

SUPREME COURT OF QUEENSLAND

CITATION: *R v MacKenzie* [2000] QCA 324

PARTIES: **THE QUEEN**
v
MACKENZIE, Lorna Margaret
(appellant/applicant)

FILE NO/S: CA No 353 of 1999
SC No 522 of 1999

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction & Sentence

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 11 August 2000

DELIVERED AT: Brisbane

HEARING DATE: 31 March 2000; 2 May 2000

JUDGES: McMurdo P, McPherson JA, Dutney J
Separate reasons for judgment of each member of the Court;
McMurdo P and Dutney J concurring as to the orders made,
McPherson JA dissenting in part

ORDER: **Application for leave to appeal against conviction dismissed. Application for leave to appeal against sentence granted. Appeal against sentence allowed by vacating the sentence imposed at first instance and substituting a sentence of five years imprisonment with a recommendation for parole after 12 months.**

CATCHWORDS: CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – HOMICIDE – MANSLAUGHTER – CRIMINAL NEGLIGENCE – where appellant shot husband with a gun she believed to be unloaded – where appellant could recall little of the event in question

CRIMINAL LAW – GENERAL MATTERS – CRIMINAL LIABILITY AND CAPACITY – DEFENCE MATTERS – ACCIDENT – EVENT OCCURRING BY ACCIDENT OR CHANCE – where appellant claimed to have tripped with the result that the gun discharged

CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – HOMICIDE – MURDER – CODE PROVISIONS – where the appellant was originally charged with murder – where the Crown would

have found its evidential burden difficult with respect to intent – where a charge of manslaughter was then offered in exchange for a plea of guilty – where guilty plea was then entered and applicant sentenced on that basis

CRIMINAL LAW – GENERAL MATTERS – CRIMINAL LIABILITY AND CAPACITY – DEFENCE MATTERS – SELF-DEFENCE AND OTHER FORMS OF DEFENCE – PARTICULAR CASES – where appellant was a “battered wife” – whether this line of defence was open to appellant on the facts

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION RECORDED ON PLEA OF GUILTY – GENERAL PRINCIPLES – where appellant claimed that her guilty plea was not entered into with adequate legal advice – where the advice complained of was not claimed to be “flagrantly incompetent” but something less serious – whether the appellant’s guilty plea was free and voluntary or whether it was entered without a proper appreciation of the consequences – whether these factors justified setting aside the plea

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – PLEAS – GENERAL PLEAS – PLEA OF GUILTY – EFFECT

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – MISCELLANEOUS MATTERS – PLEA OF GUILTY, CONTRITION AND CO-OPERATION – GENERALLY – where applicant sought to withdraw her guilty plea on appeal – whether the original guilty plea was now able to be used as a matter of mitigation

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN GRANTED – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – GENERALLY – whether applicant’s prolonged and serious abuse at the hands of the deceased could be taken into account in sentencing in a criminal negligence case

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT –

SENTENCE – FACTORS TO BE TAKEN INTO
ACCOUNT – CIRCUMSTANCES OF OFFENDER

Callaghan v The Queen (1952) 87 CLR 115, mentioned
Evgeniou v The Queen (1964) 37 ALJR 508, mentioned
Falconer v The Queen (1990) 171 CLR 30, considered
Gray (1998) 98 A Cr R 589, mentioned
Grevell (1982) 6 A Crim R 78, mentioned
The King v Lee (1950) 82 CLR 133, mentioned
Marwey v The Queen (1977) 138 CLR 630, mentioned
McDermott v The King (1948) 76 CLR 501, mentioned
Meissner v The Queen (1995) 184 CLR 132, applied
Osland v The Queen (1999) 73 ALJR 173, considered
R v Babsek [1999] QCA 364; CA No 213 of 1999, 7
September 1999, considered
R v Birch CCA No 42 of 1985, 27 March 1985, distinguished
R v Chiron [1980] 1 NSWLR 218, mentioned
R v Gadaloff [1999] QCA 286; CA No 24 of 1999, 24
September 1999, mentioned
R v Green [1986] 2 Qd R 406, mentioned
R v Griffin and Dunkerton [1999] QCA 71; CA No 309, 318
and 352 of 1998, 19 March 1999, distinguished
R v Harvey (SC(Qld), Ryan J, 10 October 1985, unreported),
mentioned
R v Inglis [1917] VLR 672, mentioned
R v Jerome [1964] Qd R 595, distinguished
R v Johnson [1964] Qd R 1, mentioned
R v Lawrie [1986] 2 Qd R 502, mentioned
R v McNally [1954] 1 WLR 993, mentioned
R v Mullen (1938) 59 CLR 124, mentioned
R v Muratovic [1967] Qd R 15, mentioned
R v Paddon [1998] QCA 248; CA No 122 of 1998, 28 August
1998, mentioned
R v Scarth [1945] St R Qd 38, mentioned
R v Tonks [1963] VR 121, mentioned
R v Whelan (CCA No 144 of 1990, 5 October 1990),
distinguished
R v Whiting; ex parte Attorney-General [1995] 2 Qd R 199,
mentioned
Sagiv (1986) 22 A Crim R 73, mentioned
Streatfield (1991) 53 A Crim R 320, considered
Turner (1970) 54 Crim App R 352, considered

Criminal Code s 23 (1)(a), s 23(1)(b), s 24, s 271(1), s
271(2), s 289, s 302 (1)(a)
Mental Health Act 1974 (Qld), s 28A

COUNSEL: A J Glynn SC with P Callaghan for the appellant/applicant
M J Byrne QC for the respondent

SOLICITORS: Boe & Callaghan for the appellant/applicant
Director of Public Prosecutions (Queensland) for the
respondent

- [1] **McMURDO P:** I have read the reasons for judgment of McPherson JA as to the appellant's appeal against conviction. I agree that the appeal against conviction should be dismissed, generally for the reasons given by McPherson JA. I wish only to add the following.
- [2] The material placed before this Court and at sentence suggests the appellant loved the deceased, was extremely remorseful at having caused his death and had great difficulty accepting the consequences of her actions. Her treating psychiatrist, Dr Whiteford, in reports tendered at sentence, documented her major reactive depressive illness after killing her husband. In these circumstances, it is not surprising that her recollection and interpretation of conferences with her lawyers was in retrospect inaccurate. Whilst I did not always find the appellant to be a reliable witness, I did not think she was deliberately untruthful. I accept the truthfulness and reliability of the evidence of Mr Copley and Mr McDonald, which was generally supported by Mr McDonald's notes of his conferences with the appellant. Those notes support the finding that the appellant's lawyers told her that she had a choice as to her plea. If she went to trial she could be found not guilty on all counts; she could be convicted of murder; she could be acquitted of murder but convicted of manslaughter. If she pleaded guilty to manslaughter she would have to serve a reasonably long period of imprisonment but could expect an early recommendation to reflect mitigating factors. She told her legal advisers that she was "not a gambler" and decided to plead guilty to manslaughter. In doing so, I am satisfied she made a free choice.
- [3] The next issue is whether that free choice was based on competent legal advice. It is difficult to see how self-defence under s 271 of the *Criminal Code* could have realistically assisted the appellant. The history of domestic violence given on this appeal would have been sufficient to raise the defence of self-defence in that the appellant may have had reason to believe she was at risk of assault from the deceased and could not effectively defend herself against the assault otherwise than by arming herself with a gun. The evidence supported a finding that the appellant believed the gun was unloaded. It follows that she must have also believed that the deceased knew the gun was unloaded as she claimed that it was always unloaded.
- [4] A defence based on self-defence contained serious flaws if the jury concluded, as was likely, that the gun was unloaded: it seems implausible that she was defending herself from assault by arming herself with an unloaded gun which she must also have believed the deceased knew to be unloaded. To raise such a defence would, as her legal advisers told her, undermine stronger defences which would reduce the offence of murder to manslaughter. The appellant was therefore correctly advised of the advantages of pleading guilty to manslaughter on the basis of criminal negligence, eliminating the slight but nevertheless real risk that she could be convicted of murder and availing herself of the mitigating benefit of a plea of guilty. This sound advice was freely accepted by the applicant who was "not a gambler".

