. at pp. 54 and 55; *Popovic v. Derks*, [1961] V.R. 413, at p. 422; *Eade v. The King* (1924), 34 C.L.R. 154, per Knox C.J., Gavan Duffy J. and Starke J. at pp. 158 and 159; *Reg. v. Kaye* (1960), 84 W.N. (N.S.W.) (Pt.1) 39, at p. 41; and *Reg. v. Colless* (1964), 84 W.N. (N.S.W.) (Pt.1) 55, at p. 58. Counsel for the respondent submitted that it was open to the jury to find that anybody who was in the room, including the appellant, must have been well aware that the assertion that the muzzle was about one yard away from the mouth of the deceased could not have been an honest mistake about that and that it must have been a deliberate lie. He also submitted that the jury could infer that the appellant lied deliberately from a sense of guilt and in an attempt to shift the blame because the appellant was not prepared, because he did not think it would be accepted by the police, to tell them that Smedley, a stranger, who had no reason to do this, should have deliberately placed the muzzle of the weapon into the mouth of the deceased and that the appellant was not "game" to say where he knew the muzzle of the gun to be, because, by saying it, "he would be telling so tall a story it would not be likely to be accepted by any investigator or future tribunal". I agree with the submissions of counsel for the Crown. The cases cited state the principle clearly: and it was open to the jury to find that the statement to the police was a deliberate lie and that it was said more probably than not out of a sense of guilt.

Ground 5.

"That the learned trial judge failed to warn the jury of the danger of convicting the appellant on the uncorroborated evidence of the witness Garry John Smedley if he might reasonably have been regarded as having some purpose of his own to serve which might have led him to give false evidence against the appellant."

At the trial it was common ground that the fatal shot must have been fired either by the appellant or by Smedley. Smedley gave sworn evidence which in the light of all the other evidence led to the inference that the appellant fired the fatal shot. Evidence that Smedley had told the police officers that the appellant was with Bryan and him in the kitchen when the fatal shot was fired and that that statement was to Smedley's knowledge false led to the inference that he was, if the appellant fired the fatal shot in circumstances when he was guilty of murder or manslaughter, led to the inference that Smedley was an accessory after the fact. According to the record of an interview between a police officer and the appellant, after the appellant had been told that Smedley and Bryan had made statements implicating him in the shooting of the deceased, the appellant said that Smedley had fired the fatal shot. This was repeated in the appellant's unsworn statement. If this were true, Smedley would have been the person who actually committed the crime and could have been convicted of murder or manslaughter. The following passages from the trial judge's directions to the jury are relevant:

"Whether you accept Smedley as a person whose evidence is worthy of belief is, of course, a matter for you. Indeed, I would regard it as the central matter for you . . . Whether Smedley is a person worthy of belief on his oath is a critical question for you to decide. There is no doubt it is the central question. And in deciding that, ladies and gentlemen, the plain common sense of this business of advocacy suggests you ask yourself this question, 'How do I think he coped under cross-examination?' and I will be coming back to make a separate analysis of what some of the things that I think were significant in the cross-examination of this man, and raise very serious questions as to whether or not he did not lie to you . . . Smedley's evidence, if you think it is safe to act on it when considered in the context of the facts which appear to be established by other evidence, leaves it open to you — I am saying no more than it is open to you — to bring in a verdict of murder or manslaughter provided, and always provided, you are satisfied that having regard to this man Smedley's obvious character and demeanour in this Court, you are satisfied that that is a safe course to take."

(The judge dealt with the cross-examination of Smedley at considerable length and repeated some of the submissions of counsel for the appellant in his closing address. He referred to the vagueness of answers of Smedley.) Dealing with the vagueness, he said:

“ . . . you see there is no doubt that it is common experience that intoxication may produce a patchy memory of what occurred while a person is in that state of intoxication. I think that is sufficiently notorious to be mentioned — at least I hope it is, without specific evidence. But is that an adequate explanation of the state of that man’s evidence? The words, ‘I do not recall, sir,’ can be the refuge of a scoundrel. Now I am not making a judgment about that, I am merely seeking to say to you that I have no doubt about it and why is it so? It is so because he has got a story, and *he has got reasons — let us not speculate as to what they are — for sticking to that story.* And he is not a fool . . . The central problem is whether it is safe to act on the evidence of that man Smedley . . . Now on his own showing it is open to you to find that Smedley committed a crime himself. I said that before. I am now going to show you why that is so. The law provides that a person who assists another who is to his knowledge guilty of a crime in order to enable the person concerned to escape punishment is said to be an accessory after the fact of that crime, so I will just give you the elements of that again . . . The aspect of that section of the Code that applies here is that he assists another who to his knowledge is guilty of a crime in order to enable him to escape punishment; and, if he does that, he becomes an accessory after the fact to that crime. Now Smedley is claiming that he became aware that Ling shot the deceased. He says he came into the room and that conversation took place. Very soon after that Mr Smedley . . . is an active party to a conspiracy to tell a false story. Now on those facts alone and certainly on all the relevant facts it is open to you to infer that, if Smedley’s basic story is true, Smedley knew facts which show that Ling is guilty of murder or manslaughter and knowing those facts he assisted Ling in order to enable Ling to escape punishment for the crime he had committed and thus he became an accessory after the fact to Ling’s crime. Now whether he became an accessory after the fact to Ling’s crime is a question of fact for you. I am only explaining the law to you but it seems clear to me that he did, but you are free to disagree with that if you like, but surely he did on that section. He, on his story, knew of a crime and he was assisting in the attempt to escape the punishment of Ling. Right — now that being so, the law requires me to direct you that it is dangerous to convict on the uncorroborated evidence of an accessory after the fact. So to get that down to a personal

level the law requires me to direct you that it is dangerous to convict on the uncorroborated evidence of Smedley, if you find him to be an accessory after the fact."

(His Honour went on to explain the meaning of corroborative evidence and continued, in a passage part of which I have already cited):

"Now as far as this case is concerned, what is the matter which requires corroboration. It seems to be clear that neither the deceased nor Bryan fired the fatal shot. That leaves two possibilities on the evidence, Ling or Smedley. If Ling fired the fatal shot, there is evidence quite independently of Smedley which would enable you to infer with what state of mind that was done — a murderous state of mind or criminally negligent state of mind. So it seems to me that the critical issue on which the Crown relies on Smedley, the suspect witness because he is an accessory after the fact, is who pulled the trigger, Ling or Smedley . . . if you decline to act on the critical evidence of either of these fellows" (referring to Bryan and Smedley) "that is to say you put Bryan out of account, which surely you will, and then you give careful consideration to Smedley's evidence, and you say, 'Look, he is so suspect, that fellow, that I am not prepared to take the responsibility of acting on what was called his central story', then I suggest you would be plainly obliged to acquit the man altogether, because on that basis there would be open a rational inference consistent with innocence, quite obviously, namely that the deceased was shot by Smedley in the circumstances alleged by the defence."

Later, his Honour reminded the jury of his direction concerning corroboration of Smedley:

"I remind you that, if you find that Smedley was an accessory after the fact and, if his basic story is true, it does appear that he was an accessory after the fact, the law intervenes and tells me that I have failed to do my job unless I direct you that it is dangerous to convict on his uncorroborated evidence."

Counsel for the appellant submitted to us that Smedley's purpose of his own which he might have wished to serve could be that he had killed the deceased and therefore would be motivated to give evidence falsely inculcating the appellant. The law as to the duty of a judge to warn a jury that it would be dangerous to convict on the evidence of an accessory after the fact or of a witness who may have some purpose of his own to serve in giving evidence appears not to have been decided definitively in England. In *Davies v. D.P.P.*, [1954] A.C. 378, Lord Simonds L.C. (with whom the other members of the judicial committee concurred) at p. 400 said:

"There is in the authorities no formal definition of the term

'accomplice': and your Lordships are forced to deduce a meaning for the word from the cases in which X, Y and Z have been held to be, or held liable to be treated as, accomplices. On the cases it would appear that the following persons, if called as witnesses for the prosecution, have been treated as falling within the category:—

(1) On any view, persons who are participes criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) . . ."

His Lordship's inclusion of accessories after the fact (in felonies) was *obiter dicta* because, as his Lordship said at p. 401, speaking of the facts of that case:

"If all that was designed or envisaged was in fact a common assault, and there was no evidence that Lawson, *a party to that common assault*, knew that any of his companions had a knife, then Lawson was not an accomplice in the crime consisting in its felonious use." [His Honour's emphasis.]

There was no suggestion that Lawson might be an accessory after the fact. His Lordship had no occasion to refer to a witness who might have a purpose of his own to serve although not an "accomplice".

However, in *Mahadeo v. The Queen*, [1936] 2 All E.R. 813, at p. 817, Sir Sidney Rowlatt, giving the reasons of the Privy Council, said of an accessory after the fact:

"It is well settled that the evidence of an accessory, which Sukraj plainly was on his own showing, must be corroborated . . ."

No authority was cited for this dictum.

The following are English cases relating to a witness who might have some purpose of his own to serve. In *Reg. v. Prater*, [1960] 2 Q.B. 464, a case concerning a witness who was a co-accused giving evidence on his own behalf, Edmund Davies J., giving the judgment of the Court of Criminal Appeal, at p. 466 said:

"For the purposes of this present appeal, this court is content to accept that whether the label to be attached to Welham in this case was strictly that of an accomplice or not, in practice it is *desirable* that a warning should be given that the witness, whether he comes from the dock, as in this case, or whether he be a Crown witness, *may be* a witness with some purpose of his own to serve . . .

