HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY

BETWEEN: **SEYYED ABDOLZADEH FARSHCHI**

Appellant

and

THE KING

Respondent

APPELLANT'S REPLY

PART I: CERTIFICATION AS TO PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: REPLY TO RESPONDENT AND INTERVENOR

A. Issues relevant to both grounds

2. The submissions of the respondent and the Attorney-General for the State of **Victoria** emphasise the importance of reading the charge as a whole.[1] However, those submissions do not meaningfully engage with the application of that approach to a direction that purports to define the standard of proof.[2] Authorities dealing with that issue support the appellant's argument.[3]

3. That emphasis also obscures the two overlapping but conceptually distinct questions in this case: is the Direction picked up by s 68(1)? And was the jury in this trial misdirected on the standard of proof?[4] The first question is logically anterior. The question is whether the Direction alters, impairs or detracts from the operation of s 13.2 of the *Code* or s 80 of the *Constitution*.[5] That cannot be answered by reference to the summing up in an individual case.

4. The respondent submits that the issue in this case is whether, if a trial judge gives the Direction, they will *necessarily* have directed the jury to apply a standard that is not beyond reasonable doubt.[6] That is not the test. It is impossible to know with certainty how jurors understand a direction.

5. Determining whether the jury was misled instead requires an evaluative assessment of what the jurors might reasonably have understood.[7] A similar

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1 See, Respondent's submissions (**RS**) [23], [34]-[40]; Victoria's submissions (**VS**) [9], [41]-[45], [47]-[49].

2 For example, RS [35] places significant reliance on the statements of Barwick CJ in *La Fontaine* (1976) 136 CLR 62, but the direction in *La Fontaine* did not purport to define reasonable doubt. Similarly, none of the authorities cited in VS [47] concerned a definitional direction of a similar character to the Direction in this case.

3 See, appellant's primary submissions (**AS**) [15] (n 17).

4 See further, AS [12]-[21].

5 See, by analogy with s 79(1) of the *Judiciary Act*, *Masson v Parsons* (2019) 266 CLR 554 at 579-580 [43] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ). See also, *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428 at 447 [32] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

6 RS [2]. See also, RS [34] and VS [41].

7 See further, AS [14] (n 16).

threshold should be applied to the question of inconsistency; if the Direction is apt to mislead jurors as to the proper standard of proof, that undermines the operation of s 13.2 and s 80.[8]

6. Contrary to RS [23], the appellant's approach to these questions is neither narrow nor semantic; it is focussed on how jurors — laypeople drawn from the community — are likely to understand the Direction. That focus explains why the intent of Parliament does not assist,[9] and why reliance on principles of statutory interpretation is flawed.[10] It also explains why the submission that the Direction risks shifting the focus onto the defence case is not "internally incoherent."[11] Rather, it recognises the overall effect of the Direction on jurors.

7. That effect includes the tendency of the Direction to encourage jurors to subject their mental processes to objective analysis through the lens of whether their doubts are 'realistic'. The assertion that that submission is contrary to authority misreads *Dookheea*.[12] There, the Court rejected the proposition that whenever a jury recognises a doubt, the jury *ipso facto* has a reasonable doubt. The Court did not depart from the broader point in *Green* that jurors should not be encouraged to subject their mental processes to objective analysis.[13]

8. That point from *Green* is consistent with the understanding that proof beyond reasonable doubt, contrary to the respondent's repeated emphasis on

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8 If inconsistency requires a concrete determination of the meaning of the Direction, the appellant maintains that it does, necessarily, detract from the criminal standard of proof.

9 Cf VS [8], [32], [39], [44], [46]. In relation to the intention to modernise language, the material cited at RS [30] (n 19) does not support the proposition for which it contends. The paper states broadly that the intent was to modernise the language from *Lifchus*, but it says nothing specific about the lineage of 'unrealistic possibility'. It would rather appear that 'fanciful' replaced 'frivolous.' See, Criminal Law Review, Department of Justice, *Jury Directions: A New Approach* (January 2013) at 94. Relatedly, that the legislative reforms were motivated by a desire to ensure juries understand the standard (VS [20]-[38]) is no of assistance. If members of the community do not properly understand the concept, that underscores the danger of improperly defining it by use of a novel expression. Research cited at VS [27] (n 35) demonstrates a concern that some forms of instruction have the potential to *decrease* a juror's comprehension of the criminal standard: Smith, "The Beyond a Reasonable Doubt Standard of Proof: Juror Understanding and Reform" (2022) 26(4) *The International Journal of Evidence & Proof* 291 at 294.