- [5] I am satisfied the appellant entered her plea of guilty in the exercise of a free and informed choice based on competent advice; there has been no miscarriage of justice and the appeal against conviction should be dismissed.
- [6] I note the reference made by McPherson JA to the English Court of Appeal's pronouncement¹ that counsel should emphasise that a defendant must not plead guilty unless he or she has committed the acts constituting the offence charged. That practice has not always been followed by experienced criminal law practitioners in Queensland, some of whom will allow a defendant who claims not to have committed the offence to enter a plea of guilty to it, providing the defendant understands that the effect of the plea of guilty is an admission to all the world that he or she committed the offence charged and otherwise makes a free and informed choice as to the plea. Nothing in this case turns on the point which did not feature in argument. In those circumstances, it is undesirable to express a concluded view as to the propriety of the latter course.
- [7] I turn now to the application for leave to appeal against sentence. The plea of guilty to manslaughter was entered on the basis of criminal negligence. The applicant was sentenced to eight years imprisonment and was recommended for eligibility for release on parole after serving three years. The applicant claims the sentence is manifestly excessive.
- [8] The applicant had been married to the deceased for 39 years; she was 62 years old at sentence; there was substantial independent documented evidence that for all but the first three months of that marriage she was the victim of the deceased's violence. Statements from her three daughters confirmed a long standing pattern of domestic violence based on physical and psychological terror, primarily to the applicant, but also to the daughters. His physical abuse included blows to the applicant's head, face and body; many hits with objects such as a broom handle or rope, on one occasion when she was recovering from a miscarriage; choking; on one occasion holding a knife and on another a broken beer bottle to her throat and pushing her over; kicking her whilst she was on the ground, on two occasions when she was pregnant causing miscarriages. He also subjected the applicant to mental abuse: he threatened to drown her when they were near water, a real threat to her as she is unable to swim; ordered her to take her clothes off; threatened to kill her; forced brutal sexual acts upon her, accompanied by threats of violence to her or the children; verbally belittled her; threatened to burn down the house whilst she was in it; criticised her efforts as a mother; nailed her bedroom door shut from the outside so she could not leave; required her to account for every moment she was away from the house; restricted her contact with other people, even family or friends and especially males; attended all her doctor's visits; demanded that she stay up and cook his dinner regardless of the hour he returned home. The violence usually occurred after the deceased had been drinking.
- [9] The psychiatric material tendered at sentence established she was suffering from a major depressive disorder arising from the stresses of her life including her marriage prior to the offence and from a reactive major depressive illness after the killing. She was genuinely remorseful and despite everything loved the deceased.

¹ See *Turner* (1970) 54 Crim App R 352 at 360.

- [10] On the day of the killing, both the applicant and the deceased were under stress because they had recently sold their home and moved to a less expensive and far more basic rural home at Skyring Creek. The purchase had not settled as the subdivision had not been approved and the Main Roads Department was not satisfied as to the suitability of vehicular access. The deceased was also disappointed that his much loved bull had not won first prize at a recent show. The deceased forced unwelcome and unpleasant sexual contact on the applicant and later punched her. She and the deceased drank almost a flagon of port and though the deceased had the larger share, they were both affected.
- [11] The learned sentencing judge accepted that "after some tranquillity had returned and [the deceased] was sitting on the verandah at the top of the outside stairs, you took his shotgun from within the house. You must have cocked it, not knowing it was loaded, and then it seems, with your finger on the trigger, it discharged." The applicant's claim that she tripped on the stairs immediately before the gun discharged was not disputed. Within seconds she phoned 000 for assistance, was immediately and genuinely distressed and remorseful, and pleaded guilty. The applicant was a retired school teacher of excellent character; many favourable references were tendered on her behalf.
- [12] The determination of an appropriate sentence in this case is difficult as the offence was one of criminal negligence and yet the applicant was a victim of serious and prolonged domestic violence. We were not referred to any comparable sentences with such a factual combination.
- [13] A starting point is to consider sentences imposed for manslaughter following the negligent discharge of guns. In *R v Griffin and Dunkerton*,² the applicants were convicted of manslaughter after a trial. Dunkerton was sentenced to 12 years imprisonment and Griffin to nine years imprisonment. The deceased discharged a shotgun into the air when he heard the car of Griffin's brother revving in a driveway near the deceased's shed. Griffin told Dunkerton to get a gun from their nearby home. The deceased fired two more shots in the air. Dunkerton returned with the gun, discharged it and killed the deceased. Dunkerton had past experience with guns during some months of military service. The judge accepted that Dunkerton deliberately pointed and discharged the gun in the general direction of the deceased without an intention to harm or kill but in a criminally negligent way. Dunkerton had an extensive criminal history including a conviction for dangerous driving causing death for which he was sentenced to 18 months imprisonment; assault of a Correctional Services officer in 1980; assault occasioning bodily harm in 1995; drug offences and offences of dishonesty extending over seven pages of criminal history. Griffin also had an extensive criminal history extending over five pages including an offence of having possession of a weapon whilst unlicensed but had not previously been sentenced to a term of imprisonment. Griffin and Dunkerton initially lied to police about their involvement and a number of defences were raised at trial. Griffin had spent 302 days in custody not solely in respect of this matter and therefore that time could not be the subject of a declaration of pre-sentence custody: in effect, it added two years to the nine year sentence imposed on Griffin. The sentences were not considered manifestly excessive on appeal.

² [1999] QCA 71; CA No 309, 318 and 352 of 1998, 19 March 1999.

- [14] In *R v Whelan*,³ Whelan shot and killed a pizza delivery man, mistakenly believing that he was someone who was planning to harm him. He was convicted of manslaughter after pleading not guilty to murder. Whelan was sentenced to 10 years imprisonment but had already served a little over 10 months in custody awaiting trial, making an effective sentence of 11 years and 8 months. The Court of Criminal Appeal noted that the sentence was a substantial one but within the appropriate range.
- [15] *Whelan* and *Griffin and Dunkerton* are much more serious than this case; the applicant's sentence must be considerably less because of the differing facts, her plea of guilty, her prior excellent character, age, indifferent mental health and remorse.
- [16] In *Streatfield*,⁴ the applicant, in an act of monumental stupidity, shot and innocently killed his de facto wife who was six months pregnant. He was convicted after a trial. The act did not arise out of a domestic quarrel and was done without any intention to harm. The applicant was in the kitchen playing with his own gun with which he was familiar; it was not ejecting properly and he had been testing it. Believing it was unloaded, he discharged it whilst pointing it at his wife. He was sentenced to nine years imprisonment which, because of the six and a half months imprisonment served by way of pre-sentence custody, was effectively a 10 year sentence. The Court of Appeal reduced the sentence to five years with a recommendation for parole after 18 months.
- [17] It must be noted that the sentence imposed by this Court in *Streatfield* was determined after considering sentences imposed for domestic killings and reliance was placed on *R v Green*.⁵ Since *R v Whiting; ex parte Attorney-General*,⁶ six years imprisonment is no longer considered the upper sentencing limit in manslaughter cases arising out of the frustrations engendered by close relationships, as it was in *Green*.⁷
- [18] Although neither *Streatfield* nor this applicant intended to harm the deceased and both *Streatfield* and this applicant believed the gun was unloaded, the degree of negligence in this case is slightly less than in *Streatfield*. *Streatfield* was familiar with the gun and was generally experienced in the use of guns, whilst this applicant had never before loaded or used any gun; *Streatfield* discharged the gun whilst pointing it at his wife, whilst this applicant tripped on the stairs with her finger on the trigger of the cocked gun. Unlike *Streatfield* she pleaded guilty.
- [19] An important issue for determination is what consideration, if any, the Court should give to the shocking history of domestic violence perpetrated upon the applicant by the deceased where the offence is one of criminal negligence. In my view, the history of domestic violence has considerable relevance and is a significant mitigating factor absent in *Streatfield*.