"In the circumstances of the present appeal it is sufficient for this court to express the view that it is *desirable* that, in cases where a person *may be regarded* as having some purpose of his own to serve, the warning against uncorroborated evidence should be given." [His Honour's emphasis.]

The court disposed of the matter on the ground that the evidence

was so clear and convincing that the court was satisfied that no miscarriage of justice had arisen by reason of the omission of a warning. The cited passage was *obiter dicta*. In *Reg. v. Stannard*, [1965] 2 Q.B. 1, concerning a witness, also a co-defendant, Winn J., giving the judgment of the court, at pp. 13 and 14, cited the latter of the two passages which I have cited from *Reg. v. Prater (supra)* and commented "The case of *Davies v. D.P.P. (supra)* certainly would not support any stronger ruling" and later continued at p. 14:

"The rule, if it be a rule, enunciated in *Reg. v. Prater (supra)* is no more than a rule of practice. I say deliberately 'if it be a rule' because, reading the passage of the judgment as I have just read it, it really seems to amount to no more than an expression of what is desirable and what, it is to be hoped, will more usually than not be adopted, at any rate, where it seems to be appropriate to the judge. It certainly is not a rule of law, and this court does not think that it can be said here that there was any departure in this respect from proper procedure of trial,"

It appears, at p. 14, that there was an application for leave to appeal to the House of Lords, the court certifying that a point of law of general public importance was involved in whether the statement in the judgment of *Reg. v. Prater* that it was "desirable" should be regarded as a rule of law notwithstanding the decision in *Davies v. D.P.P.* but the House of Lords refused leave to appeal. In *Reg. v. Russell* (1968), 52 Cr. App. R. 147, a case in which a co-defendant had given evidence against another defendant and could have been regarded as having some purpose of his own to serve in the evidence which he gave, Diplock L.J. giving the judgment of the Court of Appeal said, at p. 149:

"The second point taken is a complaint that the learned Chairman did not give the jury a sufficient direction on the need for corroboration of the evidence which Levy gave in the witness-box which inculpated the appellant."

and at p. 150:

"In the view of this Court, where a co-defendant gives evidence, there is no rule of law to that effect. The correct position is set out in the case of *Prater*" (*supra*) "in which this Court . . . said: 'It is desirable . . . ' — and I emphasise the word 'desirable' — ' . . . in cases where a person may be regarded as having some purpose of his own to serve, the warning against uncorroborated evidence should be given'."

and referring to *Reg. v. Stannard*, [1965] 2 Q.B. 1:

"I can summarise what was there recited in the head-note which says that it was at most a rule of practice that a judge when summing-up a case where two or more defendants have given evidence, parts of which reflected on the case of one or of the other defendants, should warn the jury in similar terms which

as a rule were proper to be employed by recalling the evidence of accomplices.”

Later, Diplock L.J. said, at pp. 150, 151:

“The purpose of giving such a warning is to remind the jury that an accomplice may have some purpose of his own to serve in throwing the blame on a fellow-accused or on the accused person.”

As the law is said to be correctly stated in *Reg. v. Prater*, [1960] 2 Q.B. 464, I note that this case does not decide that there is any rule but merely repeats the word “desirable”. Finally, in *D.P.P. v. Kilbourne*, [1973] A.C. 729, Lord Hailsham L.C. at p. 740 referred to the rule of practice by which judges had warned juries in certain classes of case that it was dangerous to found a conviction on the evidence of particular witnesses or classes of witness unless that evidence was corroborated. He continued:

“The earliest of these classes to be recognised was probably the evidence of accomplices ‘approving’ for the Crown, no doubt, partly because at that time the accused could not give evidence on his own behalf and was therefore peculiarly vulnerable to invented allegations by persons guilty of the same offence. By now the recognised categories also include children who give evidence under oath, the alleged victims, whether adults or children, in cases of sexual assault, and persons of admittedly bad character. *I do not regard these categories as closed*. A judge is *almost certainly wise* to give a similar warning about the evidence of any principal witness for the Crown where the witness *can reasonably be suggested* to have some purpose of his own to serve in giving false evidence (cf. *R. v. Prater*” (*supra*); “*Reg. v. Russell*” (*supra*)). [His Honour’s emphasis.]

In *Arch. Cr. Pl.*, 40th edn., par. 1425a, there is a comment:

“... a general rule *seems to be developing* that when a witness in a criminal case, whether he be a fellow-accused or called for the Crown, *may reasonably be regarded as having some purpose of his own to serve* which may lead him to give false evidence against an accused, the judge should warn the jury of the danger of convicting that accused on that witness’s evidence unless it is corroborated: *R. v. Prater*” (*supra*); “*D.P.P. v. Kilbourne*” (*supra*) “per Lord Hailsham.” [His Honour’s emphasis.]

The comment of the learned authors of *Hals. L. E.*, 4th edn., Vol. 11 in par. 457 is:

“Additionally, it is *desirable* that a similar warning be given to the jury about the evidence of any principal witness for the prosecution where the witness can reasonably be suggested to have some special purpose of his own to serve in giving false evidence”.

citing the cases which I have cited. I am not aware of any later relevant case and it appears that in England it has not been decided that there is a rule requiring a judge to direct the jury that it would be dangerous to convict on the uncorroborated evidence of such a witness.

There have been several Australian cases as to corroboration of a witness who may be an accessory after the fact and of a witness who may have some purpose of his own to serve, but as far as I am aware there is no reported case dealing with the necessity for corroborating a witness who, on the evidence of an accused, whether sworn or unsworn, was or may have been the person who actually committed the crime and not the accused. Usually it has been left to the jury to decide whether the witness was "an accomplice" (whatever meaning was given to that word). That would be quite inappropriate in a case in which the accused alleges in evidence that the witness was the person who actually committed the crimes of which he could be found guilty e.g., in this case, murder or manslaughter. That would mean that the jury would have to find beyond reasonable doubt or on the balance of probabilities (and there are different judicial opinions as to that) that the witness in fact committed the murder or manslaughter before proceeding to rely on his evidence. It seems that the law might be held to be that the jury could be so satisfied and still convict the accused if there were independent evidence corroborating the witness whom they had found had committed the murder or manslaughter. The law should not be allowed to develop so as to be in accordance with such illogical nonsense. On the other hand, is the law to require corroboration of an important witness merely because the accused in evidence, sworn and, particularly, if unsworn, states that the witness was the person who actually committed the crime and that he, the accused, was not? I think that the answer to this question is that it is irrelevant whether it is the accused or some other witness who gives such evidence.

The members of the Court of Criminal Appeal in Western Australia in *Khan v. The Queen*, [1971] W.A.R. 44, referred, as far as I am aware, to all the earlier Australian cases and concluded that the dictum of Lord Simonds in *Davies v. D.P.P.*, [1954] A.C. 378, should not be followed, and followed an earlier decision of that court, *R. v. Lewis* (1906), 8 W.A.L.R. 83, at p. 85, and applied *R. v. Ready and Manning*, [1942] V.L.R. 85. At pp. 49, 50 Virtue S.P.J., speaking generally, said:

"I conclude that any witness whom the jury may find to be a principal or an accessory (other than an accessory after the fact) to any crime of culpable homicide of which the accused person could in law be convicted on the indictment against him, is an accomplice of that accused person within the meaning of the

rule. No doubt similar reasons may exist for applying the same principle to charges of other indictable offences in respect of which verdicts of guilty of other offences than that charged may be brought and I am not to be taken as deciding further qualifications of the rule as expressed in *Davies Case* do not exist, but such cases may be dealt with as and when they arise. In any event, of course, the fact that the rule as to warning does or does not exist in a particular case does not prevent a judge giving a warning and, indeed, in the exercise of his judgment a judge should give such a warning if he considers a witness though not in law an accomplice, comes within the spirit of the rule (see the discussion on 'voluntary' warnings by Sholl, J., in *McNee v. Kay*, [1953] V.L.R. 520, at p. 529)."

Neville J., at p. 51, held that the view expressed by Lord Simonds L.C. must be qualified. Two of the qualifications were:

"(a) 'the crime charged' must be interpreted as including any other crime of which on the indictment the accused could be found guilty. If it were otherwise there would be the absurd situation that where the warning had been omitted and an accused was convicted of an offence, different from that with which he was actually charged on the uncorroborated evidence of a witness who had counselled or procured or assisted in the commission of the offence, such a conviction would stand although it would have been set aside had the accused been charged with the actual offence of which he was convicted; and

(b) only a person who could be convicted as a principal offender can be said to be an accomplice to an offence: *R. v. Lewis* (1906), W.A.L.R. 83. That decision was given on a question of law reserved for consideration by this Court under what was then s. 667 of the Criminal Code 1902 (Criminal Code 1913, s. 655) and is binding on us and it follows that an accessory after the fact, as he could not be charged and convicted as a principal offender cannot be an accomplice within the rule."

Burt J., at p. 54, referred to the use by Lord Simonds of the words "*participes criminis* in respect of the actual crime charged" where the witness could be convicted of murder as an alternative verdict although it was not the actual crime charged (wilful murder) and held at p. 55 that the rule as applied to unlawful homicide should be extended to any unlawful killing. At the same page, Burt J. stated that it was not necessary for the purposes of that case to decide whether an accessory after the fact to an unlawful killing was an accomplice for the purposes of the rule but that, if the witness was not an accomplice, "it would generally be", and it would in this case be, an occasion for the giving of what Sholl J. in *McNee v. Kay*,

[1953] V.L.R. 520, has described as the "voluntary" or "optional" warning.

