

C.A. Criminal Law - Murder - Gunshot - Doctor who performed post mortem not called - whether evidence of death of deceased - whether reasonable to draw inference deceased died from missile from gun - whether judges direction on point adequate - whether judges direction on bias adequate
Evidence of one witness that shooting not directed at any particular witness - Evidence bullet misdirected - Whether true judge should have left manslaughter to jury. JAMAICA Whether verdict of jury unreasonable. Appeals dismissed

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 50 & 51/85

No case referred to

BEFORE: THE HON. MR. JUSTICE ROWE, P.
THE HON. MR. JUSTICE WHITE, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A. (AG.)

REGINA
VS.

OWEN BROWN
&
BURCHELL PARISH

Mr. H.G. Edwards, Q.C. for Appellants

Mr. Kent Pantry, D.D.P.P. and Mr. Courtney Day: for the Crown

June 29; July 1 and 24th Sept., 1987.

WHITE, J.A.:

After hearing the arguments in support of the applications by Owen Brown and Burchell Parish for leave to appeal against their convictions for the murder of Angela Simmonds on the 1st day of October, 1982, the applications were treated as the hearing of the appeals. By a majority the appeals were dismissed, the convictions and sentences were affirmed. We now publish our reasons in writing for that decision.

The evidence upon which the prosecution relied to prove the case for murder was given by Ruth Simmonds and Hamilton Simmonds, the sister and brother of the deceased, as also Gregory Green and Ian Whyte, who each testified to seeing the two appellants on Regent Street, Allman Town, in the parish of Kingston with firearms, which they discharged. The time was about 11:30 p.m. on the 30th September, 1982.

According to Ian Whyte, while he and others were standing at the corner of Regent Street and Victoria Street, he saw four men, Duncan, Louis and the two appellants, come from premises, 18 Regent Street. He said one had a long gun, and each of the two had a short gun. He knew all four armed men before and particularly these two appellants for about two years, during which period he saw them every day. On the night in question, he saw their faces. The street

lights were on. After emerging from the yard, the four men started to fire shots towards the east. He ran off, and hid in his yard. After the sound of shooting had subsided, he went out back on to the street, where he saw the appellants and their companions running along Regent Street towards the west. When he saw them on this occasion, Burchell Parish o/c Bertie had the long gun at his side and Owen Brown, o/c Wallas, running with a short gun with the next hand at his side. The same four men entered an open land on Regent Street. After this he saw the prone body of Angela Simmonds at her gate. She was bleeding from her head. Her head was inside the gate. Ian Whyte testified that Hamilton Simmonds was leaning on a post by the corner of Regent Street and Victoria Street before the shooting started.

This was confirmed by the evidence of Hamilton Simmonds who said he was standing about eight yards from his gate; that while he was at that spot he heard the voice of Gregory Green, who was on the roof of a house. He therefore looked out towards the west along Regent Street, and he saw the appellant 'Bertie' with a long gun, and the appellant 'Wallas' with a hand gun. He knew them for about 5 years. He and Bertie had at one time belonged to the same club. He was enabled to see them clearly by what he described as "Big, big street light." When he first saw them they were about 30 yards from him. They fired their guns in an eastward direction. The witness said they were coming from the west, and they fired about seven shots. He lay down on the ground, right where he was, "until they pause." He saw them while he was lying on the ground. He then got up and ran into his gate. Up to that time he had them in view for about eight seconds. He said he noticed his sister Angela at the gate. He heard another firing of shots, so he ran into his yard. He eventually saw the body of his sister by the gate. He gave evidence that he received injuries. In his own words, "I get my head top here burst out, a shot went here" (Demonstrating). "A shot went in my chest, and a next one rub off my chin." He testified that he got shot in both shootings. In answer to the trial judge, the late Alexander, J., as to when he got the shot to his head and chin and chest, the witness said "Well, I know say that the head one directly was at the corner is after every thing finish when I realise say I get this one (touches chest)." Significantly, to the judge's further question, he said

that when he saw the two men firing the guns in the direction of the east, he did not know who they were firing at.