³ CCA No 144 of 1990, 5 October 1990.

⁴ (1991) 53 A Crim R 320.

⁵ [1986] 2 Qd R 406.

⁶ [1995] 2 Qd R 199.

⁷ At 201.

- [20] The applicant was a retired school teacher who, as the learned sentencing judge noted, should have known better than to point a cocked gun, even one which she believed was unloaded, in the direction of a human being. She did so in circumstances where she had been drinking, a factor which helps explain but not excuse her foolishness. The deceased's violence on that day and throughout their 39 year marriage further explains how, despite her education and the normal common sense one would expect from a 62 year old teacher, mother and grandmother, she was driven to stupidly pick up the gun, cock it, and point it in the general direction of the deceased, so that when she stumbled it discharged and killed him.
- [21] Psychologist Penny Gordon, who interviewed the applicant on a number of occasions and carefully documented her family dynamics and the history of the abuse, noted that one of the impacts on the applicant of the long term abuse and violence in the relationship was that it contributed "to ineffective problem solving behaviour and a perception by [the applicant] of the narrowing of her options over time. A perception of narrowed options can often result in decisions made by the abused woman that from the outside look like poor judgment."
- [22] The history of domestic violence which led the applicant to react in an irrational and criminally negligent way is an additional mitigating factor which explains how she came to depart so gravely from normal acceptable community safety standards. It makes her culpability less than in *Streatfield*.
- [23] *R v Birch*⁸ has some comparable features with this case although it does not involve criminal negligence. Birch, a 56 year old physically handicapped woman, had been a long term victim of domestic violence from her husband whom she killed. She pleaded guilty to manslaughter on the basis that she intended to hurt him, but not seriously, and she was sentenced to six years imprisonment with a recommendation for parole after 18 months. The applicant had suffered extreme cruelty, both mental and physical, from her deceased husband over a protracted period of 25 years. On the day of the offence, there had been a further argument after the deceased had been drinking; he physically assaulted the applicant and forbid her from visiting her mother. Later they had an argument because the deceased had revoked his promise to take her on a Barrier Reef holiday. She snapped and picked up what she believed was her cane but which was in fact a 17 inch long engineer's hammer weighing 1.2 kgs. She swung it two or three times at the deceased, who was lying on the bed, fracturing his left temple, left cheekbone and each orbit of the eyes. When she realised what she had done she immediately sought assistance. He died several months later after being visited regularly by the applicant. The majority of the Court of Criminal Appeal did not alter the sentence. *Birch* was more serious than this case as Birch intended to harm the deceased and deliberately struck at him at least twice with a dangerous weapon.
- [24] A substantial period of imprisonment must be imposed upon this applicant, first, to deter those who would handle dangerous guns in this criminally negligent manner, especially in the context of domestic arguments fuelled by the consumption of alcohol and second, to recognise the applicant's criminal responsibility for the death of another. Such conduct is unacceptable in a civilised society; even the grim history of domestic violence present in this case cannot neutralise such criminally

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CCA No 42 of 1985, 27 March 1985.

negligent conduct. A nominal or fully suspended sentence would be inadequate. The sentence imposed was however manifestly excessive in this unusual combination of circumstances. The various competing interests can best be met by substituting a sentence of five years imprisonment with a recommendation for parole after 12 months.

[25] I would refuse the appeal; grant the application for leave to appeal against sentence and allow the appeal against sentence by vacating the sentence imposed at first instance and substituting a sentence of five years imprisonment with a recommendation for parole after 12 months.

[26] **McPHERSON JA:** On 24 August 1996 Mr William McKenzie was sitting on the front veranda of his home when he was shot in the back. The shot passed through and shredded both of his lungs and he died more or less instantly. It came from the barrel of a shotgun held about a metre away by his wife Mrs Lorna McKenzie.

[27] A few minutes later at 8.27 am a call was received from Mrs McKenzie on the emergency number 000 at the Maroochydore police station. It was taken by Const. James Stevens and the ensuing conversation was electronically recorded. Mrs McKenzie began by saying that the police should be sent to Skyring Creek Road, Belli, where she lived, because there had been a shooting, and "I didn't think the gun was loaded". Statements by her to that effect were repeated on some six or seven occasions in the course of the conversation before the police arrived at Skyring Road. Her conversation with Snr. Const. Steve Jones at the house was also recorded. She did not know "why she had gone and got the gun ... he never had the gun loaded". She said "It's always in the cupboard but it's never loaded". She had just walked out of the door, and it went off "... just went off ... it's never loaded".

[28] Mrs McKenzie was taken to the police station, where she was interviewed. There was a recorded interview beginning at 11.51 am, in the course of which she was informed that her husband was dead. On hearing this, she became very upset and incapable of answering questions. The interview was suspended soon after it had begun. The services of Mr McDonald, a local solicitor experienced in criminal matters, were engaged by her family and in the afternoon he had a lengthy conference with her, after which a recorded interview starting at 6.57 pm was conducted by police in his presence. In the course of it, she said she and her late husband had been under stress in the preceding few weeks because of problems in settling the purchase of their property. They had both been drinking port that morning. There was an altercation between them about some fencing that was being done at the property, and he had punched Mrs McKenzie three times around the head. They were in the bathroom when he hit her, after which he had gone out with another bottle of port to the veranda, where she saw him through the bathroom window. The next thing she could remember was hearing the loud bang made by the gun going off. Apart from recalling that she had thrown the gun on the bed in the bedroom afterwards, she remembered nothing about the incident. She had not intended to kill her husband, whom she loved. She just went out there because he had said he was going to leave ("... just gonna walk off the property and leave me here"). She had, she said, just tripped down the stair on the veranda. The gun, which was used for shooting flying foxes, was kept in a wardrobe or cupboard in the bedroom. It was, she repeated, never loaded. She knew where the ammunition was,

but she had not loaded it and had never fired it before. After the interview, she was arrested and charged with murder.

[29] On 22 February 1997, Mrs McKenzie (or, as she is in this Court, the applicant for leave to appeal against conviction) was committed for trial on a charge of murder of her late husband. She underwent psychiatric examination, in all, by four psychiatrists. Professor Yellowlees concluded that she was insane at the time of the killing. The other three psychiatrists thought she was not insane, although Dr Harvey Whiteford formed the opinion that she was suffering from diminished responsibility at the time she discharged the shotgun at her husband. Professor Grant and Dr Fama disagreed with that diagnosis. On 12 March 1997 the matter was referred to the Mental Health Tribunal, where a dispute about the facts emerged. In consequence, on 16 October 1998, the Tribunal concluded that a finding about her mental state at the time of the offence could not be made, but determined that the applicant was fit for trial in terms of s28A of the *Mental Health Act 1974* (ex 1).

[30] The applicant was then faced with a trial in the Supreme Court on the indictment presented on 21 February 1997 charging her with the murder of her late husband. The proceedings before the Mental Health Tribunal took some time, and it was not until November 1998 that a trial was listed for hearing in March 1999. Beginning in March 1999, further trial dates were progressively allocated. April 19 was one, and then 19 July, and 2 August. Eventually, on 14 May a further trial date of 27 September 1999 was fixed. Finally, when the proceedings came before a Judge of the Supreme Court on 29 September 1999, *nolle prosequi* was entered on the indictment charging murder, and a fresh indictment was presented charging the applicant with manslaughter, to which she pleaded guilty. On 5 October 1999, she was sentenced to imprisonment for eight years in respect of that offence, with a recommendation that she be considered for parole after serving three years of that sentence.