In an article by J. D. Heydon, *The Corroboration of Accomplices*, [1973] Crim. L.R. 264, at pp. 280-281, the learned author stated that the kind of approach stated by Scholl J. in *McNee v. Kay* (*supra*) was "persuasively put" and continued:

"After noting that the risk underlying an accomplice's evidence was that he might blame another to curry favour with the prosecution or the court, he said: 'Such reasoning would seem to be equally applicable whether a witness who has taken part in activities which infringe the law is chargeable in connection therewith with the same offence as the accused either as principal or as accessory, or with a different and distinct offence. The temptation to exaggerate or make false accusations would appear to be much more related to the nature and possible punishment of the offence of the witness than to its technical identity with that alleged against the accused . . . I should consider the true principle to be that that person is an accomplice . . . who is chargeable, in relation to the same events as those founding the charge against the accused, with an offence (whether the same offence or not) of such a character, or who would be if convicted thereof liable to such punishment, as might possibly tempt that person to exaggerate or fabricate evidence as to the guilt of the accused'. In answer to an argument that the corroboration warning rule only applied where the crime charged involved a *mens rea* to which the witness was party, Scholl J. [*sic*] continued: 'If the true basis of the rule is the possible temptation to give false evidence in order to protect oneself as far as possible against the consequences of one's own infringement of the law in the course of the relevant events, it is his liability to successful prosecution, known to the witness, and existing when he gives evidence, or at least up to the time that he is offered immunity, that is material. Though in general offences to the establishment of which the proof of *mens rea* is necessary are more likely to be of a serious character, and to affect the testimony of an accomplice, common sense rejects the notion that a witness, who knows he may be convicted of an offence in relation to the same matters as found the charge against the defendant, notwithstanding that he had no *mens rea*, can never be tempted in such circumstances to falsify his evidence with a view to improving his own position'.

"The principal justification for this wide approach is stated by Scholl J. [*sic*] to be that a narrower approach will exclude from the ambit of a warning many people who might be interested in testifying falsely against the accused;"

This Court is not bound by any decision. There has been no binding decision by the House of Lords or the High Court, or any earlier decision of this Court. The decision of the Privy Council in *Mahadeo v. The Queen*, [1936] 2 All E.R. 813, was not an appeal from any State of Australia. I am of the opinion that this Court should apply the approach of Sholl J. in *McNee v. Kay*, [1953] V.L.R. 520 and adopt what he considered in the passage which I have cited above to be the true principle. The approach of Sholl J. was favoured by the Ontario Court of Appeal in *Reg. v. Meston*, [1975] 28 C.C.C. (2d) 497, at p. 508. The court at pp. 509 and 510 followed *Horsburgh v. The Queen* (1966), 55 D.L.R. (2d) 289, citing the dissenting judgment of Laskin J.A. in the Ontario Court of Appeal, [1966] 3 C.C.C. 240, at p. 260:

“... the more ample definition generally given is that an accomplice is one who could himself have been convicted of the offence charged, either as a principal (including in this term an accessory at or before the fact) or an aider or abettor. This definition, in my opinion, is still deficient if it would, as in *Davies v. D.P.P.* [1954] A.C. 378, exclude as accomplices persons who are parties to a crime arising out of the same transaction although not parties to the crime charged against the accused. The definition should be a reflection of the policy which underlies the vulnerability of an accomplice's evidence, and I prefer the view expressed in *R. v. Sneesby* [1951] St. R. Qd. 26.”

and also the reasons of Martland J. who delivered the majority judgment of the Supreme Court of Canada, allowing the appeal, who dealt with the matter at pp. 298 and 299:

“What is necessary to become an accomplice is a participation in the crime involved, and not necessarily the actual commission of it. Whether or not there has been such participation will depend upon the facts of the particular case.”

In *R. v. Sneesby*, [1951] St. R. Qd. 26, Philp J. at p. 29 said:

“But, in my view, on a prosecution of the second man for receiving, the thief would be an accomplice because he is *particeps criminis* in a broad sense. I think that in the case before me I have to give a meaning to the word ‘accomplice’ to cover the case of boys such as these, who, although not chargeable with the actual offence with which the prisoner is charged, nevertheless have brought themselves, by the very acts to which they were party within the criminal law, that is to say within s. 211.”

This was a case where the prisoner was charged under the *Criminal Code*, 1924, s. 210, with indecently dealing with a boy under the age of fourteen years. Philp J. held that the boys referred to in the cited passage being under fourteen could not be charged under s. 210 but

were clearly guilty (arising from the same facts) of the offence of indecent practice between males under s. 211. This still requires a decision as to what meaning is to be given to his words "who is chargeable, . . . as might possibly tempt that person to exaggerate or fabricate evidence as to the guilt of the accused". Although it is not necessary so to decide in this case, in my judgment the meaning which should be given to the word "chargeable" is chargeable with any offence on any reasonable view of the evidence — *McNee v. Kay* (*supra*) and *R. v. Sneesby* (*supra*). This principle is the principle behind the cases requiring corroboration of accomplices (but not necessarily an accessory after the fact, although it is possible that in some cases the evidence may show that an accessory after the fact may be tempted falsely to blame an accused).

I turn back now to the extracts from the direction of the trial judge to the jury which I have cited above. I hold that it was unnecessary to require corroboration of Smedley's evidence on the grounds that he was or might be an accessory after the fact to murder or manslaughter. There is no case binding upon this Court and there is no good reason, merely because a man is or may be an accessory after the fact, to consider that there is any danger if there were to be a conviction without corroboration, it normally being in the interest of an accessory after the fact to help prove that a party charged under any of the subparagraphs of the *Criminal Code*, s. 3(1), was not guilty. It was proper in the present case that the jury be so warned of the danger of convicting the accused on the uncorroborated evidence of Smedley because there was evidence which, if true, showed that he was chargeable with murder or manslaughter of the same victim. The trial judge gave a warning of the danger but did not say specifically that the warning was necessary for the reason that Smedley may have had a reason to lie to exculpate himself and blame the appellant, but put it on the basis that Smedley was or might be found to be an accessory after the fact. There could have been a miscarriage of justice if there was any chance that the jury might have found that Smedley was not an accessory after the fact and so that the danger of convicting on the evidence of Smedley without corroboration did not exist. However, the judge did canvass with the jury the matter whether the cross-examination of Smedley would raise a serious question as to whether or not he had lied to the jury. He told them that the jury could bring in a verdict of murder or manslaughter if they were satisfied having regard to Smedley's obvious character and demeanour in court, "that that was a safe course to take". I have had some difficulty with the passage cited commenting that intoxication may produce a patchy memory and the judge's comments that the words "I do not recall" (which were frequently uttered by Smedley during cross-examin-

ation) could be "the refuge of a scoundrel". The difficulty was with the words which follow that comment:

"Now I am not making a judgment about that, I am merely seeking to say to you that I have no doubt about it and why is it so? It is so because he has got a story, and he has got reasons — let us not speculate as to what they are — for sticking to that story and he is not a fool . . ."

The words which follow:

"Now I am not making a judgment about that", would, I think, be taken by the jury, if they came to any understanding about it, that the judge was telling the jury that he was not saying that Smedley was a scoundrel. His Honour's next words, "I am merely seeking to say to you that I have no doubt about it and why is it so?" seem to be a statement by his Honour that he had no doubt that the words "I do not recall" can be the refuge of a scoundrel. His Honour appears to answer the question "why is it so?" in his next words — "It is so because he has got a story, and he has got reasons — let us not speculate as to what they are — for sticking to that story and he is not a fool . . .". It seems to me that by "he" his Honour was referring to Smedley and the words "he has got reasons — let us not speculate as to what they are — for sticking to that story" and the words which follow "and he is not a fool" would have been understood by the jury to refer to Smedley only.

It seems to me that, if I can conclude that the jury must have found that Smedley was an accessory after the fact, then the jury would have clearly understood that there was a danger of convicting on the evidence of Smedley unless they found that that was corroborated by an independent witness. It will be seen that the judge reminded the jury of Smedley's claim that he became aware that the appellant shot the deceased. He then said:

"Very soon after that Mr Smedley — I am referring to the evidence of Mr Coxan and Mr Brazendale —" police officers "very soon after that Smedley is an active party to a conspiracy to tell a false story."

That was a reference to the evidence that Smedley had told police officers that the appellant, Bryan and he had conspired to tell a false story which led to a conclusion that the deceased must have shot herself. His Honour then went on to tell the jury that it was open to them to find that "Smedley knew facts which show that Ling is guilty of murder or manslaughter and knowing those facts he assisted Ling in order to enable Ling to escape punishment for the crime he had committed and thus he became an accessory after the fact to Ling's crime". He said that whether Smedley became an accessory after the fact was a question of fact for the jury, but added:

"It seems clear to me that he did, but you are free to disagree with that if you like but surely he did."

He added further:

"He on his story knew of a crime and he was assisting in the attempt to escape the punishment of Ling."

In a later passage he told the jury:

"If you decline to act on the critical evidence of either of these fellows" (referring to Bryan and Smedley) "that is to say you put Bryan out of account, which surely you will and then you give careful consideration to Smedley's evidence, and you say, 'Look, *he is so suspect*, that fellow, that I am not prepared to take the responsibility of acting on what was called his central story', then I suggest you would be plainly obliged to acquit the man altogether because on that basis *there would be open a rational inference consistent with innocence . . . namely that the deceased was shot by Smedley in the circumstances alleged by the defence.*" [His Honour's emphasis.]