When he was cross-examined, Hamilton Simmonds said while he was standing at the intersection he saw his sister Ruth and Angella and Ellis at their gate. Ruth had earlier passed in a car. While he was at the gate he was nearer to the appellants - a distance of thirty yards from them. He pointed out the distance between him and Ruth. He said he heard the shooting within seconds of hearing the shout. He repeated that he got shot in the head when he was lying on the ground, "for the blood start to run down." During the pause he got up and ran to his gate and he heard the second set of explosions, when he stopped after he had bent down to look at Angela who was blocking the gateway. Thereafter he ran into the yard.

Under further cross-examination by counsel for Parish the witness said the shout from Gregory was "Hammie, see Bertie a come!" He denied that he was shot in the yard, asserting that he was shot while he was on the road.

Ruth Simmonds testified that at about 11:30 p.m. on the 30th September, 1982 she had been driven up to her gate on Regent Street in a Volvo car. Regent Street is a one-way street east to west. Victoria Street crosses it. As she was about to get out of the car she heard a shout from west of where she was standing at the gate was the deceased, Angela Simmonds. As she heard the shout she said she heard gun shots coming from the west of her, and along Regent Street. This caused her to look towards the west. She saw Burchell Parish (Bertie), Owen Brown (Wallas) and another man named Duncan coming along Regent Street from the west. She had known them for five years and saw them frequently. She knew that Bertie and Wallas lived on Wild Street. Although she knew that Bertie lived at 10½ Wild Street, she did not know the exact address of Wallas. When she saw them "They were running coming." Each had a gun in his hand. They were firing the guns in the easterly direction, and at that time they were about thirty feet from her. She also said the street was lit up; the street lights were shining. As they advanced Bertie was about 2 feet from the others. She saw the face of each man. She ran towards her house when she heard the shots, but when she realised that her sister was not with her, she turned back to the gate. There she saw her sister. She held her

and drew her and saw blood coming from Angela's head. She saw her brother also bleeding from his head. She had not seen him before the shots were fired. About 7 shots were fired during the five minutes, later reduced to two seconds she was looking at Bertie.

When she was cross-examined by the attorney-at-law for the appellant Brown she said that she heard the voice of Gregory Green, when he shouted from the roof of a house opposite to where the car had stopped. She admitted that she looked at the men for only two seconds instead of for the five minutes which she stated in examination-in-chief. She said there were two men on the roof. She insisted that she did see the appellant Brown on that night with a gun which he fired. To further questioning she was adamant that she saw both appellants before she ran through the gate into the yard, as well as when she was going through the gate. Before she heard the shouted warning "See Bertie coming there," the deceased was standing at the gate with an umbrella over her as it was drizzling rain. She had not seen her brother before the shout. She saw him inside the yard when she ran from the street. He was in the front of the yard about a yard from the gate.

In an answer to the trial judge she said she saw the men on the roof for about ten minutes before she heard the guns firing. The men on the street were coming from westwards and firing in the eastern direction straight in front of them. The appellants and their companions were not firing towards the men on the roof. It was not so that the appellants and their companions were being fired or by the men on the roof. From what this witness saw on that night she could not think why the men were firing the guns.

Gregory Green admitted that he was one of the men who on the 30th September 1982, were "on the house top right at Regent Street and Great Georges Street corner." He told the Court that from that vantage point he saw the appellant Bertie "take time coming down on the side of the road towards the sidewalk." The appellant was then on Regent Street. He had something in his hand. From his vantage point he was able to see Hamilton Simmonds, who was standing at the light post at Regent and Great George's Streets. He (the witness) was just above 'Hammie,' but on the other side of the road. He was unable to say how far the appellant was from 'Hammie.' The witness Green said

he shouted "Hammie look out, see Bertie coming with something like a lass." He then heard a "gun shot." The sound came from the west and from the direction where he saw the appellant "screeching coming down toward Great George Street." He himself ducked as he heard the shots. Because many shots were fired he kept his head down. When he did look up again he did not see 'Hammie.' After he came off the roof, he saw Angela Simmonds lying on the ground. He saw Bertie plainly. He did not see what Bertie had in his hand, but it appeared to be a cutlass; nor did he see any one else with him. When questioned by defence attorney-at-law he denied that any shots were fired from the roof where he and Mark were.