[31] On 22 October 1999 the applicant appealed against her conviction and applied for leave to appeal against sentence. To pursue an appeal against conviction she needs, and now seeks, leave to withdraw her plea of guilty to the offence of manslaughter. For that she has to show that the entry, or perhaps it is the acceptance, of her plea of guilty to that charge produced a miscarriage of justice. The onus rests on the applicant: *Grevell* (1982) 6 A Crim R 78. It is capable of being discharged in more than one way. In giving the judgment of this Court in *R v Paddon* ([1998] QCA 248; CA No 122 of 1998, 28 August 1998) Chesterman J said that what must be shown is that the conduct of the defence fits the description "flagrantly incompetent". The Court there was, however, concerned with conduct of the accused's legal representative in the course of a trial resulting in conviction, and not, as here, with a plea of guilty that is sought to be set aside on appeal. No doubt, however, the quality of the advice leading to such a plea may be a factor to be considered on an application of either kind. In any event, the applicant also relies on other matters as going to show that, as was said in *R v Chiron* [1980] 1 NSWLR 218, 241, "the entering of the plea of guilty should be regarded, in all the circumstances, as attended by such unfairness as to warrant a new trial".

[32] What is required to sustain a proper plea of guilty appears from the reasoning of their Honours in *Meissner v The Queen* (1995) 184 CLR 132, 141, which is that

it should have been entered "in the exercise of a free choice in the interests of the person entering the plea". Some of the relevant authorities are collected in *R v Gadaloff* ([1999] QCA 286; CA No 24 of 1999; 24 Sept 1999), where a plea of guilty is referred to as "the most cogent admission that can be made", citing *Sagiv* (1986) 22 A Crim R 73, 81. It constitutes a formal or "solemn" admission or confession made in open court of all the essential factual ingredients of the offence charged : *R v Inglis* [1917] VLR 672, 674; *R v Tonks* [1963] VR 121, 127. Approaching it in that way nevertheless leaves open the possibility, recognised by Deane and Dawson JJ in *Meissner* (1995) 184 CLR 132, 148, 157, that a plea of guilty which is the product of intimidation, duress, improper inducement, or harassment is not a free and voluntary plea on which a court may properly act. The same is, of course, true of an admission or confession made out of court : see *McDermott v The King* (1948) 76 CLR 501, 511, although in that instance it is the prosecution that bears the onus of proving that the statement was made voluntarily in the exercise of free choice to speak or remain silent: *The King v Lee* (1950) 82 CLR 133, 189. No doubt the difference in the onus of proof between these two forms of confessions can be traced to the fact that a plea of guilty is made formally in open court in response to a specific charge; and also that, on appeal, it is for the applicant to demonstrate that there has been such a miscarriage of justice as to justify setting aside the conviction below. Once that is established, the jurisdiction of this Court is enlivened. At first instance, the power at common law to allow a guilty plea to be withdrawn before conviction may well be substantially wider : *R v McNally* [1954] 1 WLR 993; and cf. *R v Jerome* [1964] Qd R 595, 603; but at that stage judgment or sentence has not been given.

[33] With this in mind, it becomes possible to consider the matters relied on by the applicant here. Apart from the general complaint of unfairness, the three grounds specified in the applicant's written outline of submission are that the applicant's plea of guilty was entered without her having received "adequate, complete and appropriate" advice; that it was not a free and voluntary plea; and that it was entered without her having a proper appreciation of its consequences. In support of these submissions, a series of specific "flaws" are identified in para 21 of the applicant's written outline. Without doing them injustice, they are perhaps capable of being reduced to two principal matters. First, a failure by the applicant's solicitor to take sufficient instructions from her (§21.1), with the consequence that counsel was not in a position to properly advise (§21.3), and did not advise, her on the choices actually available to her (§21.4), or else gave incomplete and incorrect advice to her (§21.5), so preventing her from making an informed decision. Secondly, the failure of both her solicitor and counsel to recognise "personal factors" affecting their and her capacity to communicate effectively in giving or taking "critical instructions" or advice on the conduct of her defence (§21.2). The result, as it is submitted, is that the applicant was not appropriately counselled not to enter a guilty plea when it was not clear that she wished to do so (§21.6), all of which taken together had the consequence of producing a miscarriage of justice (§22).

[34] As regards the first branch of the application, the written outline (§12) concedes that the applicant does not "purport" to establish that the conduct of her professional legal advisers was flagrantly incompetent, but presumably was something less serious. Considered generally, it does not seem to me to be possible to accept the applicant's submission that her solicitor Mr McDonald either did not, or was unable to, take sufficient instructions from her for that purpose. Starting

with the private conference with the applicant, which he said went on for "a good couple of hours" during the afternoon of 24 August 1996, Mr McDonald attended at the police interview of his client which lasted from 6.57 to 8.05 pm on that day. He or his firm represented her both at the committal proceedings and the Mental Health Tribunal, at which counsel was instructed. At the request apparently of the applicant, Mr McDonald then engaged Mr Copely of counsel, to whom he sent a brief on trial. The brief delivered late on 26 March 1999 was arranged and indexed in eight segments. There were the tapes of the telephone calls and police interviews on 24 August 1996, including typed transcriptions; photographs of the scene; indictment and depositions with index; transcripts of conferences with the client, which, when later consolidated, produced a statement some 60 pages long (ex 4); papers from the Mental Health Tribunal with an index; and "research materials" comprising reported decisions and a range of published papers covering legal issues on a variety of topics, including "battered wives", of potential relevance to possible defences. Also, of course, there were medical reports, statements from investigating police and other witnesses including family members, the coroner's report, and so on, extending over 250 pages or more. Further material of other kinds was provided to counsel as matters progressed toward the first appointed trial date on 19 April 1999 and beyond.

[35] I have no hesitation in saying that, in terms of the material provided, counsel was fully and adequately briefed. There was, as it happens, a period of some four months between receipt of the brief and the hearing date that eventuated on 29 September 1999. There is no reason to doubt Mr Copely's evidence that he used the time to read and digest the brief and its contents thoroughly. He is a senior member of the junior Bar with considerable experience in murder and other criminal trials. Lengthy conferences were held in his chambers with the applicant and Mr McDonald on 1 April and again on 21 and 23 September 1999, at which the evidence and factual and legal issues were discussed and explained to her. A summary of the issues and their legal implications was forwarded to Mr Copely by Mr McDonald in a letter dated 17 April 1999. As a result of the first conference on 1 April 1999, the applicant authorised her legal representatives to make an offer to the Crown to plead guilty to manslaughter on the basis of Dr Whiteford's opinion that she was suffering from diminished responsibility. Dr Whiteford was then in the United States, and it was explained to her that arrangements would have to be made to bring him back for the trial. On her instructions, matters were set in train for that to take place.

[36] According to Mr Copely, the applicant had wished the defence to be run on the basis of diminished responsibility and accident. Crown counsel who was originally in charge of the matter rejected an offer made on her instructions to plead guilty to manslaughter on that basis; but when another counsel took over the prosecution, a further approach was made on behalf of the applicant. Statements taken by the defence were delivered to him at about midday on 23 September 1999 and elicited an agreement with the Crown to accept a plea of guilty to manslaughter on the footing of criminal negligence on her part. On 29 September the applicant signed and dated a handwritten addendum to her statement (ex 4) confirming that, when arraigned, she would plead guilty to a single count of manslaughter of her husband on 24.9.96 on that basis. She entered that plea at the sentence hearing before Helman J in the Supreme Court at Brisbane on 29 September 1999.