In the use of the word "suspect" the jury may have understood that that was a reference only to the cross-examination of Smedley and his demeanour, although they may have thought that it also referred to the fact that he might be the person who actually committed the crime. Finally his Honour reminded the jury of his direction concerning corroboration of Smedley saying, "if his basic story is true it does appear that he was an accessory after the fact". In my opinion the jury must have found that Smedley was an accessory after the fact. There was not only his own evidence of facts which made him an accessory after the fact if it was the appellant who killed the deceased, but there was also the evidence of the police that Smedley had admitted facts to them which clearly showed that he was an accessory after the fact. The judge was under no duty to tell the jury of any reason for the warning of the danger. It was sufficient that the jury were made aware of the danger. As far as I am aware there is no authority to the contrary. Lord Hailsham in *Reg. v. Kilbourne*, [1973] A.C. 729, at p. 740, referred to no such duty but said, "it is open to a judge to discuss with the jury the nature of the danger to be apprehended in convicting without corroboration and the degree of such danger (cf. *Reg. v. Price (Herbert)*, [1969] 1 Q.B. 541, 546)". The jury was well aware that on the evidence that, if the appellant had not committed the crime, the only other possibility was that Smedley had committed it.

For these reasons this ground of appeal is not made out.

Grounds of Appeal 2 and 2A.

"2. That the learned trial judge ought to have directed the jury to acquit the appellant at the close of the Crown case and in particular:—

- (a) that the learned trial judge erred in law in failing to rule that as trial judge he had the power to direct an acquittal

at the close of the Crown case if in his opinion it would have been unsafe to convict the appellant notwithstanding that there was evidence of all the elements of the crime upon which the appellant was indicted or some other crime of which the appellant could have been convicted upon the same indictment; and

- (b) that the learned trial judge erred in that he ought in the exercise of his discretion to have directed an acquittal notwithstanding the fact that there was evidence of all the elements of the crime upon which the appellant had been indicted.

2A. That the learned trial judge ought to have advised the jury at the close of the Crown case to stop the case and bring in a verdict of not guilty."

At the close of the Crown case, Mr Slicer of counsel for the appellant submitted to the trial judge that there was no case to answer on the evidence and that the jury should be directed to return a verdict of not guilty. He said that the basis of the submission "perhaps" followed from propositions which could be summarised as follows: as it was common ground that the witness Bryan could not be relied on at all and as there was no evidence of any admissions made by the appellant, the evidence of Smedley was left "standing on its own" and the jury must be directed that it would be dangerous to convict unless there was corroboration of Smedley's evidence. He submitted that the alleged lies [*sic*] of the appellant contained in the record of interview (which I have held to have been evidence capable of corroborating Smedley's evidence) could not amount to corroboration. He went on to submit that, if there were no corroboration, the evidence of an uncorroborated accomplice ought not to go to the jury; and he referred to Smedley's evidence of what he saw and heard, saying that the evidence was not sufficient to convict the appellant as it was circumstantial. He added that that evidence "even at its high water mark" came from a man with a long criminal record who was drunk or at least severely affected by drink who at best had a patchy memory and who had lied "in giving details in the totality of this case". He submitted that it was dangerous to convict on circumstantial evidence as well as dangerous to convict on the evidence of an uncorroborated accomplice and, if so, Smedley's evidence would be the only evidence against the appellant and on that basis the appellant's case would come within the test set out by the High Court in *May v. O'Sullivan* (1955), 92 C.L.R. 654, at p. 658, that, when there is a submission that there is no case to answer, the question to be decided is whether on the evidence as it stands the defendant *could* lawfully be convicted (adding that that was really a question of law) and in the dictum of Kitto J. to the same effect in *Zanetti v. Hill* (1962), 108 C.L.R. 433, at p. 442. This

submission ignored the rule that a jury may nevertheless convict, despite the warning of a danger of convicting in the circumstances set out in the submission. Moreover, when the trial judge had, correctly, pointed out that Smedley's evidence was not circumstantial, Mr Slicer conceded that that was so. Mr Slicer also, correctly, conceded that there was evidence capable of corroborating that of Smedley, as the learned trial judge so held. Thus the basis upon which the submission of no case was made collapsed.

Mr Slicer made a submission "as an alternative to the *May v. O'Sullivan* test or the *Zanetti v. Hill* test" one which he said came from the English decisions summarised in *Arch. Cr. Pl.*, 40th edn., 5th Cumulative Supplement to par. 575 (they are also referred to in the 4th and 6th Cumulative Supplements): *Reg. v. Young* (1964) 48 Cr.App.R. 292, *Reg. v. Falconer-Atlee* (1973), 58 Cr. App. R. 348, *Reg. v. Barker* (1977), 65 Cr. App. R. 287, and *Reg. v. Mansfield* (1977), 65 Cr.App.R. 276, and he relied particularly on the dicta of Lawton L.J. in *Reg. v. Mansfield* in the relevant extracts which appear in the supplements referred to. He submitted that, since those cases, "it would seem that the court was no longer to be concerned with the problem or if there was evidence upon which a reasonable jury could convict" and that the question was whether the verdict was unsafe or unsatisfactory. That this was the question was criticised by the editor of the supplement under the sub-title "Conclusion". More recently, the Court of Appeal in England in *Reg. v. Galbraith*, [1981] 1 W.L.R. 1039, at p. 1042, has held:

"... if and in so far as the decision in *Reg. v. Mansfield* [1977] 1 W.L.R. 1102 is at variance with that in *Reg. v. Barker* (Note) 65 Cr. App. R. 287 we must follow the latter.

"How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the

jury. It follows that we think the second of the two schools of thought is to be preferred.

"There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

The reference to the two schools of thought and the basis for the first school of thought appear at pp. 1040-1041:

"There are two schools of thought: (1) that the judge should stop the case if, in his view, it would be unsafe (alternatively unsafe or unsatisfactory) for the jury to convict; (2) that he should do so only if there is no evidence upon which a jury properly directed could properly convict. Although in many cases the question is one of semantics, and though in many cases each test would produce the same result, this is not necessarily so. A balance has to be struck between on the one hand a usurpation by the judge of the jury's functions and on the other the danger of an unjust conviction.

"Before the Criminal Appeal Act 1966, the second test was that which was applied. By section 4(1)(a) of that Act however the Court of Appeal was required to allow an appeal if they were of the opinion that the verdict should be set aside on the grounds that 'under all the circumstances of the case it is unsafe or unsatisfactory'. It seems that thereafter a practice grew up of inviting the judge at the close of the prosecution case to say that it would be unsafe (or sometimes unsafe or unsatisfactory) to convict on the prosecution evidence and on that ground to withdraw the case from the jury. Whether the change in the powers of the Court of Appeal can logically be said to justify a change in the basis of a 'no case' submission, we beg leave to doubt. The fact that the Court of Appeal have power to quash a conviction on these grounds is a slender basis for giving the trial judge similar powers at the close of the prosecution case.

"There is however a more solid reason for doubting the wisdom of this test. If a judge is obliged to consider whether a conviction would be 'unsafe' or 'unsatisfactory', he can scarcely be blamed if he applies his views as to the weight to be given to the prosecution evidence and as to the truthfulness of their witnesses and so on. That is what Lord Widgery C.J., in *Reg. v. Barker (Note)* 65 Cr. App. R. 287, at p. 288, said was clearly not permissible:

"... even if the *judge* — our emphasis — 'has taken the view that the evidence could not support a conviction because of the inconsistencies, he should nevertheless have left the matter to the jury. It cannot be too clearly stated that the judge's obligation to stop the case is an obligation which is concerned primarily with those cases where the necessary

minimum evidence to establish the facts of the crime has not been called. It is not the judge's job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks the witness is lying. To do that is to usurp the function of the jury . . ."

I hold that, in Tasmania, the law on the submission of no case is as held in *Reg. v. Galbraith* and that Mr Slicer's reliance on the test being whether a verdict of guilty would be unsafe or unsatisfactory was unsound. In *Reg. v. Prasad* (1979), 23 S.A.S.R. 161, at pp. 162, 163, King C.J. and White J. at pp. 171, 172 also declined to follow the dicta of Lawton L. J. in *Reg. v. Mansfield* (1977), 63 Cr.App.R. 276, and held that there was no discretion to direct the jury to bring in a verdict of not guilty where there is a case to answer (although both held that the trial judge could invite a jury and even advise a jury to stop a case and bring in a verdict of not guilty).

The present case is one which comes within proposition (2)(b) at p. 1042 of *Reg. v. Galbraith* (*supra*). This is a case where the evidence for the prosecution was such that its strength or weakness did depend on the view to be taken of Smedley's reliability and where, on one possible view of the facts, there was evidence upon which a jury could properly come to the conclusion that the appellant was guilty, and so, the trial judge did not err in allowing the matter to be tried by the jury.

As to ground 2A: There was no submission by Mr Slicer at the trial that the judge should consider the exercising of a discretion to advise the jury to return a verdict of not guilty, although the existence of the power to do so was referred to in some of the cases which he cited. On the hearing of the appeal it was submitted for the appellant that, nevertheless, the trial judge, on being asked to direct the jury to acquit, should have ruled on whether he had a discretion to advise the jury to acquit and that he failed to consider whether or not he had this discretion and, so, did not exercise it. Assuming that the jury has a right to stop the case and bring in a verdict of not guilty at least after the close of the case for the Crown, it is plain that the judge is under no duty to consider any discretion to inform the jury of that right and to consider any discretion to inform the jury of that right and to advise the jury to exercise it. Certainly he is under no duty, if in fact there is no case to answer but there is no submission that he should so rule, to direct the jury to bring in such a verdict, unless a fundamental ingredient of the charge is shown to be missing. *R. v. George* (1908), 25 T.L.R. 66; *Reg. v. Trotter* (1979), 22 S.A.S.R. 64, at p. 68. At the trial, after Mr Slicer resiled from his submission that the evidence of Smedley was circumstantial and conceded that there was evidence of motive capable of constituting corroboration as to murder, as counsel for the appellant put it, "the submission just petered out". The judge was not asked to exercise

any such discretion. He did not call on counsel for the Crown to answer Mr Slicer's submission and did not rule specifically on the submission of no case to answer, understandably, by reason of Mr Slicer's correct concession that neither of the conditions existed. The appeal should not be allowed on either of these grounds.