10 Cf VS [42] (n 60). In particular, the submission that the Direction has to be understood in light of the other limbs of s 64(1) ignores that s 64(1) does not require trial judges to use any particular form of words. See further below at [9], indicating that, in practice, not all judges use each of the s 64(1) limbs when directing a jury.

11 Cf RS [33].

12 RS [32].

13 See, *Dookheea* (2017) 262 CLR 402, especially at 416-417 [25], 418- 423 [28]–[36] (the Court).

probabilities and likelihood,[14] is about more than degrees of probability. It is a state of *subjective* persuasion.[15] The following example illustrates the point:[16] 25 prisoners are in a prison yard when 24 of them attack the prison guards. The remaining prisoner tries to stop the attack. There is no available evidence distinguishing the innocent prisoner from the rest. Local prosecutors randomly select one of the prisoners and bring him to trial for participating in the attack. The possibility that the prisoner put on trial might have been the one who tried to stop the attack would not be fanciful. It would not be imaginary. It would not be unreal. It would however be understood by many jurors to be 'unrealistic.'

9. Finally, the submission that judges in Victoria overwhelmingly consider that s 64(1) and its predecessor have enhanced their ability to explain proof beyond reasonable doubt to jurors is overstated.[17] The submission was based on a study in which only ten judges were asked the relevant question.[18] Eight agreed with the proposition, and only some indicated that they use all limbs of s 64(1).[19]

B. Ground two

10. The prudential approach is not "a rigid rule imposed by law."[20] The Court must make an evaluative choice. Here, three factors weigh powerfully in favour of determining the constitutional question.

11. First, the appellant's grounds are interrelated. Section 13.2 of the *Code* takes its meaning from its constitutional and common law context.[21] Further, as explained in AS [14],[22] ground one involves an evaluative assessment about the

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14 See, RS [25], [26], [28].

15 See, the Hon Stephen Gageler AC, "Evidence and Truth" (2017) 13 (3) *The Judicial Review* 1 at 7. See further, Glanville Williams, "The Mathematics of Proof" (1979) *Criminal Law Review* 297 at 298 regarding the limitations of statistical probabilities.

16 Drawn from, Sarah Moss, "Knowledge and Legal Proof" in Tamar Szabó Gendler & Ors (Eds), *Oxford Studies in Epistemology* (2022) Vol 7 at 176, referring to the example from Charles R Nesson "Reasonable Doubt and Permissive Inferences: The Value of Complexity" (1979) 92(5) *Harvard Law Review* 1187. See Nesson at 1225: "…any conceptualization of reasonable doubt in probabilistic form is inconsistent with the functional role the concept is designed to play".

17 VS [40].

18 See, Clough et al, *The Jury Project 10 Years On — Practices of Australian and New Zealand Judges* (April 2019) at 58.

19 Ibid. It is therefore unclear how regularly the Direction is used by trial judges.

20 See, eg, *Zhang v Commissioner of the Australian Federal Police* (2021) 273 CLR 216 at 230 [22] (the Court), quoting *Clubb v Edwards* (2019) 267 CLR 171 at 192-193 [35]-[36] (Kiefel CJ, Bell and Keane JJ).

21 See further, AS [79].

22 See also, above at [5].

risk of jurors being misled by the Direction. That assessment should consider the *likelihood* of jurors being misdirected and the *gravity* of the risk should it eventuate. Determining ground two would elucidate the constitutional values that underlie the gravity of the risk; avoiding ground two would tend to lessen the sensitivity of the assessment to its constitutional context.[23]

12. Second, what is necessary "to do justice in the case"[24] is capable of encompassing more than a result or outcome. It can extend to the principles for which a case stands, and the bases on which it was decided.[25] Such considerations are particularly acute in a criminal case involving the deprivation of liberty, where the constitutional validity of the verdicts are in question.

13. Third, contrary to RS [46], [59] and [62], unsettled authority is not a persuasive factor in favour of avoidance. Rather, it is a good reason to address a constitutional question.[26] Here, the respondent submits that "a broad cohesive vision of s 80 continues to elude the High Court."[27] There is no real dispute that this case presents a sufficient factual foundation to answer the constitutional question posed.[28] Doing so would present an opportunity to articulate a "cohesive vision" of s 80 within its modern constitutional context.