[37] Arising out of these events, the applicant now submits that she was not properly or competently advised, or did not fully understand the implications of what she was doing when she pleaded guilty. Many affidavits were filed and read in support of, and some in opposition to, the application in this Court. Before us, the applicant, Mr Copely and Mr McDonald were each cross-examined, the evidence of Mr Copely being received by video link from Roma where he was appearing as counsel in proceedings there. In his address on behalf of the applicant, Mr Glynn SC suggested that we might regard Mr McDonald "as being able to be described as passive in attitude, but defensive", and Mr Copely as "somewhat more aggressive and somewhat more defensive of his position". I agree with those assessments of both witnesses, while adding that I formed the impression that, rather than being overly defensive, Mr McDonald emerged as a careful and thoughtful witness, whose testimony I have no hesitation in accepting in all essential respects.

[38] It was suggested on the strength of some of the expert evidence on behalf of the applicant that she was essentially a submissive individual, who in the presence of men, would "do what she was told". I am bound to say that that was not the impression conveyed by seeing and hearing her give her evidence in the presence of a large audience in this Court. The applicant was born in 1936, and so was 59 years old at the time of her husband's death in August 1996. After leaving school, she attended Teachers Training College, which was no small achievement in the Queensland of those days, especially for a young woman with a rural background. She had some success in sport, and there is a reference from Professor Jones stating that she has a good command of English, as indeed was evident in the proceedings before us. Under cross-examination, she appeared confident and well able to assert herself, to the point of meeting one of Mr Byrne's questions with the response:

"I disagree with you entirely Mr Byrne, and I'm afraid that I am sorry to say but I think that's a very unfair question and summing up of me that you put to me."

She had the capacity of an intelligent witness to pick where a line of questioning was heading and to take early evasive action, on some occasions prematurely so. Because the matter is ultimately one primarily of impression, and there is no reason to think that the applicant's condition in September 1999 was very different, it is perhaps not necessary to traverse her evidence in greater detail than to say that I do not accept the submission that, at the conferences with her legal advisers, she was unable to communicate her views, or to understand what she was being told, or that she was overborne or overwhelmed by their advice, or by their view of her best interest to the exclusion of her own.

[39] I will, however, record my conclusions on three specific points that arose in the course of the evidence. One is that I am in no doubt that, despite the applicant's claim that she did not know when she first became aware she was being charged with murder, she was by September 1999 fully conscious of the difference between that offence and manslaughter, and of the consequences in terms of length of sentence that flowed from it. Another is that I accept that she was never told by Mr McDonald or Mr Copely that she had to "practise" saying she was guilty in anticipation of being arraigned in court. Reasoning with an accused person by pointing out the advantages of pleading guilty, and the disadvantages of not doing so, is not improper. See *Meissner* (1995) 184 CLR 132, 157 (Dawson J); and a degree of pressure may be "quite legitimate" if exerted by an accused's own lawyer

acting solely in the interests of the accused (Deane J, in *Meissner*, at 149). In England, it has been said that it is the duty of counsel "to give the accused the best advice he can and, if need be, advice in strong terms ... Counsel, of course, will emphasise that the accused must not plead guilty unless he has committed the offence charged" : see *Turner* (1970) 54 Cr App R 352, 360. I am satisfied that these requirements were not disregarded by her counsel and solicitor in advising her. A third matter is that, when the options and implications of going to trial on a charge of murder, or of pleading to manslaughter, were explained to her, as I accept they were, I am satisfied that she did say that she was "not a gambler". In his written notes of the conference held on 23 September, Mr McDonald recorded her remark to that effect, which, he explained in evidence, he took to mean she was "not wanting to gamble on the outcome of the trial, or a trial". There are sound reasons for accepting his evidence, and for rejecting her assertion that the word is not even part of her vocabulary.

[40] In the result, I am not prepared to find that there were difficulties of communication or comprehension on the applicant's part, or any other form of conduct on the part of Mr McDonald or Mr Copely that operated to deprive her of the power to exercise a free choice in deciding to enter, or not to enter, a plea of guilty to the charge of manslaughter presented against her on 29 September 1999. What remains to be considered is whether, before making that choice, the advice she received from her solicitor and counsel was so deficient or defective as to justify or require the setting aside of her conviction and plea, and ordering that there be a trial of the charge of murder against her. To do so requires investigation of the weaknesses and strengths of the prosecution case against her.

[41] To secure a conviction of murder against the applicant, the Crown would have had to prove that the applicant killed Mr McKenzie with the intention of causing his death or doing him grievous bodily harm: Code s 302(1)(a). The act that caused his death was discharging the gun at close range in his direction: *Falconer v The Queen* (1990) 171 CLR 30. At a trial for murder, it would have been for the prosecution to prove beyond doubt that that act was the result of a conscious choice on her part, and not something that had occurred independently of the exercise of her will in terms of s 23(1)(a) of the Code. The prospects of doing so were no doubt diminished by her repeated statements, both in the initial "000" telephone conversation on 24 August 1996 and later, that the gun had discharged when she tripped. In addition, like the appellant in *Falconer v The Queen* (1990) 171 CLR 30, the applicant here would have had an arguable case that her actions were carried out while she was in a "dissociated" state. The same sequence or series of events, coupled with other evidence, would or might have raised a question whether she might not have been suffering from diminished responsibility. Against this, there was good reason to think that she must have cocked the firearm. There was available evidence from a police firearms expert that the gun was not capable of being discharged without first being cocked; and the only reasonable inference was that she herself had cocked it before it discharged.

[42] Still, the Crown was also bound to prove that the applicant had intended to kill or do grievous bodily harm: Code s 302(1)(a). Her assertions that she had tripped, or as her statement ex 4 more than once expresses it, "stumbled", and her repeated statements that she believed the gun was not loaded, might have raised a doubt in the minds of a jury whether such an intention was proved against her. On this

aspect of the case, it would not have been necessary for the applicant to rely on s 24 or s 23(1)(a) of the Code. A reasonable doubt whether there was a genuine mistake on her part about the gun being unloaded, or that the gun had accidentally discharged because she tripped, would have led to acquittal on the charge of murder, not because of either of those two provisions, but because, as Latham CJ said in *R v Mullen* (1938) 59 CLR 124, 130, "it was an essential part of the Crown case to negative accidental killing". A reasonable doubt engendered by her statements that such a mistake had occurred, or that the killing was accidentally caused by her tripping or stumbling on the step, would have tended to undermine proof of the intention required by s 302(1)(a) without resort to either s 24 or s 23(1)(a). It would nevertheless have been open to a jury to find that such an intention existed on her part. There was some evidence from which it might have been inferred that she loaded the shotgun before going out to the veranda with it. A box of cartridges was found in an opened drawer in the bedroom where she admitted she had later thrown the gun. In addition, there were several statements in the course of the telephone call to the effect that Mr McKenzie had said he was going to leave her, in defiance, it seemed of settled arrangements for their future which they had previously made.

[43] As it appeared to the applicant's legal representatives, the possibility that the applicant might be convicted on a charge of murder was by no means negligible. The risk that a verdict of murder might be returned may have been slight, but its consequences (life imprisonment) if it eventuated were severe, and could not be equated with a more substantial risk of the less serious consequence in terms of prison sentence that would follow from entering a plea of guilty to manslaughter. It was, in my view, because she appreciated the implications of that distinction that the applicant told her legal advisers that she was "not a gambler". It is, however, also clear that, while they were successful in conveying this state of affairs to the applicant, Mr Copely and Mr McDonald also greatly discounted the applicant's prospects of securing a complete acquittal of the charge of killing her husband, whether her action in doing so was considered as one of murder or manslaughter. On appeal, it was submitted that because of this the applicant was denied the benefit of competent advice, and so prevented from making an informed decision in her own interests about whether or not to plead guilty to manslaughter, or to take her chance at a trial on a charge of murder. Assuming that this would, if established, demonstrate the necessary element of "unfairness" in her entering the plea of guilty, or show that a miscarriage of justice has taken place, it becomes necessary to consider whether there was any basis in law on which the applicant could fairly be said to have had a chance of outright acquittal of which she was deprived by being given and acting on incompetent advice.

