HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE AND EDELMAN JJ

THE QUEEN APPELLANT

AND

KRITSINGH DOOKHEEA RESPONDENT

The Queen v Dookheea
[2017] HCA 36
13 September 2017
M159/2016

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of Victoria made on 12 April 2016 and, in their place, order that:*

    (a) *the application for leave to appeal against conviction is granted;*

    (b) *the appeal is treated as instituted and heard instanter and is dismissed.*

On appeal from the Supreme Court of Victoria

Representation

G J C Silbert QC with B L Sonnet for the appellant (instructed by Solicitor for Public Prosecutions (Vic))

O P Holdenson QC with C A Boston for the respondent (instructed by Stary Norton Halphen)

CATCHWORDS

The Queen v Dookheea

Criminal law – Criminal procedure – Jury directions – Standard of proof – Where jury directed that Crown required to prove accused's guilt not beyond any doubt but beyond reasonable doubt – Whether such direction error of law – Whether such direction productive of substantial miscarriage of justice.

Words and phrases – "any doubt", "beyond reasonable doubt", "fanciful doubt".

1 KIEFEL CJ, BELL, GAGELER, KEANE, NETTLE AND EDELMAN JJ. The question for decision in this appeal is whether the Court of Appeal of the Supreme Court of Victoria (Maxwell P, Redlich JA and Croucher AJA) erred in holding[1] that it was an error of law productive of a substantial miscarriage of justice for the trial judge (Emerton J) to direct the jury that the Crown did not have to satisfy the jury of the respondent's guilt "beyond any doubt, but beyond reasonable doubt". As the authority of this Court stands, it is generally speaking undesirable for a trial judge to direct a jury in terms which contrast proof beyond reasonable doubt with proof beyond any doubt. But, for the reasons which follow, it was not an error to do so in the circumstances of this case.

Facts

2 The respondent ("Dookheea") was arraigned before a judge of the Supreme Court of Victoria on one charge that he did at Tarneit in Victoria on 9 May 2013 murder Faisal Zazai ("the deceased"). On 15 May 2014, Dookheea pleaded not guilty to murder but guilty to manslaughter, but the Crown did not accept that plea in discharge of the indictment and so the matter proceeded to trial. The sole issue at trial was whether Dookheea had acted with murderous intent. At the conclusion of the trial, Dookheea was convicted of murder and sentenced therefor to 19 years' imprisonment with a non-parole period of 15 years.

The case at trial

3 The Crown case at trial was that the deceased had been the owner of a pizza store business one store of which was managed by Dookheea's wife, Ms Ramjutton. At relevant times, Dookheea and Ms Ramjutton were in significant financial debt and faced eviction from their home. On the evening of 9 May 2013, the deceased went to Dookheea's and Ms Ramjutton's home to collect the takings from the store managed by Ms Ramjutton. Earlier that day, Dookheea had gambled away the takings at the Crown Casino.

4 The evidence showed that shortly after the deceased arrived at the home, a violent physical altercation started between Dookheea and the deceased in the kitchen and then continued on the front lawn as the deceased attempted to flee from Dookheea and Ms Ramjutton. It was accepted that Dookheea had placed

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1 *Dookheea v The Queen* [2016] VSCA 67 at [89].

his hands around the deceased's neck and squeezed until the deceased stopped resisting. Dookheea and Ms Ramjutton then dragged the deceased's body into the house and placed it in a spare room, where Dookheea sat on the deceased's back. Shortly afterwards, the police arrived. Expert medical evidence pointed strongly towards the deceased having died as the result of neck compression (or strangulation).

5 When first questioned by police, Dookheea stated that the deceased had come to his home in the belief that Ms Ramjutton would be at home alone and that the deceased had attempted to sexually assault her. Dookheea claimed that, when Ms Ramjutton cried out for help, he intervened to assist her and a fight ensued during which the deceased suddenly went limp while on the front lawn. Dookheea said that he had taken the deceased back into the house in order to prevent the deceased escaping.

6 In a subsequent police interview, Dookheea conceded that the account of events he had previously given was false. He explained that he had once worked as an employee in the deceased's pizza store business and then acquired a franchised store from the deceased. He said that the franchise had failed and he blamed the deceased for his difficult financial circumstances, which he attributed to the failure of the franchise. He admitted that he had conceived of a plan to assault the deceased in order to extract money from him, or at least persuade him to waive a debt owed to him. Dookheea also admitted that, prior to the deceased's arrival at the house, he had purchased duct tape and parked his vehicle away from the house so as to make the deceased believe that Ms Ramjutton was home alone, and that it had been part of his plan to hit the deceased if necessary. He admitted to contemplating disposal of the deceased's corpse if the deceased died during the execution of this plan.

7 Dookheea did not give or call evidence at trial. His defence was that the Crown had not established beyond reasonable doubt that he had acted with intent to kill or inflict really serious injury.