Detective Corporal of Police, Vilmore Austin, carried out investigations into the shooting and murder. He gave evidence that on the 1st October, 1982, as a result of information received he went to premises 7 Regent Street in Allman Town, which was where the Simmondses lived. On the 5th October 1982, he attended a post mortem examination on the body of Angela Simmonds at the Kingston Public Hospital Morgue. He said he saw Dr. Ramu extract a bullet from the head of the deceased. It was handed to him. He took it to the Government Ballistics Expert, Senior Superintendent of Police, Daniel Wray. Mr. Wray said he weighed the lead slug which was handed to him by Detective Corporal Austin. It weighed 45 grams, and his examination revealed that it was a lead pellet of the number 1 buck shot size. It was originally round, with a diameter of approximately .30 inch. These are loaded in shotgun cartridges. Eleven of these pellets are loaded in each 12-gauge shotgun cartridge. All would be discharged from the barrel of the shotgun, and it could have a maximum range of approximately 660 yards when discharged from a regular 12-gauge shotgun. Each pellet could have a lethal energy up to and over a hundred yards. Each single pellet of the eleven could have maximum energy - maximum lethal energy of up to and above a hundred yards." The condition in which he saw the pellet was that it was damaged and deformed. This suggested that it impacted with some hard object while it was travelling at a fast speed. It is significant that he said that for this purpose the human head would be such a hard object.

He elaborated on the condition of the exhibit when he was cross-examined to the extent that it was the major mass of a lead pellet. Its origin weight was 54 grams, and in original shape was like a ball. As he saw it, one end of it was completely flat. This condition, he said, indicated that it made several impacts against hard surfaces.

The following questions and answers are of interest: (pp. 175-6)

Q: If that pellet went directly into a human head, it would encounter the skull?

A: Yes.

Q: And the hardness of the skull could damage the pellet somewhat?

A: Yes sir

Q: If that pellet went directly into the human skull, would I be correct in saying that the other areas - apart from the impact against the skull, the other areas would not be damaged at all? Hardly damaged?

A: If it went directly.

HIS LORDSHIP: Just a minute. The other areas would not be damaged, or hardly damaged?

A: One surface would be flat.

HIS LORDSHIP: I want to know what the witness is saying. Are you saying that other areas would not be damaged?

A: Would not be damaged.

Q: So, if that object was found in a human - in a person's head, there would be every indication that that is a ricochet bullet?

A: Yes, sir. Indications are that it made several impacts.

Q: And that would be a bullet that ricocheted?

A: The damage suggests that.

Q: Off several objects?

A: Off more than one object.

Q: More than one object?

A: More than one surface."

He told the court/that the pellets would spread over a "25 yards diameter." ^{also}

No evidence was heard from Dr. Ramu, who performed the post mortem.

Nor was his deposition which was taken at the preliminary enquiry ordered to be read apparently because of the difficulty of the Crown to establish the conditions for its admissibility.

The appellant Owen Brown, gave sworn evidence to establish an alibi. He denied the allegations made by the Crown as to his complicity in the criminal incident on the night of the 30th September, 1982. He said, however, that on the 1st October he heard his name being linked with a murder. This was about 6 a.m. and before he left for work. On the advice of a lawyer he went to the Central Police Station, where he was taken into custody.

Under cross-examination he said that he knows the appellant Parish, whom he calls Bertie; Bertie lives at 10½ Wild Street; he, the appellant lives at 33 Wild Street. On the night in question he was warned by his baby "mother" not to go outside because she heard an explosion up by the road.

The appellant, Burchell Parish, made an unsworn statement. He also set up an alibi; having gone to Fleet Street to the home of his girlfriend, where he slept overnight. The next morning when he went back to his home at 33 Wild Street he heard people saying that he had killed Angela Simmonds. He was later detained by the police.