[44] As to that, it was submitted on appeal that her legal advisers had failed to advise her sufficiently or at all of her prospects of obtaining a verdict of outright acquittal on all charges on the strength of self defence in terms of s 271 of the Code. It is the fact that, as I find, Mr Copely and Mr McDonald did discuss that question with Mrs McKenzie. What is said, however, is that they did so on the footing that, for self defence to succeed, it was necessary for her to have been under an immediate threat of injury from her husband. To express it in the form in which it is summarised in Mr McDonald's conference note of 23 September 1999:

"Notwithstanding Mrs McKenzie's evidence of domestic violence, that [a] section 271 defence would not appear to

be supported by clear testimony from her as to an imminent threat of force from Bill McKenzie likely to cause death or grievous bodily harm".

It was put to Mr McDonald, that in adopting this approach, he and counsel had "missed the point". His response was "not so much missed the point as a question of the way we saw the strength of evidence, or the lack of strength of evidence. It was very remote in time". The "lack of immediacy" he said, was "certainly a strong influence in our thinking ...".

[45] There are, as I see it, really two points involved in these questions and answers. The first is whether what is conveniently, but not altogether accurately, called the "battered wife syndrome" is in law material to an issue of self defence on a charge of homicide; the second is whether, if it is, there was here any evidence capable of raising such an issue. The applicant had never said she was acting in self defence when she shot her husband, and there was little or no direct evidence from her on the subject. Mr McDonald in his notes and his evidence may have been referring to either or both of these matters. There was, as he and Mr Copely were aware, a considerable body of material in their possession showing that the applicant, according to her own statements as well as those of others, had been periodically subjected to physical assaults, and brutal, threatening and humiliating treatment by her husband throughout their married life of some of 40 years: see, for example, ex 4, at pp 6 to 15. There were witnesses, both members of the family and others, who were able and willing to attest to such incidents, of which the last was said to have taken place in February 1996, and had taken place again with the three punches delivered to the applicant's head in the bathroom on the very morning of and shortly before the killing. The applicant said that, on that morning, she was conscious of her husband's mood and apprehensive of what he might be going to do to her.

[46] If the applicant's counsel and solicitor in advising her were acting under the impression that self defence was available only in response to an immediate physical threat to the person of the applicant, then they were mistaken about the law. Evidence of "battered wife's syndrome" of the kind that was available to the applicant and her legal advisers in this case is a proper matter for expert evidence. See *Osland v The Queen* (1999) 73 ALJR 173, 185 col 2C, 206-207. It is capable of demonstrating "the heightened arousal or awareness of danger which may be experienced by battered women" (Gaudron, Gummow JJ, in *Osland*, at 185 col 1D), which may bear directly on, or be relevant to, a defence of either provocation or self defence (Kirby J, at 206-207). The issue is, however, as Gaudron and Gummow JJ pointed out (73 ALJR 173, 186 col 1A):

"not simply whether the accused is a battered woman.
Rather the issue is usually whether she acted in self defence
and, if not, whether she acted under provocation."

Evidence of the kind described might, in the opinion of Kirby J (73 ALJR 173, 209 col 1A-B), be offered as being relevant to the question:

"...(4) whether, in the evidence, the particular accused believed on reasonable grounds that there was no other way to preserve himself from death or grievous bodily harm than by resorting to conduct giving rise to the charge".

[47] The form in which the question was stated by Kirby J in *Osland v The Queen* corresponds very closely in substance with the provisions of s 271(2) of the Criminal Code. Section 271, which is headed Self-defence against unprovoked assault is in the following terms:

"271.(1) When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for the person to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.

(2) If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that the person cannot otherwise preserve the person defended from death or grievous bodily harm, it is lawful for the person to use any such force to the assailant as it necessary for defence, even though such force may cause death or grievous bodily harm".

In the many decisions in which s 271(2) has been considered, it seems to me that the authoritative view, and certainly the interpretation most favourable to someone (for present purposes, I will assume it is the applicant) relying on its provisions, is that the accused is entitled to be acquitted of a homicide charge if she believes on reasonable grounds that she cannot save herself from death or grievous bodily harm except by using life-threatening force to defend herself, irrespective of the consequences that may have for the life or health of her assailant. See *R v Muratovic* [1967] Qd R 15, 18-19 (Gibbs J, with Lucas J agreeing), as interpreted and approved by the High Court in *Marwey v The Queen* (1977) 138 CLR 630, 636-637, 640-641, 642, 643; *R v Lawrie* [1986] 2 Qd R 502, 504, 506; and *Gray* (1998) 98 A Cr R 589.

[48] The only qualification introduced by the High Court in *Marwey* in approving the reasoning of Gibbs J in *R v Muratovic* is that their Honours did not consider it necessary, in applying s 271(2) to enlist s 24 of the Code to exempt an accused person from criminal responsibility because of an honest and reasonable mistake on his or her part. In imposing the requirement that the accused "believes on reasonable grounds" that she cannot otherwise preserve herself, s 271(2) in effect supplies its own version of s 24 of the Code, to which it is consequently not necessary to resort except for the limited purpose described by Connolly J in *R v Lawrie* [1986] 2 Qd R 502, 504. Section 24 may still be invoked, his Honour said, and must be the subject of a direction by the trial judge, "if the accused had an erroneous understanding of some fact which, if true, would have supported the existence of a reasonable ground for his belief". *R v Lawrie* [1986] 2 Qd R 502, 504, referring to the observations of Barwick CJ in *Marwey v The Queen* (1977) 138 CLR 630, 637.

[49] For present purposes it may be assumed that, by reason of her husband's previous treatment of her, Mrs McKenzie satisfied that requirement; that is, that at

the time she approached her husband on the veranda with the gun in her hands, her state of mind was such that she honestly and reasonably believed facts that put her life, health or bodily integrity at risk of a further and life-threatening assault by her husband (see ex 4, at 40, line 24). The question, however, is whether this or other evidence available to her was such as to justify a belief on her part on reasonable grounds that she could not defend herself from such an attack "otherwise" than by presenting the gun to, or pointing it in the direction of, her husband. It is at this stage of the inquiry that, in my opinion, an attempt to raise self defence at the trial in answer to the charge of homicide would have gone awry. It is plain that in the 000 telephone call the applicant had repeatedly told the police that she believed the gun was not loaded. That part of her account is less prominent in her consolidated statement provided for the conferences with counsel in September 1999; but, when asked at the formal police interview on the evening of 24 August 1996, at which her solicitor was present whether she knew the gun was loaded, she answered "No, it's never loaded". Paragraph 47 of the applicant's written outline on this appeal submits that all previous times the applicant had indicated that she did not recall cocking the gun and believed that the gun was "not loaded". There are cross-references in note 75 to para 47 to passages in the telephone call and police interview transcripts, which have been referred to earlier in these reasons. The original submission on the sentence appeal argued that she should have been sentenced on that basis. It was overtaken at the second day's hearing of her application in this Court by a fresh submission on sentence; but a jury could not have failed to be impressed by her initial statements to the police on the telephone and in the recorded interview on 24 August 1996 that she believed the gun to be unloaded. Indeed, if she knew it was loaded, there was a compelling inference that she had loaded it, and had done so with the intention of killing her husband or of doing him grievous bodily harm. The risk of her being found guilty of murder would have been increased by a considerable margin.