The course of the trial

8 The trial was conducted over 10 days in 2014. The trial judge gave the jury a number of preliminary directions before evidence was called. As part of that exercise, the trial judge directed the jury as to the standard of proof as follows:

> "The other important thing for a criminal trial such as this is that the prosecution must prove the offence beyond reasonable doubt. Beyond reasonable doubt. That's the expression that's used and one that you might have heard before (you probably will have). It's the highest standard known to our legal system. If any of you have been involved in civil cases involving contractual disputes or personal injuries or anything of that kind - disputes around fences, neighbourhood disputes - the [civil] standard is a different standard, it's a lower standard. It's on the balance of probabilities: is something more probable than not. The criminal standard is much higher than that. If you're not satisfied beyond reasonable doubt of the elements of the offence, then you should find Mr Dookheea not guilty of that offence."

9 Later on the same day, in the course of the Crown's opening address to the jury, the Crown prosecutor stated that the sole issue in the trial would be the question of intent and that it was incumbent on the Crown to establish murderous intent beyond reasonable doubt:

> "The real issue in this trial will be what was [Dookheea's] state of mind at the time that he did the acts that caused the death of the victim in this case, [the deceased]. How do you work out what his state of mind is? You look at the evidence as it unfolds, you consider, for example, the evidence of the pathologist who we will call and she will give evidence of the number of injuries and talk about the amount of force required, the time that it required to strangle somebody. So all of those things will be things that you'll ultimately consider as to whether you are satisfied beyond a reasonable doubt whether he is guilty of murder.
>
> ...
>
> It's the third element for murder that will be in issue, that the Crown must prove, thirdly, that at the time that [Dookheea] was performing the acts that caused the death, that he was intending to kill - this is the required state of mind - that he was intending to kill or cause really serious injury."

10 During the trial, the trial judge answered a jury question as to the meaning of really serious injury in relation to murder. Her Honour prefaced her answer with the following statement as to the necessity for the Crown to establish each of the four elements of murder beyond reasonable doubt:

> "In order for the accused to be found guilty of murder, the prosecution must prove beyond reasonable doubt four elements of murder. ... The third is that the accused committed those acts intending to kill someone or cause them really serious injury; and that is the issue in this trial."

11 In the course of delivering the Crown's closing address to the jury, the Crown prosecutor re-emphasised the need for the jury to be satisfied of guilt beyond reasonable doubt, and thus for the jury to be *sure* of Dookheea's guilt:

> "Because there are four elements in relation to murder which the Crown must prove beyond a reasonable doubt. [Dookheea] and Mr Dempsey on his behalf do not have to prove anything, we do. We have to prove it beyond a reasonable doubt. Each element to murder we must prove beyond a reasonable doubt to your satisfaction, acting on the evidence.
>
> Let's go through the elements because I should do that in any event.
>
> The first one is the Crown must prove beyond a reasonable doubt that it was the acts of [Dookheea] that caused the death of [the deceased]. There's no argument in this case that he did cause his death.
>
> Secondly, the Crown must prove beyond a reasonable doubt that at the time that he did that he was acting consciously, voluntarily and deliberately. There's no argument about that in this trial.
>
> It is the third element that is in dispute, that is, at the time that he was performing the act or acts that killed [the deceased], the Crown must prove beyond a reasonable doubt he was intending to kill or at the very least intending to cause really serious injury. That's the issue. Can we prove it? If we haven't proved it to your satisfaction you will acquit him, that is, you will bring back a verdict of not guilty. If you are not sure - and that is the collective state of your minds: did he, didn't [he], we don't know - you will acquit him because you would not be satisfied beyond a reasonable doubt. ...
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> So we have embarked on this task - and I suppose I should mention the fourth element being that the Crown must prove beyond a reasonable doubt that the acts - that when he killed [the deceased] that he had no lawful justification or excuse, for example, acting in self-defence. That does not arise here. So there is no suggestion at all that he was acting in

self-defence and the defence, as I understand it, concede that. So we're focusing on the narrow issue, that third element.

...

Let's just pause again for a moment. The Crown undertakes to prove beyond a reasonable doubt - I've gone through all the elements and, in particular, this third element, the one in dispute, but it does not mean that we have to prove each and every fact that we rely upon. ...

In other words, going back to what your task is, thinking about can the Crown prove beyond a reasonable doubt [Dookheea] was intending to kill or cause really serious injury?"

12 On the same day, while delivering the defence closing address to the jury, defence counsel similarly re-emphasised the need for the jury to be satisfied of guilt beyond reasonable doubt:

"To judge this man's action for the most grave charge that we know, the man's rigour and detachment, it is not enough for you to say well, we think he probably meant what the Crown say he meant or he probably meant or he might have meant; you need to be satisfied beyond reasonable doubt of that which is presented to you by the prosecution in a very narrow band of things that are in issue in this case, about what he was thinking. And your decision is final. You can't call each other up or Facebook each other three weeks from now or a month from now and go look, I've just had this nagging doubt about why people behave strangely when they've done something wrong. I'm not sure it means that. You can't do that. You can't have second thoughts. So if you're not sure, if you have a doubt, if you have a reasonable doubt, then that's the way you approach your task, if that means you're true to your oath."

13 On the next day of trial, the trial judge directed the jury in the course of the charge as to the standard of proof beyond reasonable doubt as follows:

"In order for the prosecution to succeed and for you to find Mr Dookheea guilty of murder, the prosecution must establish each element of the offence. I will explain to you shortly what the elements of the offence are, that is, the offence of murder. *Elements* is just a lawyers' term for the essential ingredients or the essential components of the

offence. The prosecution has to prove each of these elements beyond reasonable doubt.