The several grounds of appeal canvassed the lack of medical evidence in proof of the cause of death of Angela Simmonds; the inadequacy in law of the directions of the trial judge in that those directions "did not deal with the circumstances that might have arisen in this case." Our attention was directed to pages 218, 219 & 220 of the Record, to the alleged failure of the learned trial judge to direct the jury on the possible bias against the accused of the principal eyewitnesses for the Crown, who were related to the deceased, and to the alleged error of the learned trial judge in failing to leave manslaughter to the jury, and thereby the appellant was deprived of a possible verdict of manslaughter. In the result it was contended that the verdict of the jury was unreasonable and cannot be supported by the evidence on which the prosecution relied.

At the trial, as gathered from the transcript, there was no doubt that Angela Simmonds had died. She was seen at the gate of the premises, where she was living, with a wound in her head, from which blood flowed, in the

immediacy of the shooting. Certainly, no one saw her alive again after she was taken to the hospital. Further it is certain that Ruth Simmonds attended the post mortem examination at the Kingston Public Hospital Morgue and identified the body, from the head of which Detective Corporal Vilmore Austin informed the Court, he saw Dr. Ramu extract the pellet which the detective corporal produced as an exhibit. This was the pellet about which he was questioned, and in respect of which Senior Superintendent Wray gave his opinion as earlier set out. The pellet was removed from the body in the ~~stagnant flattened state~~ as it appeared in Court.

The fact that Dr. Ramu was not called as a witness, it was argued by Mr. Edwards, left unproven his qualification to perform the post mortem examination. At the same time it was argued that there was no evidence that the pellet had penetrated the skull of the deceased, considering that at least seven shots were fired, and also that the expert evidence established that this pellet was not fired directly at anyone. The words underlined are the repeat of the words of the learned counsel for the defence, who seemed to be giving his gloss to the evidence of the Ballistics Expert. That evidence described the way in which the pellets of a cartridge discharged from a shotgun behave, and did not in any way lend countenance to the view that the gun was not aimed at anyone, at the time of the alleged shooting.

However, in respect of the cause of death, it is permissible to look first at page 222 of the summing-up, where the trial judge said to the jury:

"Now, one of the ingredients is the death of Angela Simmonds, and members of the jury, this is an unusual case, at least from my point of view in that no doctor came and told you how Angela Simmonds died.

So again, members of the jury, you are being asked to draw inferences, and remember I warned you throughout this case on both sides you will be called upon to draw inferences. What has been put before you is that up to the time of the shooting Angela Simmonds was alive, apparently in very good health, out in the street with her sister. The next thing that happened according to the evidence is that shots were fired, Angela Simmonds was seen lying at her gate bleeding from injuries. The next thing is that a post mortem examination was carried out and the bullet was taken from her.

So, members of the jury what you have? Angela alive and well, shooting, she is seen to be injured and she is dead. The prosecution is asking you, if you believe all this, to find as a fact that it was the bullet taken from her body, if you believe that was done, that caused her death, and that this bullet entered her body as a result of the shooting of which the prosecution is saying, a matter for you, that these two accused were involved in."

Again at page 228 the judge directed the jury:

"Now on the 5th October, 1982 Miss Simmonds went to the Kingston Public Hospital morgue where she identified the body of Angela Simmonds at the post mortem. So there is evidence that Angela Simmonds is dead; because if you believe Miss Ruth Simmonds on this point she went and identified the body of her sister Angela, to the doctor who performed the post mortem examination. That is evidence, if you believe it, that Angela is dead. What you have to further consider is how she died, whether you believe in all the circumstances that she died as a result of this gunshot injury which the prosecution is asking you to say came about as a result of these men firing guns along Regent Street that night, two of whom were the two accused before the court."

It is clear from those two passage that the learned trial judge brought home to the jury's mind their responsibility to decide on the cause of death in the light of the absence of the doctor. What he did was to ask them to consider whether it was reasonable to draw the inference that she was killed by a missile discharged from a firearm in the circumstances identified in the evidence.