Ground 1.

"The verdict of the jury of guilty of manslaughter was unreasonable and contrary to the weight of the evidence."

The verdict, of course, was not one of murder but one of manslaughter (by criminal negligence) and, therefore, evidence which went solely to show a motive for forming an intention to kill was not relevant to manslaughter.

As to the application for leave to appeal on this ground, this Court, if it gave leave, should allow the appeal "if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence". — *Criminal Code*, s. 402(1). As to the ground of appeal that the verdict was *contrary to the weight of the evidence* and as to the powers of the Court of Criminal Appeal under legislation similar to the Tasmanian legislation, see *Raspor v. The Queen* (1958), 99 C.L.R. 346, at pp. 350-352. The case of *Aladesuru v. The Queen*, [1956] A.C. 49, a decision of the Privy Council on appeal from West Africa referred to by the court in *Raspor v. The Queen* at p. 351, not being an appeal from an Australian court, is not binding on this Court, but it is persuasive authority that no appeal lies on this ground. In this case I would apply that ruling unless, as claimed by ground 6 of the Notice of Appeal, there was thereby a miscarriage of justice — see *Criminal Code*, s. 402(1). The High Court in *Raspor v. The Queen*, at p. 351, referred to the Tasmanian case of *Bennett v. Pierce* 16th July, 1872, Merc. (Newspr) (Tas.). (Aust. Dig., Vol. 1, col. 259, 2nd ed., Vol. 1, col. 331) where it was said that "the distinction between a verdict contrary to evidence and against the weight of evidence is that in the former case the court is ready to grant new trials to rectify the obvious miscarriage of justice while in the latter they are loth to disturb the decision of a competent tribunal". See also *Hitchens v. The Queen*, [1962] Tas. S.R. 35, at p. 48. In *Plomp v. The Queen* (1963), 110 C.L.R. 234, at p. 238, it can be seen that there were submissions by counsel for the applicant that there was no evidence on which the jury could properly have convicted the accused and that even if there were such evidence at the very worst there were two hypotheses, one consistent with innocence and one with guilt. At p. 244 Dixon C.J. said, "If the Court of Criminal Appeal had thought that it was dangerous to convict Plomp in all the circumstances it would have been within the province of that court to interfere". However, in *Hayes v. The*

Queen (1973), 47 A.L.J.R. 603, an earlier appeal to a Court of Criminal Appeal had been dismissed on grounds, one of which was that it could not be said that the verdict was unsatisfactory or that a miscarriage of justice would occur if the conviction was allowed to stand. Barwick C.J., with whose reasons all the other members of the court agree, said at pp. 604, 605:

"I have come to the conclusion that it would not be dangerous in the administration of justice to allow the jury's verdict to stand. In considering the matter, I have not taken the view that, so long as there is some evidence on which reasonable jurymen might be entitled to convict, there is no responsibility in a Court of Criminal Appeal in any case to consider whether none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand. I agree with what was said in the joint judgment of Dixon C.J., Fullagar J. and Taylor J. in *Raspor v. The Queen* (1958), 99 C.L.R. 146, at pp. 350-352, and what was said by Sir Owen Dixon in *Plomp v. The Queen* (1963), 110 C.L.R. 234, at p. 244. These expressions of opinion were made in relation to courts of criminal appeal constituted under statutory provisions containing the formula 'if it thinks that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence'. In exercising its powers under such a formula, *the court of criminal appeal must, of course, act on that view of the facts which in its opinion the jury were entitled to take, having seen and heard the witnesses*. His Honour was not, nor am I, taking the view that the court's function under this formula is the same as that which the Court of Criminal Appeal in England has decided is to be performed under the amended formula now current in the United Kingdom by reason of the *Criminal Appeal Act*, 1968 (U.K.). See *R. v. Cooper* (1969), 1 Q.B. 267, at p. 269.

"Occasions when a verdict can be set aside upon such considerations as I have mentioned will no doubt be relatively rare. But, in my opinion, the Court of Criminal Appeal under the formula in the Criminal Appeals Acts or provisions obtaining in Australia has the responsibility to which I have referred, *taking the facts to be as the jury were entitled to accept them*, that is to say, of satisfying itself on the facts as so found that in the administration of justice in criminal matters it would not be dangerous to allow the verdict to stand." [His Honour's emphasis.]

R. v. Patmoy (1944), 45 S.R. (N.S.W.) 127, was a case where two principal witnesses for the Crown were of disreputable character and they and another witness were (on the reading of the transcript

of the trial) obviously unreliable witnesses. Jordan C.J. at pp. 133, 134 said:

“As to this, however, as was pointed out by this Court recently in *R. v. Crooks* (1944) S.R. (N.S.W.) 390 at 393:

‘... the law was clearly stated by the High Court in *Ross v. The King* (1922) 30 C.L.R. 246 at 255-256: “If there be evidence on which reasonable men could find a verdict of guilty, the determination of the guilt or innocence of the prisoner is a matter for the jury and for them alone, and with their decision based on such evidence no court or judge has any right or power to interfere”.

‘If there is no evidence of guilt, or only such a faint *scintilla* that reasonable men could not act upon it, the trial judge may direct a verdict of not guilty: *R. v. George* (1908) 25 T.L.R. 66 and, if he refrains and the jury convict, it is the duty of a Court of Criminal Appeal to set aside the conviction. If evidence is given which, if accepted, is sufficient to justify a conviction, and a verdict of guilty is challenged on the ground that the preponderance of evidence is the other way, it is necessary to establish that the evidence pointing to innocence is of such kind that reasonable men could not have failed to accept it, and is so overwhelming that reasonable men could not have failed to act on it, as, for example, where some fact emerges, which is common ground or cannot be seriously disputed, and is entirely inconsistent with guilt. But the fact that a transcript contains what appears to be strong evidence for the defence does not entitle a Court of Criminal Appeal to substitute trial by three judges who have not seen the witnesses for trial by twelve jurymen who have.’

“In the present case, it was perhaps somewhat surprising that the jury accepted the evidence of the trio produced by the Crown, and it has been pressed upon us that the fact they did so made their verdict ‘unreasonable’ within the meaning of s. 6 of the Criminal Appeal Act of 1912. But they saw the Crown witnesses and we did not. The spoken word under the harassing conditions of cross-examination may have produced a less unfavourable impression than the written word.”

We had cited to us a decision of the Court of Criminal Appeal of New South Wales, *Reg. v. Hill* (1981), 3 A. Crim. R 397. It appears from the reasons of Street C.J. at p. 401 that he was considering whether that court should “intervene in circumstances in which it considered that *a miscarriage of justice has occurred: Criminal Appeal Act*, s. 8(1)”. His Honour said:

“There is, however, a ground of appeal number 3(ii) to the effect that the verdict should be regarded as unsafe and unsatisfactory

in the light of the evidence of the history of violence by the deceased towards the appellant.

"The unsafe and unsatisfactory overtones of the verdict are *manifest in the strong case of provocation which can be perceived from the objective statement of the undisputed facts*. This was a case in which, from the human point of view, the appellant can receive a significant measure of understanding in having ultimately lost her self-control after a prolonged period of intense emotional strain. It is difficult to accept that she should be regarded as a murderess to be called upon in consequence to suffer the mandatory sentence of life imprisonment.

"I am of the view that consistently with the authorities that delineate the jurisdiction of this Court in a supervisory sense to ensure that miscarriages of justice resulting from verdicts that can fairly be regarded as unsafe and unsatisfactory should be exercised in this case. The verdict was unsafe and unsatisfactory." [His Honour's emphasis.]

Nagle C.J. at C.L. at p. 401 agreed. It will be seen that this was an appeal allowed by reason of a "strong case" (of provocation) "which can be perceived from the objective statement of the undisputed facts". The case is distinguishable from the present case in which no strong case for the defence can be perceived from undisputed facts. In this case no reasonable jury on the evidence could have come to any conclusion but that the muzzle of the rifle was in the mouth of the deceased when the trigger was pulled. From the way in which the case was conducted and on the evidence, there were strong inferences to be drawn that neither Bryan nor the deceased pulled the trigger. Although in cross-examination Smedley had given answers from which it could have been thought that he was not a satisfactory witness, the jury could have drawn an inference against the accused that he had deliberately lied out of a sense of guilt in telling the police that Smedley had pulled the trigger when the muzzle was about one yard from the deceased's mouth. On the evidence there was an inference to be drawn that it was more likely that the appellant by virtue of his relationship with the woman and his disrespect for her was the man who put the muzzle of the rifle in her mouth. According to the record of the interview with the appellant, when asked whether, when Mrs Hallett came out of the bedroom, he had interfered with her clothing, he said, "I might have got hold of her night-dress and pulled it." and there was evidence that he had lifted her night-dress and made a comment to the other men about her not having any pants on. The jury were entitled to have regard to the unsworn statement in accordance with the judge's direction to consider it a *prima facie* view of the facts and to give it what weight they felt it was entitled to in light of the facts they

found were clearly proved; and in view of the evidence of his claim that the muzzle when discharged was about one yard from the deceased's mouth as well as Smedley's evidence that he was in a different room when the shot was fired, the jury could have been properly satisfied beyond reasonable doubt that the person who put the muzzle in the deceased's mouth also pulled the trigger and that that person was the appellant and a verdict of manslaughter would have been one quite safely reached. I would not allow the appeal on this ground.