The words 'beyond reasonable doubt' are common English words. They mean what they say. Beyond reasonable doubt is not something that is capable of expression on some sort of percentage basis. You will remember at the start of the trial I contrasted the beyond reasonable doubt standard, which is the highest standard known to law, with the much lower civil standard that applies where there are contractual disputes or personal injuries claims or things of that kind. There, it is a much lower standard, it is called the balance of probabilities, more likely than not.

It is for you as the jury to decide in respect of the elements of murder whether you have a reasonable doubt that an intention to kill or cause really serious injury was present at the time Mr Dookheea killed [the deceased].

During the course of my charge at various times I am going to say 'the Crown' or 'the prosecution' - those terms are interchangeable - the Crown or the prosecution must establish or prove something. When I say that, understand that I mean the prosecution must establish or prove the thing beyond reasonable doubt. But I am not necessarily going to repeat those words every time or we would be here for longer than we need to. But just understand that that is the burden that is carried by the Crown. That does not mean the Crown has to prove every fact that it puts before you or every fact that it says you should accept. What the prosecution has to prove beyond reasonable doubt are the elements of the crime, that is, the essential ingredients of the offence. I will take you to those in a minute and you will already have I think a pretty clear understanding that three of the elements of murder are not in dispute in this case. There is really only one of the elements and that is intention.

It is not disputed by Mr Dookheea that his acts caused the death of [the deceased], that he did those acts consciously, voluntarily and deliberately and that he had no lawful justification for doing them. You should have no difficulty in finding these elements proven beyond reasonable doubt. But whether Mr Dookheea intended to kill or cause really serious injury to [the deceased] remains to be proven by the prosecution beyond reasonable doubt.

> You will have noticed that Mr Dookheea as the accused did not give evidence. Because it is for the prosecution to prove its case beyond reasonable doubt, he is not bound to give evidence. ... You must therefore not draw any inferences against Mr Dookheea for not choosing to give evidence; you must not even consider that he did not give evidence when deciding whether the Crown has proved its case beyond reasonable doubt."

14 Specifically with respect to inferential reasoning, the trial judge directed the jury in terms that further emphasised the need to be satisfied beyond reasonable doubt:

> "You may not draw an inference about an important matter such as an element of the offence unless it is the only reasonable inference that can be drawn on the facts. As you probably appreciate, that stems from the burden of proof on the prosecution, that is, the burden to prove all the elements of the offence beyond reasonable doubt.
>
> In determining whether an inference is a reasonable one, you consider the evidence as a whole. You are not obliged to discard or disregard every piece of evidence that does not by itself establish the element of the offence beyond reasonable doubt. You can look at all the evidence together."

15 Later, with respect to motive, the trial judge directed the jury in terms that still further emphasised the need for the jury to be satisfied of Dookheea's guilt beyond reasonable doubt:

> "Circumstances can and do arise from time to time in which it may be established beyond reasonable doubt that a particular person committed a specific crime, yet to the outside observer the behaviour involved may be inexplicable. There may be no motive that can be discerned. On the other hand, the situation may arise when an accused person may be considered to have a powerful motive for engaging in the unlawful activity but nevertheless the jury may not be satisfied beyond reasonable doubt that the accused person committed the criminal offence. A jury can derive assistance from the absence or presence of motive as affecting the likelihood of the participation of a person in the illegal conduct, but ultimately the absence of motive cannot affect your judgment when you are satisfied beyond reasonable doubt on the evidence of the guilt of the accused person and nor can motive be used to fill a gap in the Crown case

> if you are not so satisfied. The presence or absence of motive is simply one of the factors to be taken into account when considering whether or not the accused may have been involved in the criminal activity the Crown is attempting to attribute to the accused."

16 The trial judge then directed the jury as to the elements of the offence of murder, and it was in the course of that exercise that her Honour contrasted proof beyond reasonable doubt with proof beyond any doubt. The impugned passage of the direction was as follows:

> "I am going to move on to murder then and the elements of murder. You have heard this before. I will say it again. Before you could find Mr Dookheea guilty of murder there are four elements that the prosecution must prove beyond reasonable doubt. ...
>
> The question you have to ask yourselves is 'has the Crown established beyond reasonable doubt that at the time Mr Dookheea committed the relevant act or acts that caused [the deceased's] death, he intended to kill [the deceased] or cause him really serious injury?' *As a corollary you might ask, 'do I hold a reasonable doubt that at the time he committed the relevant act or acts that caused [the deceased's] death, Mr Dookheea intended to kill [the deceased] or cause him really serious injury?' In other words, you do not have to work out definitively what Mr Dookheea's state of mind was when he caused the injuries that killed [the deceased]. You have to consider whether the Crown has satisfied you that Mr Dookheea had the intention that is required. And the Crown has to have satisfied you of this not beyond any doubt, but beyond reasonable doubt*." (emphasis added)

17 Thereafter, however, the trial judge further directed the jury in terms that once again emphasised that the need for proof beyond reasonable doubt meant that if the jury had any reservations they should acquit Dookheea:

> "You can only infer that Mr Dookheea intended to kill [the deceased] or cause him really serious injury if you are satisfied beyond reasonable doubt that that is the only reasonable inference open from the facts that you have found. *If any evidence causes you to have reservations about drawing such an inference, then the benefit of your doubt should go to Mr Dookheea. ...*

> You cannot return a verdict on manslaughter until you return a verdict on murder. Returning a verdict on murder is deciding whether he is guilty or not guilty of murder. If you cannot agree on murder, that is, whether he is guilty or not guilty of murder, then you cannot move on to manslaughter. You can only move to manslaughter if you are all agreed that Mr Dookheea is not guilty of murder, that is, you all agree that the Crown has failed to satisfy you beyond reasonable doubt of the elements of murder." (emphasis added)

18 Finally, the trial judge issued the jury with an aide memoire of each of the elements of the offence charged, in which it was stated in bold type that the jury had to be satisfied of guilt beyond reasonable doubt:

> "Before you could find Kritsingh Dookheea guilty of murder, there are **four elements** that **the prosecution must prove beyond reasonable doubt**:
>
> ..."

19 At the conclusion of the charge, the jury retired to consider their verdict. There were no exceptions taken to the directions.

Proceedings before the Court of Appeal

20 Dookheea appealed against conviction to the Court of Appeal on a number of grounds. The Court of Appeal rejected all but one: that the trial judge erred in directing the jury that the Crown was required to satisfy them of guilt "not beyond any doubt, but beyond reasonable doubt". Their Honours' reasons for accepting it were as follows[2]:

> "The submission for [Dookheea] was that the judge fell into error by making the final statement in [the impugned] passage, since:
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> - the common law does not permit (except in very limited circumstances, not here applicable) any explanation of the phrase 'beyond reasonable doubt';

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2 *Dookheea* [2016] VSCA 67 at [87]-[91] (footnotes omitted).

- the jury not having asked any question about the meaning of the phrase, the power conferred on a trial judge by s 20 of the *Jury Directions Act 2013* [see now the *Jury Directions Act* 2015 (Vic), ss 61-64] to give an explanation of its meaning had not been enlivened; and

- the direction would have left the jury with the erroneous understanding that they could hold some doubts and still convict [Dookheea].

The submission for the [Crown] accepted that the power under the *Jury Directions Act* was not enlivened, but maintained that its enactment gave a judge 'greater scope to explain the phrase'. Moreover, although the terms of the direction 'were unfortunate', it was 'strictly speaking not wrong as a matter of logic'. Finally, the [Crown] pointed out, defence counsel had not taken any exception.

We have concluded that her Honour did fall into error when she spoke of the Crown having to satisfy the jury 'not beyond any doubt but beyond reasonable doubt'. The standard of proof being fundamental to a fair trial, the failure to take exception could not stand in the way of the ground succeeding. It was on that basis that we concluded that the appeal must succeed.

The position at common law was clearly explained by the South Australian Court of Criminal Appeal in *Compton* [(2013) 237 A Crim R 177]. The respective judgments of Kourakis CJ and Peek J analyse the relevant authorities in comprehensive and illuminating terms, which it is unnecessary for us to repeat. The short point, as highlighted in [Dookheea's] written case, is that a doubt held by a jury is, by definition, a reasonable doubt. As the High Court said in *Green* [(1971) 126 CLR 28 at 32-33], 'a reasonable doubt is a doubt which a particular jury entertain in the circumstances'. It is an error, therefore, to suggest to jurors that they may entertain a doubt which is not a 'reasonable' doubt and on that basis proceed to convict the accused.

In due course, consideration should be given to removing the precondition to the power of explanation in the *Jury Directions Act*. It is not clear to us why, as a matter of policy, the power of a judge to assist a jury in this respect should depend for its exercise upon the jury first having asked a question."

The contentions

21 Before this Court, the Crown argued, as it did before the Court of Appeal, that although the trial judge had strayed from the traditional formulation of the criminal standard of proof by directing the jury in terms that contrasted reasonable doubt with any doubt, it was not an error to do so, and, in any event, it was not productive of a substantial miscarriage of justice because the charge taken as a whole sufficiently made clear to the jury that Dookheea was to be given the benefit of any reasonable doubt[3].

22 Counsel for Dookheea contended to the contrary that the impugned direction was erroneous in that it invited jurors to subject their mental processes to an objective analysis – a two-stage process of deciding whether they had any doubt and then, if so, whether they considered that doubt to be a reasonable doubt – and thereby tended to undermine the standard of proof on the critical issue at trial. It was submitted that it was apparent from *Green v The Queen*[4] that a reasonable doubt means a doubt that is held by a jury as a whole, as opposed to a doubt that is held by an individual juror as such; that an individual juror is not required or to be encouraged to submit his or her mental processes to any sort of objective analysis; and that, for that reason, this Court has previously rejected further elaboration of the meaning of proof beyond reasonable doubt. To direct the jury as the trial judge had done, it was said, ran counter to that authority by conveying to individual jurors the impression that any doubt which the juror might hold was to be disregarded unless it passed some further test requisite to reach a particular degree of doubt.