We do not find justified the complaint that the trial judge failed to deal with the possible bias against the accused of the principal eye-witnesses, who were related to the deceased. In fact it is outstanding in the summing-up that in more than one passage he reminded the jury of the political milieu in which it was insinuated that the shooting took place. For at page 217 he reminded the jury:

"However, other things have been said in relation to this case, and this has to do with politics, and though it has not been projected, in the sense that it was put up as the reason or reasons for this incident, there were political undertones, and, members of the jury, on the basis of inferences again

You may be called upon to draw inferences in relation to what you believe took place that night. It is open to you, depending upon the evidence that you find, to make you believe that there was an invasion on Regent Street that night by persons from another political persuasion. You heard comments and indeed there was evidence that there was a war between Regent Street and Wild Street, based on political differences.

Members of the jury, a matter for you, depending on how you view the evidence you might very well find or conclude that this incident, if you find that any incident took place, came about as a result of an invasion by persons who do not live on Regent Street as against persons who do."

Next, as page 233, in alluding to the evidence of Ruth Simmonds, he said this:

"Members of the jury, it is not only from the point of view of whether the circumstances allowed her to see them and to be able to identify them, you have to look at it from the point of view of whether or not she may be lying. You have to look at the whole circumstances. She lives at Regent Street. There is evidence as to the animosity between Regent Street residents and Wild Street residents; so you have to look at it from the point of view of whether or not she is lying on these men."

Again at page 243, in discussing the evidence of Gregory Green, he adverted them as follows:

"He was asked about support of political Party, he said no, he doesn't support any, but at time he lived at 8 Regent Street. Members of the jury, matter for you what significance this has if any, bearing in mind what the undertones of this case appear to be. Apparently there was a war between Regent Street and Wild Street."

When he dealt with the evidence of Ian Whyte, Alexander, J., reminded the jury that Ian Whyte had denied the suggestions to him that he was lying, having concocted the story which he was relating from the witness box. The learned judge went on to say (pages 254 - 256):

"It is at this stage, members of the jury, that we get something more about the political undertones because through Mr. Whyte the court learned that there are differences, political, not only caused between the Regent Street and Wild Street people, but that Mr. Whyte himself had been a victim of this difference, and even though he would not describe himself as an activist

he said that 'if anybody trouble me I am prepared to defend myself.' Indeed, in Mr. Delisser's cross-examination of Mr. White, there is the suggestion that there was a previous disagreement between White himself and Bertie. It was put to him, he said he can't recall that he saw Bertie in a Bar on Prince Albert Street in 1981; he said he can't recall, but it is not true that there was this incident when he, Mr. White, was called a political name, and he says not true that as a result of this incident there was any stabbing involving Bertie and 'I never had any fuss at all'. He admits he lives as Bertie on Wild Street, and he, Mr. White on Regent Street. He knows of political war between Wild Street and Regent Street. He is involved slightly. It is not true that there was this incident in 1981 in which Bertie got stabbed.

So, members of the Jury, here is the suggestion, that the motivating factor behind Mr. White, the reason why he is coming here to give this testimony, is based on political disagreement between he and Bertie. Mr. White, of course, does not agree with that. So, members of the jury, it is a matter for you, bearing in mind the differences between what Mr. White said and the other witness, whether Mr. White was where he he said he was; and even more importantly whether Mr. White is motivated by politics to come here and lie to you, the jury in relation to these accused men bearing in mind that they live on Wild street and Mr. White lives on Regent Street."

On the strength of those quotations it cannot be denied that the judge did place for the jury's consideration the issue of bias, albeit not the bias from family relationship, but the bias which was really insinuated i.e. the bias of political disagreement and warfare. It should be emphasised that family connection and relationship could never by itself be a reason for rejecting the evidence of a witness.

Two other points of the arguments in support of the appeal will now be examined. Mr. Edwards sought to take advantage of the fact that none of the witnesses for the prosecution said that the shooting was directed at any particular person, and the ricocheting of the bullet adumbrated by the

Ballistics Expert, indicates strong support for the contention that the bullet was not fired directly at anyone. Therefore, he contended, there was no aiming of the firearm at the head of the deceased, so there could not have been the required mens rea, no intention to kill.