[50] Assuming, as I consider to be most likely, a trial jury would have been inclined to find that the applicant honestly believed the gun was not loaded, it would in my opinion have been well-nigh impossible for her to raise at trial a defence under s 271(2) of the Code. Twelve ordinary members of the community, however sympathetically disposed to her they might have been, would have had great difficulty with the notion that anyone could believe on reasonable grounds that there was no way of defending herself from apprehended assault except by using a gun which she genuinely believed not to be loaded. When confronted with this problem, Mr Glynn SC turned his attention to s 271(1) of the Code. The difficulty for the applicant with that provision is that it proceeds on the assumption that the force used in self defence is, objectively speaking, "not such as is likely to cause death or grievous bodily harm". In fact, the contrary was demonstrated here when Mr McKenzie was killed. Mr Glynn nevertheless endeavoured to show that s 271(1) was capable of applying to a case like this. There are many obstacles in the way of such a submission, not the least of which is the presence of s 271(2). It has traditionally been regarded as catering for "major" unprovoked assaults, where, as happened here, the force used in self defence causes death or grievous bodily harm. See *R v Johnson* [1964] Qd R 1, 12-13, and *R v Muratovic* [1967] Qd R 15, 18. If s 271(1) was designed to cover such cases, there would have been no need for s 271(2) at all, which, it may be added, was originally the second paragraph of what until recently was but a single section 271. In my respectful opinion, the prospects

of persuading a trial judge in the circumstances of this case to direct a jury under s 271(1) would have been negligible.

[51] The applicant's legal advisers would have been justified in advising the applicant accordingly, with the consequence that reliance on self-defence under s 271(2) at a trial of the applicant for killing her husband would almost certainly have failed if, as might be expected, the jury adopted a rational or reasoned approach to the matter. It is true that they might have concluded that the applicant had intended only to frighten her husband with what she believed to be an unloaded firearm; but, for that to be effective, her belief would have had to have been not only "honest" or genuine, but, in terms of s 272(2) (and also s 24, if it were relevant) also based "on reasonable grounds". She might perhaps have succeeded in raising a doubt about that element; but she would then have been left with the very real difficulty not only of accounting for her conduct in menacing, or preparing to menace, her husband with a gun which inferentially she must have cocked ready to discharge, but which, according to her assertions, she was too unskilled to be capable of loading or of checking to see if it was in fact loaded or unloaded. In those circumstances it is difficult to believe that she would not have been found guilty of manslaughter by criminal negligence to which she pleaded guilty, if not perhaps even of the charge of murder which by her plea to manslaughter she succeeded in avoiding.

[52] In the result, no miscarriage of justice has been shown to have resulted from the failure of the applicant's legal advisers to advise her to go to trial on a charge of murder, or in advising her as they did to plead guilty to manslaughter on the basis of criminal negligence. It follows that Mrs McKenzie was not deprived of a fair chance of outright acquittal on the charge of having killed her husband. On the view I have formed, she never had any real chance of being acquitted at trial except perhaps by a jury acting perversely, which is not a consideration that her legal advisers were called on to contemplate, or which they could have adopted as a proper criterion in advising her.

[53] On the question of leave to appeal against sentence, I have had the advantage of reading the reasons of the President and Dutney J on this matter. The range of sentences in cases of manslaughter is naturally very wide because, as has often been acknowledged, so much depends on the circumstances. The closest analogue to the facts of the present case is *Streatfield*, (1991) 53 A Crim R 320, where the appellant "playfully" aimed a loaded firearm at his wife across the table, and pulled the trigger. The shot killed her and their unborn child with whom she was pregnant. There the appellant's case was that he believed the firearm was unloaded; he was found guilty of manslaughter on the ground of criminal negligence under s 289. For criminal responsibility to attach under that section of the Code, there must have been conduct on the part of the person charged amounting to recklessness in the control of the thing that causes death, or at the very least a grave departure from the ordinary standard of care expected of a person having it under his control. See *R v Scarth* [1945] St R Qd 38; *Evgeniou v The Queen* (1964) 37 ALJR 508, 515.

[54] In *Streatfield* that test was satisfied because of the accused's failure to make sure that the gun was not loaded before pointing it at his wife and pulling the trigger. It is true that, on one view of it, his handling of the firearm was more reprehensible than that of the applicant here. He deliberately pointed the firearm

and pulled the trigger, whereas here the gun discharged when, according to what the applicant said, she stumbled on the step going on to the verandah. But this, in my respectful opinion, is to miss the point of the particular form of criminal responsibility imposed by s 289. It is removed from the operation of s 23(1)(a) (involuntariness) and s 23(1)(b) (accident) of the Code by the fact that s 23(1) makes those "excuses" for, or forms of exemption from, criminal responsibility subject to the express provisions (of which s 289 is one) of the Code relating to negligent acts and omissions. See *Callaghan v The Queen* (1952) 87 CLR 115, 119. It is the accused's "control" or handling of the firearm or dangerous thing of which he is in charge, and not just the particular "act" which results in death, that is the focus of s 289. Viewed in this way, it does not seem to me to make much difference that Streatfield claimed to have experience of handling firearms, whereas the applicant here had none. On one view of it, her conduct was the more reprehensible because she was aware she lacked the ability to check if the gun was in fact unloaded and she knew she had not done so. She must have cocked the gun, without which it would not have discharged. By contrast, Streatfield claimed that his experience of firearms led him to think it was unloaded.

[55] It therefore seems to me that, in relation to the degree of culpability of their respective actions, there is not much to choose between the two offenders. As a trial judge, I sentenced Streatfield to imprisonment for nine years, or effectively to 10 years, as he had already spent half a year in custody at the time of sentence. On appeal, the Court held that sentence was excessive and reduced it to five years, with a recommendation for parole after 18 months. de Jersey J (as he then was) would have reduced the sentence to seven years. On reflection, I respectfully consider imprisonment for seven years to have been about the right level. In *Streatfield* the attitude of the majority of the Court was partly influenced by the decision in *R v Green* [1986] 2 Qd R 406, concerning the factor of mitigation afforded by "frustrations engendered by close relationships", which they considered as having to some extent circumscribed the sentencing discretion in cases of that character; but, in so far as *R v Green* introduced an upper limit on sentences for manslaughter in such circumstances, it has since been qualified, if not overruled, by what was said in *R v Whiting, ex p Attorney-General* [1995] 2 Qd R 199.

[56] All matters considered, however, including what was said by de Jersey J in his dissenting judgment in *Streatfield*, I consider that the head sentence imposed on the applicant in the present case may fairly be considered excessive and should be reduced to imprisonment for six years. In a case of killing by criminal negligence like this, it seems difficult to find a completely logical rationale for taking account of the applicant's earlier brutal treatment by her deceased husband. The very nature of the offence of manslaughter on the basis of criminal negligence to which she pleaded guilty might be thought to exclude consideration of that factor if she caused his death through the reckless handling of the gun, rather than because of some degree of provocation or self defence. Still, it might serve to explain why she went and got the gun in the first place. The applicant was herself unable to offer any specific reason for her having done so, although she did at one stage in the initial telephone conversation with the police say that she had done it to frighten him. In relation to sentence, one of the difficulties confronting the learned sentencing judge, as well as this Court, is that the applicant was unable to remember anything between the time of her going to get the gun from the bedroom and her becoming conscious that it had discharged. Drawing all appropriate inferences in her favour, it

may fairly be seen as a crime in which, intending to frighten her husband against repeating his behaviour of that morning or on earlier occasions, she took the gun out to the verandah to back up a warning that she was intending to give to him. This perhaps sits rather uneasily with her other statements about his threat earlier on that day that he was going to leave her; but, in the absence of a more accurate or reliable account of events, it is the best that can be made of the evidence we have.

[57] What remains to be considered is the matter of a parole recommendation. Unlike *Streatfield*, the applicant here pleaded guilty to the offence of manslaughter by criminal negligence. A plea of guilty ordinarily attracts a recommendation for parole in some form. Traditionally it has been regarded as doing so primarily for two reasons. One is that it manifests remorse on the part of the offender in committing the offence. The other is that it effects a saving of the expense, and, perhaps one may also say in some cases, of the emotional stress, involved in a criminal trial. At sentence before the primary judge, these matters were taken into account and reflected in the recommendation for eligibility for parole after three years.