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3 See generally *R v Neilan* [1992] 1 VR 57 at 68-70; *R v Chatzidimitriou* (2000) 1 VR 493 at 495 [5], 496 [8] per Phillips JA, 509 [46] per Cummins AJA; *Ho* (2002) 130 A Crim R 545 at 552 [32] per Bell J (Meagher JA and Hidden J agreeing at 562 [66], [67]); *Ladd v The Queen* (2009) 27 NTLR 1 at 55 [155] per Martin (BR) CJ; *R v Hettiarachchi* [2009] VSCA 270 at [59].

4 (1971) 126 CLR 28 at 32-33; [1971] HCA 55.

Explication of "beyond reasonable doubt"

23 In *Darkan v The Queen*[5], the majority remarked that the stand which this Court has taken against a trial judge attempting to explain to a jury what is meant by "beyond reasonable doubt" is "an extreme and exceptional stand" which "has not been shared elsewhere". It is therefore open to question why that stand has been taken. In part it is the product of history, but it also proceeds from a perception that explanations of "reasonable doubt" are more likely to exacerbate a jury's uncertainties than alleviate their concerns.

24 Historically, the notion that it is undesirable for a trial judge to attempt to explain to the jury what is meant by "beyond reasonable doubt" took root at a time when it was conceived that the expression "reasonable doubt" was "a well understood expression". It was considered that it was dangerous for a trial judge to attempt "to define with precision a term which is in ordinary and common use with relation to this subject matter"[6]. Half a century after *Brown v The King*[7] was decided, in *Thomas v The Queen*[8], Kitto J added to the reasons for avoiding explication of "beyond reasonable doubt" that:

> "[w]hether a doubt is reasonable is for the jury to say; and the danger that invests an attempt to explain what 'reasonable' means is that the attempt not only may prove unhelpful but may obscure the vital point that the accused must be given the benefit of any doubt which the jury considers reasonable."

25 A further decade later came the point made in *Green* – which was so much relied upon by counsel for Dookheea in this case – that[9]:

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5 (2006) 227 CLR 373 at 395-396 [69] per Gleeson CJ, Gummow, Heydon and Crennan JJ; [2006] HCA 34.

6 *Brown v The King* (1913) 17 CLR 570 at 584 per Barton ACJ; [1913] HCA 70. See also at 594 per Isaacs and Powers JJ, cf at 596.

7 (1913) 17 CLR 570.

8 (1960) 102 CLR 584 at 595; [1960] HCA 2. See also at 593 per Fullagar J, 599, 601 per Taylor J, 604-605 per Windeyer J.

9 (1971) 126 CLR 28 at 33 (footnote omitted).

> "[j]urymen themselves set the standard of what is reasonable in the circumstances. It is that ability which is attributed to them which is one of the virtues of our mode of trial: to their task of deciding facts they bring to bear their experience and judgment. They are both unaccustomed and not required to submit their processes of mind to objective analysis of the kind proposed in the language of the judge in this case. 'It is not their task to analyse their own mental processes': Windeyer J, *Thomas v The Queen*. A reasonable doubt which a jury may entertain is not to be confined to a 'rational doubt', or a 'doubt founded on reason' in the analytical sense or by such detailed processes as those proposed by the passage we have quoted from the summing up."

26 Later again, in *La Fontaine v The Queen*[10], Barwick CJ summarised the position thus:

> "This Court has clearly laid it down that it is both unnecessary and unwise for a trial judge to attempt explanatory glosses on the classical and, as I think, popularly understood formula which expresses the extent of the onus resting on the Crown in its attempt to establish the commission of a crime: see *Green v The Queen*. The Court has also indicated the limited occasions on which, in a case depending on circumstantial evidence, the extended formula proposed by Alderson B in *R v Hodge* [(1838) 2 Lewin CC 227 [168 ER 1136]] should be used: see *Grant v The Queen* [(1975) 11 ALR 503]."

27 Today, views might reasonably differ as to whether "proof beyond reasonable doubt" is a well-understood expression in ordinary and common use with relation to the subject matter. On the one hand, it might be supposed that generally increased standards of education and increased exposure to film, television and digital media would have made the concept of proof beyond reasonable doubt better understood today than it was considered to be a century ago. But, on the other hand, the relative frequency with which juries these days are known to ask trial judges to define "reasonable doubt" or to provide some other form of guidance as to how they should decide if they have a reasonable

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10 (1976) 136 CLR 62 at 71 (Mason J relevantly agreeing at 87) (footnotes omitted); [1976] HCA 52.

doubt[11] suggests that the concept of proof beyond reasonable doubt is not as well known or well understood as it was once supposed to be. And significantly, it appears that the experience in the United Kingdom, Canada and New Zealand is that juries today do have difficulties with the concept of proof beyond reasonable doubt, and, accordingly, that more is required by way of explication. In the course of argument and in written submissions, the Crown referred to a number of decisions of courts of those countries in which the problem, and measures adopted to lessen it, have been considered[12].

28 It was not contended, however, that we should depart from what was said in *Green* and *La Fontaine*. Counsel for the Crown explained that the decisions to which he referred concerning developments abroad were provided only by way of background. It was accepted that, for the purposes of this appeal, the law as to how a trial judge should direct a jury regarding proof beyond reasonable doubt is as stated in *Green* and *La Fontaine*. But, the Crown submitted, it does not follow that it is an error for a trial judge to contrast reasonable doubt with any doubt. While it may be unnecessary and unwise for a trial judge to do so, it will not always result in a substantial miscarriage of justice and in this case it did not do so.