Two observations on this submission. One, that on the evidence, it is clear that when the four gunmen emerged from the premises on to the street there were other persons on the street. The witness, Hamilton Simmonds, was among a group of men before he moved away and went to another spot to speak to someone else. The shooting started while he was thus positioned. Even while he was prostrate on the street the shots were being fired; up to when he had reached his gate to go into his yard he was assailed by bullets. Certainly, despite the tentative enquiry about shots coming from the direction of the roof of the house where the lookout or watchman, Gregory Green was, there was no evidence to firmly establish that was so. There was no evidence that there was any firing in the air, without any intention to cause harm, and it was then that somehow the pellet ricocheted. In fact those are speculations which cannot stand against the factual evidence that the gunmen fired their guns towards the east. The effect of Hamilton Simmonds' evidence that "I know say that the head one (wound) directly was at the corner," is not reduced by his reply that he did know who they were firing at. Especially, is this quite clear when it is recalled that the shout to him warned him to look out, because Bertie was coming. The foregoing comments on the submissions by Mr. Edwards are made in the light of his submissions subsuming the argument that the learned trial judge should have left the issue of manslaughter to the jury.

During the summing-up, the attention of the jury was directed to the discrepancies between the evidence of several witnesses, and the inconsistencies of any individual witness with his previous testimony. So, bearing that in mind, it is incumbent that, as the judge told the jury over and over, if they accept the evidence of the surrounding circumstances, they would be asked to draw reasonable inferences arising from and consonant with the circumstances so assessed.

One of the first things that was left for their consideration was in the following passage as appears at page 211:

"Now Mr. DeLisser, in his address to you, adds what he calls a theory; and if you were to agree with him, it could only be by inference; and this has to do with that bullet. And he said or suggested, bearing in mind the condition of the bullet and all the surrounding circumstances, is it not more reasonable to think that that shot was fired, not from the direction the men were coming from, but somewhere else? Matter for you, entirely for you."

at

At page 216 he reminded the jury that the defence was not all taking issue as to whether or not Angela was shot and killed that night. "What the defence is saying, and where issue is drawn in a very crucial way, is that they are saying neither Brown nor Parish was there that night, none of them took part in this incident."

When he dealt with the fact of Gregory Green being on the roof he posited for the jury (P 242):

"... you will probably have to ask yourselves why is a man apparently in a sane frame of mind climbing on to a roof top ten o'clock at night and it is raining. What did he go there to do? Because, members of the jury, you can draw inferences to try and complete in your mind's eye the story of Regent Street that night. You have not been told every detail of what might have taken place that night. Indeed, suggestions have been made by defence in particular, that the whole story has not been told. But, members of the jury, you are twelve intelligent people who are sitting there trying as best as you can to find the truth."

Now, does this situation described by Mr. Green, if you believe him, tell you a story? If so, what. Is it that the men or persons were at various positions waiting for something that night? and as part of your deliberations, if you believe this is so, waiting for what, waiting for who? And, members of the jury, in these circumstances if you can draw inferences and they must be reasonable as I told you, it is perhaps of great significance in trying to arrive at the truth as to whether the persons involved in it, because of what you may think was their purpose out there that night, could either be very sure of what they are saying, or lying as to who the men they said they saw were, or making an honest mistake, depending on the view that you may take or find."

Here the learned trial judge had brought to the attention of the jury the setting in which the tragic incident had occurred.

By doing so he brought to their minds the need to give consideration to the possibility that the evidence given fell short of the real facts on that night. At the same time he pointed them to the evidence by the witnesses for the Crown who were not able to say who the men were firing at. He did tell the jury: (p247)

"If you believe that these men came on Regent Street that night, armed with guns, and fired these guns, what was the motivating factor? What did they have in their minds? What were they seeking to accomplish? Is it that there was a -- that there was some expectation that something was happening that night and that the whole scenario was geared along those lines, and that, perhaps, someone knew or suspected that there was going to be an invasion that night, and efforts were made by the Regent Street people to -- That's a matter for you."