14. That context is critical. Victoria submits that "the BRD standard involves the striking of a balance between competing societal values — the value of securing the conviction of persons who have committed crimes and the value of avoiding wrongful convictions."[29] That submission overlooks the constitutional values at

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23 See, by analogy, *Palmer v Western Australia* (2021) 272 CLR 505 at 554 [145] (Gageler J), quoting Holmes, "Law in Science and Science in Law" (1899) 12 *Harvard Law Review* 443 at 460.

24 See, RS [44], quoting *Lambert v Weichelt* (1954) 28 ALJ 282 at 283 (the Court). See also, ***Mineralogy*** *Pty Ltd v Western Australia* (2021) 274 CLR 219 at 247-248 [56] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

25 See, *Mineralogy* (2021) 274 CLR 219 at 260 [104] (Edelman J).

26 *Private R v Cowen* (2020) 271 CLR 316 at 348 [91], 354-355 [107] (Gageler J); 374 [153], 375-377 [158]-[162] (Edelman J). See also, *Mineralogy* (2021) 274 CLR 219 at 260 [103] (Edelman J).

27 RS [60], also submitting that "no clear majority view has prevailed as to the intended larger purpose of s 80", quoting Stellios, "The Constitutional Jury — 'A Bulwark of Liberty?'" (2005) 27 *Sydney Law Review* 113 at 113, 127.

28 In contrast to many cases applying a prudential approach, including, for example, *Mineralogy* (2021) 274 CLR 219. In the appellant's submission, the need for restraint or caution is at its highest in cases that lack a sufficient factual foundation. Cases that could be disposed of on multiple bases raise distinct considerations and, ordinarily, yield more readily to countervailing considerations.

29 VS [63].

stake.[30] Victoria further submits that placing the choice of standard in the hands of Parliament would "better reflect the democratic design of the *Constitution*."[31] The design of the *Constitution* though is also sensitive to individual liberty. The democratic function of s 80 places control of certain judicial outcomes in the hands of the people; the standard of beyond reasonable doubt ensures that control is exercised consistently with the constitutional value placed on liberty, and the constitutional compact between individual and State.

15. The approach urged by the appellant is not in tension with authority. Since well before federation the overarching premise of the criminal law has been that the prosecution must prove *its case* beyond reasonable doubt. That is so even when a reverse onus may apply for a specific element of an offence or for a particular defence.[32] That is so even if a different standard is prescribed for a particular element.[33] There is a clear difference between reversing the onus or modifying the standard for an element, and uniformly diminishing the criminal standard.[34]

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30 See further, AS [62]-[74].

31 VS [63].

32 Contrary to RS [52], that was contemplated by the appellant's primary submissions: AS [75], AS [19] (n 23). In *Woolmington v Director of Public Prosecutions* [1935] AC 462 at 481, before referring to the golden thread and its exceptions, Viscount Sankey LC observed: "Juries are always told that, if conviction there is to be, the prosecution must prove the case beyond reasonable doubt". See further, AS [56]-[57]; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 501 (Mason CJ and Toohey J); *RPS v The Queen* (2000) 199 CLR 620 at 630 [22] (Gaudron ACJ, Gummow, Kirby and Hayne JJ); *Azzopardi v The Queen* (2001) 205 CLR 50 at 64 [34] (Gaudron, Gummow, Kirby and Hayne JJ); *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 136 [102] (Hayne and Bell JJ). See also s 141(1) of the *Evidence Act 2008* (Vic) and the other Uniform Evidence Acts.

33 See, RS [50] citing s 13.2(2) of the *Code* and ***Leask*** *v Commonwealth* (1996) 187 CLR 579. *Leask* was argued on the basis that the offence provision was not validly enacted pursuant to a head of Commonwealth power. It does not foreclose the proposition that there might be other constitutional limits to reducing the standard of proof in relation to a specific element of an offence. However, that issue does not need to be determined in this case.

34 In that respect, it should also be noted that the power to reverse an onus is not without limitation. See, eg, *Nicholas v The Queen* (1998) 193 CLR 173 at 190 [24] (Brennan CJ), 236 [156] (Gummow J); *Kuczborski v Queensland* (2014) 254 CLR 51 at 122-123 [244] (Crennan, Kiefel, Gageler and Keane JJ).