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11 See *Chatzidimitriou* (2000) 1 VR 493 at 494 [3]-[4] per Phillips JA; *R v Cavkic* (2005) 12 VR 136 at 139 [213] per Vincent JA (Charles JA and Osborn AJA agreeing at 137 [1], 144 [269]); *Ladd* (2009) 27 NTLR 1 at 52-53 [147] per Martin (BR) CJ; *Martin v The Queen* (2010) 28 VR 579 at 580 [58] per Ashley JA (Buchanan JA and Redlich JA agreeing at 580 [1], 587 [93]). See also Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 December 2012 at 5559.

12 See for example *Miller v Minister of Pensions* [1947] 2 All ER 372 at 373; *Bracewell* (1978) 68 Cr App R 44 at 49; *R v Lifchus* [1997] 3 SCR 320 at 327 [14], 334 [31], 335 [36], 336-337 [39] per Lamer CJ, Sopinka, Cory, McLachlin, Iacobucci and Major JJ (L'Heureux-Dubé J agreeing at 340 [48]); *R v Starr* [2000] 2 SCR 144 at 267-268 [242] per Iacobucci, Major, Binnie, Arbour and Lebel JJ; *R v Wanhalla* [2007] 2 NZLR 573 at 587-588 [48]-[49] per William Young P, Chambers and Robertson JJ, 612 [173] per Hammond J. See also *R v Stephens* [2002] EWCA Crim 1529; *R v Majid* [2009] EWCA Crim 2563; *R v Smith* [2012] EWCA Crim 702.

The distinction between reasonable doubt and any doubt

29 The Crown's submissions should be accepted. Evidently, the Court of Appeal based[13] their decision on the approach adopted by the South Australian Court of Criminal Appeal in *R v Compton*[14]. In turn, *Compton* was based on what was there said to be the binding effect of three earlier decisions of the South Australian Court of Criminal Appeal in *R v Wilson*[15], *R v Dam*[16] and *R v Pahuja*[17]. In each of those decisions, it was held that if a trial judge directs a jury, in substance or effect, that when left with any doubt at the end of deliberations it is for them to decide whether that is a reasonable doubt, an appeal against conviction must be allowed[18]. *Wilson* was the wellspring of that line of authority. In that case, King CJ premised his conclusion – that such a direction will invariably be productive of a miscarriage of justice – on the notion that reasonable doubt is a doubt which is entertained by a reasonable person in the circumstances and hence that reasonable doubt encompasses any doubt entertained by the jury acting reasonably[19]. King CJ therefore concluded that to suggest to a jury that there is a difference between a reasonable doubt and any doubt is calculated to cause the jury to subject their mental processes to analysis, to incline the jury to discount a doubt for fear that it may not be reasonable, and thus to obscure the point that the accused must be given the benefit of any doubt which the members of the jury as a reasonable jury may have.

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13 *Dookheea* [2016] VSCA 67 at [90].

14 (2013) 237 A Crim R 177.

15 (1986) 42 SASR 203.

16 (1986) 43 SASR 422.

17 (1987) 49 SASR 191.

18 *Wilson* (1986) 42 SASR 203 at 207 per King CJ (Johnston J agreeing at 224); *Dam* (1986) 43 SASR 422 at 429-431 per Jacobs J (Mohr J and Bollen J agreeing at 433); *Pahuja* (1987) 49 SASR 191 at 194-195 per King CJ, 220-221 per Johnston J.

19 *Wilson* (1986) 42 SASR 203 at 207 (Johnston J agreeing at 224). See also *Pahuja* (1987) 49 SASR 191 at 194-195 per King CJ, 220-221 per Johnston J.

30 With respect, so to reason misconceived the effect of this Court's decisions in *Thomas* and *Green*, and it is a process of reasoning that should not be followed. During the late 19th century, Chief Justice May of the Boston Municipal Court propounded[20] a theory that the standard of proof beyond reasonable doubt was adopted in the late 18th century to ameliorate the harshness of the criminal justice system, and so to make conviction more difficult by increasing the standard of proof. Wigmore[21] and McCormick[22] later adopted May's thesis. More recently, to the contrary, however, it has been suggested that the standard of proof beyond reasonable doubt was introduced to compensate the prosecution for the advantage obtained by an accused upon being permitted to adduce evidence[23]. There is now, too, a third school of thought, which proposes that the standard of proof beyond reasonable doubt was introduced to make the delivery of a conviction easier for juries constituted of anxious Christians, living in an age still haunted by fear of damnation for convicting an innocent man[24]. But, in fact, it appears most likely that the test of beyond reasonable doubt was introduced in the mid-18th century simply as a means of expressing more clearly the then well-settled test of satisfaction as a matter of conscience or moral certainty[25].

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20 May, "Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases", (1876) 10 *American Law Review* 642 at 656-659.

21 Wigmore, *Evidence in Trials at Common Law*, Chadbourn rev (1981), vol 9 at 405 §2497.

22 Broun, *McCormick on Evidence*, 7th ed (2013), vol 2 at 670 §341.

23 Morano, "A Reexamination of the Development of the Reasonable Doubt Rule", (1975) 55 *Boston University Law Review* 507 at 515.