From reading the evidence and the summing-up, it is undeniable that the suppositions of the defence were firmly put to the jury. Then, as before us, the question of the ricocheting of the pellet was of great significance to the defence. As the judge put it at page 257:

"They are saying, first of all, that the men were not there, but what they are also suggesting, is that even if you believe that the men were there, based on the condition of the bullet and the view that Mr. Wray, the expert has, that it ricocheted before landing in the head of Angela Simmonds, that you the jury cannot be sure what direction the bullet originated from; that if you are in that state of mind, even if you believe the men were there, that they were armed as the Prosecution witnesses say, you cannot be sure that the fatal pellets came from the gun or guns of these men. If you are not sure about that, then the only alternative is to find the accused men not guilty, because the Prosecution would not have satisfied you that the cause of Angela Simmonds' death was shots fired from the guns of these men."

This point of argument was left to the jury, taking into account all the circumstances as were disclosed by the evidence. That evidence was that the shots came from one direction only, and from firearms held in the hands of the appellants and their companions.

Once the jury accepted this, the question of their acting together, their intention in so doing was graphically pinpointed when the trial judge

advised them on page 218 when he was dealing with the principle of accident as it applies to murder. He said:

"Now I am using this example and I hope I will not be taken literally. It is just for emphasis. If I came here intending to kill Mr. Foreman - I am sorry about that Mr. Foreman, you are the nearest to me - so I take out my gun and I aim at Mr. Foreman and I shoot intending to kill Mr. Foreman, something happens, perhaps I am a bad shot, Mr. Foreman ducks; the gun is defective so it does not hit Mr. Foreman, it hits the lady behind him. I can't come to court and say, well I am not guilty of killing the lady behind Mr. Foreman because I intended to kill Mr. Foreman. so hitting her is an accident.

I can't say that. Why? Because the intention to kill was there when I fired the gun. So if it hit somebody else it does not change the situation, because when I fired that gun I intended to kill. So if I miss and kill somebody else I am still guilty of murder. If it hits some object and ricochets on to the lady it is the same principle. The important thing is what you, the members of the jury, believe was in my mind when I fired that gun. And if it was in my mind to commit murder, or to cause grievous bodily harm, and if I miss the object I intended to hit and hit someone else I am still guilty of murder.

If I came here and said I am going to kill anybody that I see in this court-room and I just fire my gun - who want to get hit get hit, who don't get hit it is their good luck - again, members of the jury if in that situation my own child whom I love and who may have been in the court-room at the time, who I had no intention of hurting, is shot and killed, I am guilty of murder. Why? Because it was my intention when I fired the shot to kill." (p 219)

The matter was not left there, however, because at page 221, he turned their attention to "if a sane and reasonable man armed himself with a loaded gun and proceeded to an area for whatever reason, and fires that gun at a time when people are on the road, if you believe that people were on the road, not just once, but several times, if you believe all these things happened," then the offence of murder was made out.

We do not accept the submission that Alexander, J, should have left the issue of manslaughter to the jury. This was not a reckless use of a firearm, but a wanton shooting at persons who were on the public thoroughfare.

The intent to murder was clearly indicated by the circumstances.

The foregoing considerations point to the strength of the prosecution's case. The judge did put to the jury to decide whether the appellants were present at the scene on that night. The alibi of the appellants was rejected by the jury. In which event, the jury during their deliberations over forty-three minutes had to consider whether the appellants did discharge firearms on that night at the scene. It is appreciated that in view of their stated defence it would be incongruous for them to say that if we were there we did shoot, but we did not intend to shoot at or cause to any person any grievous bodily harm.

Inescapably, this was not a case in which the matter could be dealt with merely saying that there was no mens rea, no intention to kill because the Crown witnesses said only that the shooting was eastwards. The fact of the matter is that the ricocheting bullet did not absolve those who discharged it from a firearm of the responsibility for the death of Angela Simmonds. We therefore find no fault in the summing-up with the result as set out at the commencement of this judgement.