I would grant the application for leave to appeal but refuse the appeal.

EVERETT J.: On 15th May, 1981, after a trial which occupied eight days, the appellant was convicted of manslaughter, after having been arraigned on a charge of murder. He was sentenced to imprisonment for three years and a half.

[His Honour set out the amended grounds of appeal and continued:]

The charge arose out of a fatal incident at Devonport on the night of 15th-16th August, 1980, when Mrs Hilda May Hallett ("the deceased"), with whom at the time the accused was living, was killed by a .22 rifle bullet at the house they occupied. The bullet entered her mouth. The rifle belonged to the accused. The incident happened on an occasion when two acquaintances of the accused were at the house late at night. Police officers were called to the house, at which they arrived about 1.45 a.m. They found the body of the deceased, who was apparently dead, on a settee in a lounge room. Her legs were crossed; at her feet was a .22 rifle. She appeared to have been shot in the mouth. The accused and his companions — Garry John Smedley and Peter Andrew Bryan — all told the police that the deceased had apparently committed suicide. However, in November 1980, Smedley and Bryan made statements to the police to the effect that the accused had shot the deceased. When interviewed shortly afterwards, the accused said that Smedley fired the shot.

Counsel for the appellant, in his analysis of the evidence, said:

"At the trial it became clear that it was beyond any doubt that the deceased had been shot either by Smedley or the accused. It also became clear, or at least to the judge and apparently to both counsel, that the witness Bryan was extremely unreliable. Bryan, in his evidence in chief, said that he had seen the accused go over to the deceased with the rifle at a time when Smedley was not in the room and that, with the rifle in his hands, the shot had been discharged. By the end of his cross-examination he was saying that he did not know who had in fact shot the deceased. But it was never alleged by anybody that Bryan had shot the deceased."

The trial judge, in his summing up, told the jury he did not

propose to mention the evidence of Bryan "because I formed the view that he was a person not worthy of belief on his oath. Consequently to use his evidence in any the least degree to support a conviction would be an unjust act." Counsel at the trial, and on the hearing of the appeal, concurred in this view. Disregarding at this stage the precise manner in which the shooting occurred, the first issue at the trial was whether or not the prosecution had proved beyond reasonable doubt that it was the accused who fired the shot.

Smedley claimed he was outside the lounge room when the shot was fired. It was not in dispute that either he was the principal offender or an accessory after the fact (*Criminal Code*, s. 6(1)) in that his evidence at the trial was that, believing that the accused had shot the deceased in circumstances amounting to a crime, he told the police a false story that the deceased committed suicide while the three men were in the kitchen. He concluded his evidence in chief by saying: "I was covering up for Darrell" (the appellant). "I was afraid of repercussions on to me. And if we told the truth the police would not have believed us anyway because of our past history."

The primary issues left by the trial judge for the consideration of the jury were the charge of murder as alleged in the indictment and, in the alternative, the crime of manslaughter based on culpable negligence (*Criminal Code*, ss. 150 and 156(2)(b)).

I shall deal with the grounds of appeal in the same order as that in which they were argued by counsel for the appellant.

Ground 3.

Counsel for the appellant accepted as correct the view expressed by the trial judge, during the hearing of submissions by counsel in the absence of the jury before the summing up, that what he described as "the vital point where corroboration is required" was in respect of Smedley's evidence that he did not pull the trigger of the rifle and therefore, by inference, the accused did.

In elaborating this view in his summing up, the trial judge said:

"The central problem is whether it is safe to act on the evidence of . . . Smedley. I repeat that I ignore Bryan because he is not worthy of comment. Now on his own showing it is open to you to find that Smedley committed a crime himself. The law requires me to direct you that it is dangerous to convict on the uncorroborated evidence of an accessory after the fact . . . If Ling fired the fatal shot there is evidence quite independently of Smedley which would enable you to infer with what state of mind that was done — *a murderous state of mind or criminally negligent state of mind*. So it seems to me that the critical issue on which the Crown relies on Smedley — the suspect witness because he is an accessory after the fact — is who pulled the trigger, Ling or Smedley." [His Honour's emphasis.]

His Honour then referred to the evidence capable of amounting to corroboration "by implicating Ling by showing that he and not Smedley pulled the trigger". Such evidence involved possible motives for the accused wishing to terminate his relationship with the deceased. It was described by the trial judge as "pretty weak", but left to the jury for its finding as a question of fact.

The argument for the appellant under this ground of appeal was that the direction concerning corroboration of the evidence of Smedley in respect of "a possible motive or possible motives for the appellant to kill the late Hilda May Hallett" should have been confined solely to the primary charge of murder and, as a corollary, that the jury should have been directed that such evidence was not capable of constituting corroboration in relation to the alternative crime of manslaughter based on criminal negligence.

In my view this submission is not valid for a number of reasons, none of which involves any principle of law. The trial judge, in a detailed analysis of the reason for the requirement of corroborative evidence, expressly made it plain that the jury should consider such evidence in relation to the state of mind of the accused if the jury found that he fired the fatal shot — i.e. was it "a murderous *or* criminally negligent state of mind". The distinction in respect of the applicability of corroborative evidence was thereby clearly drawn. But his Honour went further than expressing the distinction in simple terms. He invited the jury to consider whether the deceased may have been shot in the course of "horseplay". He did so in terms which in my opinion made it abundantly clear that on the basis of "horseplay" the jury would not have been concerned to consider motive as constituting corroboration of the evidence of an accomplice. The whole structure of the summing up involved what I respectfully regard as a proper direction to the jury to consider two contrasting situations: (a) murder, involving specific intent, in relation to which there should be acceptable corroborative evidence as to the accused's state of mind; and (b) a vastly different position which the trial judge thus described: "This situation has to be considered — namely, the trigger was pulled, but it was with no murderous intent at all; it was just some ridiculous horseplay." This direction was against a background of heavy drinking of intoxicating liquor by most of those concerned on the night of the death of the deceased, so much so that it was open to the jury to find that at least the deceased, Bryan and Smedley were affected by liquor to a substantial degree. The trial judge referred to evidence of a concentration of alcohol in the blood of the deceased of 0.290 g of alcohol in 100 ml of blood.

On the second occasion on which the trial judge, after an adjournment over night, referred to the evidence concerning motive, he did so purely in the context of reminding the jury of the defence

submission that such evidence "did not show a motive for *murder* at all" and that it was the defence case that "there is a very real hypothesis . . . that this was in fact a motiveless killing".

I am unable to conclude that the summing up, considered as a whole and in the light of the addresses of counsel, left any room for doubt that the direction in respect of evidence of motive as capable of corroborating the evidence of Smedley was confined to the primary charge of murder. I therefore consider that this ground fails, and I do not find it necessary to discuss the alternative basis on which counsel for the respondent argued that the direction was proper.

Ground 4.

The evidence relating to this ground of appeal was:

(a) The evidence for the prosecution of Dr R. Cummings, Director of the Department of Forensic Pathology at the Royal Hobart Hospital, who carried out a post-mortem examination of the deceased, that the muzzle of the rifle would have been inside her mouth when the fatal shot was fired. Dr Cummings expressed his reasons for this opinion thus:

"Q. Are you able to express any opinion as to possibility of the muzzle of the rifle which caused her death having been either inside or outside the mouth at the time the fatal shot was fired? A. It would have been inside her mouth. It was based on the fact that the groove on the top of the tongue was blackened on its edges, the blackened areas being presumably due to gun powder residue. If the gun had been outside of her mouth, within a few inches or so of the face when it was fired, there would have been gun powder tattooing on the face and this was absent, it was not present.

Q. Do you have any view or do you hold any opinion as to the possibility that the muzzle of the gun could have been say a yard from her mouth at the time the fatal shot was fired? A. No, it could not. This wouldn't — if it were it wouldn't have left any blackening on the tongue.

Q. So you are left with the opinion that the muzzle of the gun must have been inside the mouth at the time the fatal shot was fired? A. Yes."

(b) Police evidence that in an interview with the accused on 26th November, 1980, following previous interviews on 16th August and 2nd September, 1980, he implicated Smedley in these terms:

"A. Garry was still sitting in the chair I showed you and he was mucking about with the rifle and he pointed it at her and said open your mouth.

Q. What happened then? A. She opened her mouth and he

aimed the rifle at her and I saw him pull the trigger and he shot her in the mouth.

Q. How far was he from her at the time he pulled the trigger? A. He was about 3 yards away and the end of the barrel was about a yard from her mouth.

Q. How did Smedley aim the rifle? A. He held it out at full length in front of him."

The trial judge left to the jury the question of the evidence to which I have referred in this way:

"Now the only other piece of evidence which could possibly corroborate Smedley's . . . evidence to the effect that Ling pulled the trigger is Ling's statement to the police to the effect that the end of the barrel was about a yard from her mouth when Smedley shot her. But, ladies and gentlemen, the law requires you to exercise the utmost caution before treating that evidence, that reference to the muzzle being that distance away from her when Smedley shot her, as evidence corroborating Smedley. The law says this — that you could only treat that passage in that record of interview as corroborative of Smedley's evidence — the critical evidence of Smedley against Ling — if you find that that passage in that record of interview satisfies two tests — and two very stringent tests — and I would like you to take a note of the two tests or conditions. The conditions are these. That when Ling said that, it was a lie. Now let us be careful we know exactly what a lie is. A lie is a statement of an alleged fact which the speaker knows to be false or does not believe to be true, that is what a lie is. The first condition is that when Ling said that he was telling a lie. And the second condition is that you are very clear that if it were a lie it was the concoction of a guilty man and not a lie told by a man in a state of panic or a lie told for which there is some other reasonable explanation. So there are two elements. You would have to be very clear that it was a lie in the sense that I have defined a lie and you would have to be very clear that it was the concoction of a guilty man and not a lie told by a man in a state of panic or a lie told which has some other reasonable explanation."