24 Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial*, (2008) at 5.

25 Shapiro, *Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence*, (1991) at 20, 23, 40-41; Jonakait, "Finding the Original Meaning of American Criminal Procedure Rights: Lessons from Reasonable Doubt's Development", (2012) 10 *University of New Hampshire Law Review* 97 at 145.

31 The invocation of trial by jury as a substitute for trial by ordeal resulted from Pope Innocent III's 1215 Fourth Lateran Council prohibition on clergy performing religious ceremonies in connection with ordeals[26]. Jurors then, as now, were required to swear by God that they would determine the truth of the matters presented to them[27]. Jurors were not initially directed as to the standard of proof they were required to apply[28]; the standard was left to each juror's own conscience. But, in an age of strong Christian belief and adherence, it was understood that to convict an accused despite lingering doubts was a violation of the juror's oath, and that to convict an innocent man was a mortal sin that would result in damnation[29]. Writing in the 13th century, Britton thus recorded that "if the jurors are in doubt of the matter and not certain, the judgment ought always in such case to be for the defendant"[30].

32 By contrast, by at least the 17th century, English law had rejected the idea that facts, or trial proof, could be established with absolute certainty[31]. During the 17th century, English judges thus began to direct jurors that they should acquit unless satisfied in their conscience or morally certain of the accused's

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26 Plucknett, *A Concise History of the Common Law*, 3rd ed (1940) at 112-113; Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial*, (2008) at 53, 126-127.

27 Nichols, *Britton – The French Text Carefully Revised with an English Translation Introduction and Notes*, (1865), vol 1 at 30-31; Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial*, (2008) at 153.

28 See Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial*, (2008) at 153.

29 See Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial*, (2008) at 3.

30 Nichols, *Britton – The French Text Carefully Revised with an English Translation Introduction and Notes*, (1865), vol 1 at 32-33.

31 Franklin, *The Science of Conjecture: Evidence and Probability before Pascal*, (2001) at 62-63; Jonakait, "Finding the Original Meaning of American Criminal Procedure Rights: Lessons from Reasonable Doubt's Development", (2012) 10 *University of New Hampshire Law Review* 97 at 140-141.

guilt[32]. As Professor Shapiro has observed[33], directions of that kind reflected, or were at least consistent with, Protestant theological conceptions of conscience as an act of intellect, rather than will or deference to the wishes of another. As described by Professor Jonakait, "[c]onscience ... was a product of rationality and understanding and not of the passions or feelings. ... [A] person seeking the solace of a right conscience did not have to reach mathematical certainty"[34]. A satisfied conscience could be reached short of the absence of all doubt; a satisfied conscience was one without a reasonable or rational doubt[35].

33 Society's regard for the 17th century jury system's approach to fact finding appears to have informed some aspects of the thinking of English Enlightenment philosophers[36]. Reciprocally, Enlightenment philosophy – particularly John

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32 Morano, "A Reexamination of the Development of the Reasonable Doubt Rule", (1975) 55 *Boston University Law Review* 507 at 511-512; Jonakait, "Finding the Original Meaning of American Criminal Procedure Rights: Lessons from Reasonable Doubt's Development", (2012) 10 *University of New Hampshire Law Review* 97 at 141. See also Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial*, (2008) at 180-181.

33 Shapiro, *Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence*, (1991) at 13-15.

34 Jonakait, "Finding the Original Meaning of American Criminal Procedure Rights: Lessons from Reasonable Doubt's Development", (2012) 10 *University of New Hampshire Law Review* 97 at 142. See also McAdoo, *The Structure of Caroline Moral Theology*, (1949) at 76-77.

35 Shapiro, *Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence*, (1991) at 16; Jonakait, "Finding the Original Meaning of American Criminal Procedure Rights: Lessons from Reasonable Doubt's Development", (2012) 10 *University of New Hampshire Law Review* 97 at 142.

36 See Waldman, "Origins of the Legal Doctrine of Reasonable Doubt", (1959) 20 *Journal of the History of Ideas* 299 at 303-304; Shapiro, *Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence*, (1991) at 11-12; Jonakait, "Finding the Original Meaning of American Criminal Procedure Rights: Lessons from Reasonable Doubt's Development", (2012) 10 *University of New Hampshire Law Review* 97 at 141.

Wilkins' epistemology of three categories of knowledge (physical, mathematical and moral), each involving a different type of certainty and of which the last was based on testimony and reports without requiring absolute proof[37], and John Locke's consideration of probability bordering so near upon certainty as to form the basis of human conduct[38] – influenced 18th century Anglo-American jurisprudential thought on the processes of proof and the rules of evidence[39]. Thus, from about the mid-18th century, most likely first in America and then in England[40], judges began to employ the expression "beyond reasonable doubt" as, it appears, a means of explaining to juries what was meant by being satisfied in their conscience or being morally certain of guilt[41]. At the start of that process, all three expressions – "satisfied in conscience", "moral certainty" and "beyond reasonable doubt" – were used together and all three meant the same. Ultimately,

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37 See Waldman, "Origins of the Legal Doctrine of Reasonable Doubt", (1959) 20 *Journal of the History of Ideas* 299 at 301-303 citing Wilkins, *Of the Principles and Duties of Natural Religion*, 4th ed (1699), Bk 1, Chs 1 and 3.