[58] Matters changed, however, when the applicant sought to have her plea of guilty set aside in this Court. Her appeal was lodged only three weeks after she entered her plea of guilty, and less than three weeks after she was sentenced. Her remorse, if any, was therefore rather short-lived, and, on the appeal before us, her personal attitude was not noticeably remorseful. Moreover, it is by no means clear to me that much, if any, saving in cost or expense was effected through not having a trial. Instead, two full days were spent in this Court considering her appeal, which, if it had been no more than a sentence application for leave to appeal, could have been disposed of in far less time. Affidavits of some length were generated, and witnesses were cross-examined. A trial would in the nature of things have occupied more time, although the prosecution case against her was, as I see it, capable of being established on little more than the transcript of the telephone conversations and interviews on the day of the killing. Some saving was certainly effected by her plea of guilty, but perhaps not very much. In addition, her claim to set aside her plea was, on the view I have taken of it, not well-founded at all. Not much reflection would have been needed to demonstrate that she could not have been intending to defend herself with a gun she believed to be unloaded. To that extent, her position does not differ greatly, if at all, from *Streatfield*, where the accused pleaded not guilty. As well, her application to this court involved serious reflections on her former legal advisers involving assertions amounting to professional misconduct on their part, which she failed to establish. Of course, this may fairly be said to be a risk incidental to the profession of solicitors and barristers; but, as her current solicitor Mr Boe implied in a letter he wrote to Mr McDonald before the hearing, it does not for that reason become any more enjoyable. As it is, for reasons I have already given, the applicant's case that she was prone to submissive behaviour in the presence of men was not borne out by her evidence or demeanour in the witness box in this Court.

[59] It is, of course, to be clearly understood that under our legal system, a person is quite entitled to do what the applicant sought to do here without being penalised for failing to make good the grounds for doing so. On the other hand, however, someone who elects to adopt that course of proceeding is, if he or she is unsuccessful, scarcely in a position to insist that the plea of guilty that was

originally entered is to be regarded as indicating remorse on her part, or of having effected much saving in terms of time and expense. Having repudiated her plea of guilty, the applicant is not in a position to claim the benefit of having entered it in the first place.

[60] The applicant is nevertheless entitled to consideration for her good character and past service to the State as a teacher and to her children as a mother, as well as the hardship she has had to endure during her married life. She had no prior convictions of any kind. Although until sentence she was on bail, she must also have suffered the strain of having had the whole process of trial and sentence looming ahead of her for what has now been a very long time. Taking all these matters into account, I consider that she should be recommended for eligibility for parole after two years.

[61] I would therefore dismiss the application for leave to appeal against conviction; but grant leave to appeal against sentence, and allow that appeal by setting aside the sentence imposed and substituting a sentence of imprisonment for six years with a recommendation for parole after serving two years.

[62] **DUTNEY J:** I have had the benefit of reading in draft the reasons of McPherson JA in relation to the appeal against conviction and the reasons of the President on the appeal against conviction and the application for leave to appeal against sentence. With the same qualification made by the President in relation to *Turner* (1970) 54 Crim App R 352 at 360 I agree with the reasons of McPherson JA on the appeal and with the order he proposes. I agree also with the additional remarks of the President in relation to the appeal against conviction. I have had the further advantage of reading in draft the reasons of McPherson JA in relation to sentence. In so far as reliance is placed on *Streatfield* (1991) 53 A Crim R 320 I consider it a more serious case than this. In *Streatfield* the gun was deliberately pointed at the deceased and the trigger pulled, albeit in the belief the gun was unloaded. To point a gun at anyone whether loaded or not is an act of extreme foolishness which goes beyond the actions of the applicant in this case.

[63] I agree generally with the reasons of the President in relation to the application for leave to appeal against sentence and I agree with the orders she proposes. I have been assisted in coming to this conclusion by the matters that follow.

[64] It has been observed that:

"manslaughter is, above all, an offence in which particular circumstances vary so much that it is difficult, and perhaps undesirable, to try to generalise in advance about the appropriate sentence to be imposed": *R v. Whiting; ex parte the Attorney General* [1995] 2 Qd R 199 at 202.

Despite these remarks some guidance can be obtained from cases displaying features in common with this one. Significant features of this case include the age and previously unblemished record of the applicant, the abusive relationship, the absence of intent to cause harm, the unlikelihood of further offence or risk to the public and the immediate and obvious remorse of the applicant.

- [65] In *R v Green* [1986] 2 Qd R 406 a teenage boy who shot his abusive and drunken father on the spur of the moment with a shot gun had his sentence reduced from 9 years with a parole recommendation after 3½ years to 5 years with a parole recommendation after 18 months. A head sentence of 5 - 6 years was said to be an appropriate range for domestic violence manslaughter where no special features called for either a longer or a shorter term. While the suggestion of an appropriate range of 5-6 years is in no way to be taken as putting a cap on sentences for this type of offence it is a range consistent with other cases displaying similar features to this one.
- [66] In *R v Birch* (CCA No 42 of 1985, 27 March 1985) a head sentence of 6 years with a recommendation for parole after 18 months for a 56 year old, abused and crippled wife who “snapped” and beat her sleeping husband with a hammer causing his death some months later was undisturbed. Despite an intention to “hurt” her husband the Court of Criminal Appeal accepted that there was no intention to kill or cause grievous bodily harm. In *R v Harvey* (SC(Qld), Ryan J, 10 October 1985, unreported) a woman who stabbed her abusive husband to death was sentenced to 6 years with a recommendation for parole after 2 years.
- [67] There are cases in which higher sentences have been imposed. In *R v Babsek* ([1999] QCA 364; CA No 213 of 1999, 7 September 1999) 9 years was increased to 10 years with no recommendation. The killing there was the result of a deliberate shooting not involving criminal negligence as the consequence of an emotional reaction by the prisoner to the break up of her relationship. Save for the ending of the relationship the actions of the deceased did not contribute to the conduct of the prisoner. After observing that *Babsek* was a “very serious example of manslaughter and the penalty must reflect its gravity (para 12), the Court added:
 “Deterrence of those who choose to damage their partner rather than let him or her escape a relationship is an important sentencing objective. People seeking to escape such relationships deserve the help of the law.” (para 14)

Such a case has little in common with this one. This case has much more in common with *Birch* and *Harvey*. In my view the head sentence of 8 years is too high and fails to properly allow for the lack of intent, good character and antecedents of the applicant and the background of violence by the deceased against the applicant (including on that morning) which seems likely to have been the real cause for the applicant seeking out the gun in the first place. The fact of the abusive relationship is relevant to the sentence because in a case like this as with a case of diminished responsibility the deceased has, by his own conduct, significantly contributed to the fatal act. The seeking out of the weapon the negligent handling of which caused the death, is a predictable response to the deceased’s abuse. The fact that here the killing was the result of negligent handling of a firearm the applicant believed was unloaded is a significant matter. In such a case the deterrent aspect does not carry quite the same importance as where the killing is the result of a willed act, albeit while the perpetrator is in a state of diminished responsibility. The absence of a willed act in my view enables the Court to take a more lenient view of the offence than might otherwise have been the case.

[68] In my view a head sentence of five years proposed by the President is adequate to act as a deterrent to the commission of this type of offence in the particular circumstances here. I do not think the attempted withdrawal of the plea of guilty necessarily indicates a lack of remorse. In my view the evidence demonstrates an immediate and continuing remorse by the applicant for what she had done. She had to live with the consequences of her actions and the pending trial for three years from the event to the date of conviction. This is in itself a punishment where one is (as the applicant was) so obviously distressed by what she has done. I do not think the appeal against conviction (while in view of its length abrogating much of the benefit of the original plea of guilty) in the circumstances necessarily demands a period of actual imprisonment beyond that suggested by the President when all the peculiar facts of this case are taken into account. I agree that the applicant should be eligible for parole after one year.