His Honour also said:

"It is open to you to find that it amounts to corroboration of Smedley's evidence on the critical issue that it was Ling who pulled the trigger because it is open to you to find that it was a lie and the concoction of a guilty man."

Counsel for the appellant conceded that the statement of the accused on 26th November, 1980, concerning the position of the muzzle of the rifle in relation to the mouth of the deceased could have been regarded by the jury as incorrect and that it was "logically possible" that the accused was telling a lie. However, counsel argued,

the statement by the accused, with accompanying detail, that Smedley fired the fatal shot was not capable of being corroborative, even if found to be incorrect and a lie in respect of the distance between the muzzle of the rifle and the mouth of the deceased, because it was equally consistent with guilt or innocence of the accused.

The decisions in the English and Australian cases relied on as support for this argument cannot be extended beyond the facts which were reasonably open in such cases. They may or may not be applicable to other cases. In my opinion they are not generally relevant to the facts of this case.

I consider that the question which it would have been proper for his Honour to pose in deciding whether, as a matter of law, this evidence should have been left to the jury may be stated thus: If the jury conclude that the statement was a lie in the sense that it was the deliberate concoction of a guilty man, is it open to the jury to find that such statement implicates the accused in a material particular in respect of the crime with which he is charged?

With respect, I am in no doubt that his Honour carefully considered this question and, as a matter of law, correctly answered it by ruling that the evidence was capable of being found to be corroborative to the requisite degree. No authority was cited which in my view indicates that, on the facts of this case, the conclusion of the trial judge was in error. On the contrary, a recent decision of the English Court of Appeal accords with the manner in which the trial judge left the question to the jury in this case. In *Reg. v. Lucas*, [1981] Q.B. 720, [1981] 3 W.L.R. 120, on an appeal against the direction of a trial judge to the jury relating to evidence capable of being corroborative, Lord Lane, in delivering the judgment of the court, said (at pp. 724 and 123):

"To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lie must be a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family. Fourthly the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated that is to say by admission or by evidence from an independent witness."

The lie which the jury was entitled to find the accused had uttered was told in the course of an interview with police officers more than three months after the death of Mrs Hallett, at the beginning of which the accused adhered to another lie that "she shot herself". It was the third formal statement of the accused and was

made after he had been told that his two companions had abandoned the suicide story and had "made statements which implicated him in the shooting of Mrs Hallett". It was thus of special significance because the accused must have realised that he was in an extremely serious position. He immediately attempted to implicate Smedley by claiming that Smedley deliberately aimed the rifle at the deceased, pulled the trigger and shot Mrs Hallett in the mouth. He volunteered that at that moment "the end of the barrel was about a yard from her mouth". This claim, conceded by counsel to be capable of being regarded as a lie in the sense in which his Honour directed the jury, was made in the course of a detailed description of the alleged movements of Smedley, including a demonstration of how the rifle was held. The trial judge was entitled to take the view that the jury could conclude that the description of the actions of Smedley was an attempt by the accused to colour his new story, to give it verisimilitude, to divert attention from himself and to focus it on Smedley. Since there was the clear evidence of Dr Cummings, admittedly not qualified by cross-examination, from which the jury could conclude that the colouring was a lie, I am in no doubt that such lie, if found, could have been regarded by the jury in the circumstances of this case as corroborative by implicating the accused in a material particular — that is, that it was the accused who fired the fatal shot. The trial judge was therefore entitled — indeed bound, in my view — to leave the alleged lie to the jury for it to consider in relation to the question of corroboration (see *Eade v. The King* (1924), 34 C.L.R. 154). The ruling was legally correct because the jury was entitled, in its consideration of the total conduct and statements of the accused, to draw an inference against him in relation to the alleged lie. In leaving this question to the jury in the manner in which he did, the trial judge's ruling was, in my respectful opinion, completely consistent with the authorities.

I wish to record the alternative argument of the Crown Advocate that in any event the decision of the House of Lords in *Davies v. D.P.P.*, [1954] A.C. 378 — that accessories after the fact to the crime of murder are among the group of persons who should be treated as accomplices for the purpose of the rule in respect of corroboration — does not necessarily state the law in Tasmania. There is no need to consider this submission in view of the opinion I have reached concerning this ground of appeal, in which I do not think there is any substance. I prefer to leave consideration of the Crown Advocate's submission until the point directly arises, especially as no such argument was at any stage raised in this case until the submissions in reply of the Crown Advocate.

Ground 5.

The argument submitted on this ground was that the "purpose of his own" which Smedley might have wished to serve was that he

may have been motivated to give false evidence implicating the accused because he himself murdered the deceased. Therefore, it was argued, the trial judge should have warned the jury of the danger of convicting the accused on the "*uncorroborated*" evidence of Smedley, not because Smedley was, on one view, an accessory after the fact to a crime but because he might have been the principal offender, as claimed by the accused in an unsworn statement submitted at the trial.

It appears to me that this argument confuses the legal principle whereby corroboration of the evidence of an accomplice is required with the caution which should be exercised in scrutinising the evidence of a witness who may have a special motive for not telling the truth.

At the trial, and on the hearing of the appeal, it was not disputed that either the accused or Smedley pulled the trigger of the rifle when the fatal shot was fired. Each asserted it was the other who did so. Within this narrow compass I consider the trial judge charged the jury with extreme care and fairness from the accused's point of view. In the context of this ground of appeal some of the specific references to Smedley in the summing up were:

(a) "Whether you accept Smedley as a person whose evidence is worthy of belief is, of course, a matter for you. Indeed I would regard it as the central matter for you."

(b) After having summarised the principal evidence of Smedley, his Honour said:

"Whether Smedley is a person worthy of belief on his oath is a critical question for you to decide. There is no doubt it is the central question. And in deciding that, ladies and gentlemen, the plain common sense of this business of advocacy suggests you ask yourself this question, 'How do I think he coped under cross-examination?' and I will be coming back to make a separate analysis of some of the things that I think were significant in the cross-examination of this man, and *raise very serious questions as to whether or not he did not lie to you.*" [His Honour's emphasis.]

...

"Smedley's evidence, if you think it is safe to act on it, when considered in the context of the facts which appear to be established by other evidence, leaves it open to you — I am saying no more than it is open to you — to bring in a verdict of murder or manslaughter provided, and always provided, you are satisfied that having regard to this man Smedley's obvious character and demeanour in this Court, you are satisfied that that is a safe course to take. I am merely stating at the moment a course you could take consistent with the law, if you give

weight to the essence, or what Mr Cox called the central features, of the Smedley story.”

(c) His Honour reminded the jury in detail of what he described as Smedley’s “bad criminal record for dishonesty” and of the attack on his credibility by counsel for the accused in respect of the lack of detail in his evidence on important matters. His Honour cited a number of instances of vague answers in cross-examination by Smedley. He told the jury: “The words ‘I do not recall, sir’ can be the refuge of a scoundrel.” He urged the jury to consider whether Smedley’s drunken state was the true explanation of the vagueness of some of his evidence.

(d) At one point in the summing up, the trial judge said: “Unfortunately . . . the credibility of both the accused and Smedley, and indeed Bryan, if anyone dared take him seriously, has been adversely affected by lies told since the death.”

(e) His Honour prefaced his formal directions in respect of corroboration of the evidence of an accomplice with these words: “I repeat again there is no doubt what the central problem about this case is. The central problem is whether it is safe to act on the evidence of that man Smedley.” Although spoken in the context of directions concerning corroboration in the strict sense, this reference to Smedley emphasised generally the care which the trial judge urged the jury they should exercise in considering his evidence.

(f) Near the end of his summing up, the trial judge said:

“Now if you reject the evidence of both Bryan and Smedley — . . . or if you find that it would not be safe to act on the evidence of either of them — then you are left in the position of a Crown case based entirely on circumstantial evidence.”

His Honour then gave orthodox directions relating to circumstantial evidence.

(g) Finally, his Honour reminded the jury of the criticism of Smedley by counsel for the accused, and said:

“Then he” [i.e. counsel] “goes further than that; he says, look, really you should not place any reliance on Smedley at all because he is a liar and the test of whether a man is a liar or not is how did he cope in cross-examination — and he gave examples — some of which you realise I have considered myself quite independently of him, but he gave additional ones to say, well, that man is a liar; at the very least you could not — on a very serious occasion — take the step of relying on him.”

In my view there is no rule of law or practice which requires that a direction in the terms stated in this ground of appeal must in all circumstances be given. But nonetheless, when the passages in the summing up to which I have referred are considered in the context of the whole of the directions, there can be no doubt that an extremely careful and explicit warning was given to the jury about Smedley’s

evidence. Such warning was more than adequate to satisfy any requirement that it is prudent to advise a jury to exercise extreme care in considering the evidence of a witness of the type, and in the situation, of Smedley.

This ground therefore is not established.

Grounds 2 and 2A.

These grounds were argued together. Their basis was a submission by counsel for the accused at the trial when the prosecution case had closed that it was so weak that the jury ought to be directed to acquit the accused at that stage. The alleged weakness, it was claimed at the trial, related to the identity of the person who fired the fatal shot — the accused or Smedley.

The discussion at the Bar of these grounds on appeal ranged widely over a number of English and Australian cases, especially the decisions of McGarvie J. in *Wilson v. Kuhl*, [1979] V.R. 315, and of the South Australian Court of Criminal Appeal in *Reg. v. Prasad* (1979), 23 S.A.S.R. 161. The essence of the argument of counsel for the appellant was that the trial judge had a discretion at the close of the prosecution case to direct or advise the jury to return a verdict of not guilty because of the inherent danger of convicting the appellant on evidence which was not sufficiently strong to be the basis of a safe verdict, and that the trial judge had failed to exercise such discretion or had wrongly exercised it.

I do not think there is any doubt that in some cases in modern times there have been inroads, actual or attempted, into the traditional sanctity of the verdict of a jury, although it is, of course, subject to two qualifications. First, the power of a trial judge to direct an acquittal in the circumstances discussed in cases such as *May v. O'Sullivan* (1955), 92 C.L.R. 654; *Zanetti v. Hill* (1962), 108 C.L.R. 433; *Riseley v. The Queen*, a decision of the Tasmanian Court of Criminal Appeal, [1970] Tas. S.R. 41; and many decisions of single judges of the Supreme Courts of Australian States. Secondly, the verdict of the jury may, on appeal, be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence (*Criminal Code*, ss. 401(1)(b)(iii) and 402(1)). No doubt such inroads superficially bear the stamp of logic the more clearly by reason of the power, now plainly recognised, that a trial judge may, in effect, direct a verdict of guilty, when there is no issue of fact left for the determination of the jury. A recent case of this kind was the decision of the High Court of Australia in *Yager v. The Queen* (1977), 13 A.L.R. 247, 139 C.L.R. 29. The situation was not dissimilar in *Jackson v. The Queen* (1976), 9 A.L.R. 65, 134 C.L.R. 42, in which Barwick C.J. said in respect of a criminal trial involving false entries for taxation purposes at p. 45:

"I also agree that the course adopted by the trial judge in obtaining the verdict of the jury was correct. He could properly

have told them during his summing up that if they found that the false entries were made fraudulently, irrespective of whether the object of the fraud was the employer or the Income Tax Commissioner, it was their duty to return a verdict of guilty. In the result, he rightly told them that the answers they had given to the questions posed for them established all the elements of the offence charged. He then asked them for their verdict. They correctly found a verdict of guilty. There is no need to consider whether he could have directed a verdict, as this course was not followed."

However, such a judicial power is essentially different from a discretion to direct or advise a verdict of not guilty, so long as there is outstanding the resolution of a factual issue and there is evidence on which the jury could in this respect reasonably make findings against the accused. I am unable to appreciate how logically it is claimed that this principle has in England been altered by reason of the extension of appellate power following the enactment of the *Criminal Appeal Act* 1968. The question was considered by the English Court of Appeal in *Reg. v. Galbraith*, [1981] 1 W.L.R. 1039, in which the appellant had been convicted by a majority verdict of affray. In delivering the judgment of the court, Lord Lane said:

"We are told that some doubt exists as to the proper approach to be adopted by the judge at the close of the prosecution case upon a submission of 'no case': see *Archbold, Criminal Pleading Evidence & Practice*, 40th ed. (1979), 6th Cumulative Supplement, para. 575 and *Reg. v. Tobin* [1980] Crim. L.R. 731.

"There are two schools of thought: (1) that the judge should stop the case if, in his view, it would be unsafe (alternatively unsafe or unsatisfactory) for the jury to convict; (2) that he should do so only if there is no evidence upon which a jury properly directed could properly convict. Although in many cases the question is one of semantics, and though in many cases each test would produce the same result, this is not necessarily so. A balance has to be struck between on the one hand a usurpation by the judge of the jury's functions and on the other the danger of an unjust conviction.

"Before the Criminal Appeal Act 1966, the second test was that which was applied. By section 4(1)(a) of that Act however the Court of Appeal was required to allow an appeal if they were of the opinion that the verdict should be set aside on the grounds that 'under all the circumstances of the case it is unsafe or unsatisfactory'. It seems that thereafter a practice grew up of inviting the judge at the close of the prosecution case to say that it would be unsafe (or sometimes unsafe or unsatisfactory) to convict on the prosecution evidence and on that ground to withdraw the case from the jury. Whether the change in the

powers of the Court of Appeal can logically be said to justify a change in the basis of a 'no case' submission, we beg leave to doubt. The fact that the Court of Appeal have power to quash a conviction on these grounds is a slender basis for giving the trial judge similar powers at the close of the prosecution case.

"There is however a more solid reason for doubting the wisdom of this test. If a judge is obliged to consider whether a conviction would be 'unsafe' or 'unsatisfactory', he can scarcely be blamed if he applies his views as to the weight to be given to the prosecution evidence and as to the truthfulness of their witnesses and so on. That is what Lord Widgery C.J., in *Reg. v. Barker (Note)* (1975) 65 Cr. App. R. 287, 288, said was clearly not permissible:

'... even if the *judge*' — our emphasis — 'has taken the view that the evidence could not support a conviction because of the inconsistencies, he should nevertheless have left the matter to the jury. It cannot be too clearly stated that the judge's obligation to stop the case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the judge's job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks the witness is lying. To do that is to usurp the function of the jury'

Although this was a case where no submission was in fact made, the principle is unaffected. (pp. 1040, 1041)

...

"How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred." (p. 1042)

In my view, the more readily judicial approval is given to attenuation of the authority of a criminal jury, subject, of course, to the traditionally accepted restraints on jury verdicts, then the sooner will juries, as the basal component of the system of criminal justice which we are accustomed to espouse and praise, lose their identity as community representatives and, in consequence, their intrinsic authority.

I further take the view that even if the arguments of counsel for the appellant are correct — and I am not persuaded that they are — the trial judge ruled correctly on the submission made to him, and, however wide his discretion may have been as a matter of law, that he was right in leaving the ultimate issue of guilt or innocence to the jury in the way in which he did. It is still the law (*Criminal Code* s. 366) that an officer of the court “shall inform the jury that it is their duty to try the issue raised upon the pleadings”.

Whatever was the precise conclusion of the trial judge as to what was involved in the submission of defence counsel that he should direct an acquittal, it is clear that his Honour took the view that, on the basis of the prosecution evidence at that stage, it was proper to leave the case to the jury. A consideration of a transcription of the arguments of counsel and of the observations of the trial judge makes it clear that the main thrust of the submission of “no case to answer” related to the question of corroboration. At the end of an exhaustive discussion on that question, in the light of evidence which the jury was entitled to accept, his Honour simply said: “The matter will go to the jury on that basis.” I do not consider that any case has been made which casts doubt on the correctness of that ruling. If there was a case to answer — and the trial judge so held, in my view correctly — then no question of direction or advice to “stop the case” could logically arise on the facts of this case. I regard *Wilson v. Kuhl*, [1979] V.R. 315, as distinguishable on its facts. In any event I doubt, with respect, if his Honour’s decision in that case extends as far as has been claimed.

I prefer to leave any further discussion of the power of a trial judge to give directions or “advice” to a jury to the length argued by counsel for the appellant until the question arises directly because of the state of the prosecution evidence. I do not consider that any such question arose in this case.

Ground 1.

This was the last of the grounds of appeal argued on behalf of the appellant. There is no complaint in respect of the directions of the trial judge relating to culpable negligence. Counsel said he preferred to base his argument on the proposition that the verdict was unreasonable. He went as far as to submit that “it must have been impossible for the jury to be satisfied beyond a reasonable

doubt upon the evidence that it was the accused, and not Smedley, who shot the deceased".

It is trite to say that the jury had the advantage of observing the witness Smedley and forming a judgment as to his veracity and reliability. It is equally trite to say that the jury did not have the opportunity of a similar observation of the accused. But the jury received the usual direction as to the evidentiary status which should be accorded the accused's unsworn statement (*Peacock v. The King*, (1911) 13 C.L.R. 619). In the light of such direction, I consider it was entitled to regard the accused's version as a tissue of lies. If it did so, then it was the more likely to accept Smedley's evidence. The trial judge stressed to the jury that before it could convict the accused in the alternative of the crime of manslaughter it must be satisfied of three essential ingredients, the first of which was that it was the accused who fired the fatal shot. It was not, of course, a case of balancing conflicting versions. The jury was clearly directed as to the burden of proof. There were a number of assertions in the accused's unsworn statement which the jury could have regarded as inherently improbable and not worthy of belief, including the reason given by the accused for removing the rifle from the boot of his motor car; his subsequent action in "testing" it, allegedly for Smedley, by firing one bullet into the floor; the vagueness of the circumstances in which he impliedly suggested that Smedley loaded the rifle before the fatal shot was fired; his claim at the trial that when the rifle was discharged "the end of the barrel would have been right where her mouth was", as contrasted with the significantly different version in his statement to the police on 26th November, 1980, to which I have referred; his ready acquiescence in a plan, allegedly proposed by Smedley, that all three men should claim to the police that the deceased shot herself; and his failure to remonstrate in any way with Smedley for allegedly killing the person with whom he was living. These are some of the matters which no doubt caused the jury to reject the accused's attempt to blame Smedley for the killing. Moreover, the evidence for the jury's consideration included three statements by the accused to the police, dated 16th August, 2nd September and 26th November, 1980, the inconsistencies in which were manifest. In addition, there was the evidence of Smedley, which it was open to the jury to accept.

I therefore do not consider the argument for the appellant on ground 1 is tenable.

My overall view, applicable to all grounds of the appeal, is that there was no judicial error in the trial and that the verdict cannot in any way be impugned. Indeed, on the material before the appellate court I regard the verdict as logical and understandable, without any taint whatsoever of a miscarriage of justice. I would therefore grant the application for leave to appeal but dismiss the appeal.

Leave to appeal granted.
Appeal dismissed.

Attorneys for the applicant: *O'Rourke & Blow.*

A.G.M.