38 See Locke, *An Essay Concerning Human Understanding: Collated and Annotated, with Prolegomena, Biographical, Critical and Historical, by Alexander Campbell Fraser*, (1894), vol 2 at 364-365; Waldman, "Origins of the Legal Doctrine of Reasonable Doubt", (1959) 20 *Journal of the History of Ideas* 299 at 311.

39 See Gilbert, *The Law of Evidence*, 7th ed (1805) at 1; Waldman, "Origins of the Legal Doctrine of Reasonable Doubt", (1959) 20 *Journal of the History of Ideas* 299 at 305-306, 311-312; Shapiro, *Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence*, (1991) at 25-27.

40 Langbein, *The Origins of Adversary Criminal Trial*, (2003) at 262; Jonakait, "Finding the Original Meaning of American Criminal Procedure Rights: Lessons from Reasonable Doubt's Development", (2012) 10 *University of New Hampshire Law Review* 97 at 102.

41 See Shapiro, *Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence*, (1991) at 21-22; Langbein, *The Origins of Adversary Criminal Trial*, (2003) at 263-264; Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial*, (2008) at 197-199. See also Waldman, "Origins of the Legal Doctrine of Reasonable Doubt", (1959) 20 *Journal of the History of Ideas* 299 at 310.

however, as Professor Franklin has concluded[42], the previous common understanding that the standard of proof in criminal trials should be somewhere between probable suspicion and complete certainty came to be expressed solely in the formulation "beyond reasonable doubt".

34 Given, as this scholarship suggests, that the standards of satisfied conscience and moral certainty, and thus of beyond reasonable doubt, were adopted as the result of the English law's rejection of the idea that facts could be established with absolute certainty beyond any doubt, it is in that sense that Kitto J should be taken to have stated in *Thomas* that whether a doubt is reasonable is for the jury to say[43]. Contrary to King CJ's reasoning in *Wilson*, it is not the case that whenever a reasonable jury recognises the existence of a doubt, no matter how slight the doubt may be, the jury ipso facto has a reasonable doubt. Rather, as was stated in *Green*[44], and has since been appreciated in decisions on this point by most Australian intermediate courts of criminal appeal[45] (including in previous decisions in Victoria[46]), a reasonable doubt is a doubt which the jury as a reasonable jury considers to be reasonable (albeit, of course, that different jurors might have different reasons for their own

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42 Franklin, *The Science of Conjecture: Evidence and Probability before Pascal*, (2001) at 62-63. See also Shapiro, *Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence*, (1991) at 21.

43 (1960) 102 CLR 584 at 595.

44 (1971) 126 CLR 28 at 32-33.

45 See *Goncalves* (1997) 99 A Crim R 193 at 196 per Malcolm CJ, 204 per Wheeler J (Heenan J agreeing with both Malcolm CJ and Wheeler J at 200); *Graham* (2000) 116 A Crim R 108 at 127 [59] per Underwood J (Evans J agreeing at 129 [71]); *Ho* (2002) 130 A Crim R 545 at 552 [32], 554 [41] per Bell J (Meagher JA and Hidden J agreeing at 562 [66], [67]); *R v Clarke* (2005) 159 A Crim R 281 at 290 [53] per McMurdo P (Helman J and Chesterman J agreeing at 292 [81], [82]); *W v The Queen* (2006) 16 Tas R 1 at 7 [10] per Slicer J; *Ladd* (2009) 27 NTLR 1 at 55 [155] per Martin (BR) CJ.

46 See for example *Neilan* [1992] 1 VR 57 at 71; *Chatzidimitriou* (2000) 1 VR 493 at 495 [5], 496-497 [8]-[9] per Phillips JA, 509 [46] per Cummins AJA; *Hettiarachchi* [2009] VSCA 270 at [59], [61].

reasonable doubt). Phillips JA accurately summarised the position in *R v Chatzidimitriou*[47]:

> "the test remains one of reasonable doubt, not of any doubt at all; and ... the jury's function includes determining what *is* reasonable doubt – or to put that in more concrete fashion, whether the doubt which is left (if any) is reasonable doubt or not." (emphasis in original)

35 Granted, the idea that a reasonable doubt is one that a particular jury entertains at the conclusion of their deliberations is an idea that pertains to the corporate state of mind of the jury as opposed to the animadversions of the individual members of the jury. But, as Cox J knowingly observed in *Pahuja*[48], it is the votes of each of the individual members of the jury that are determinative of the verdict of the jury as a whole. Each juror is appointed to consider the evidence and to decide whether it satisfies him or her of guilt beyond reasonable doubt; and, in order to discharge that function, each individual member of the jury must in effect enquire of himself or herself whether he or she entertains a reasonable doubt. In practical reality, each individual juror may at some point in the course of the juror's consideration of an issue have a doubt which, upon reflection and evaluation, he or she is disposed to discard as an unreasonable doubt. For that reason, a judge's directions to a jury as to the applicable standard of proof are as much directed to each individual member of the jury as they are to the jury as a whole. The same is true of a Black direction[49].

36 Contrary, therefore, to Dookheea's submissions, it is not the case that any doubt on the part of an individual juror dictates that the prosecution has failed to convince that juror to the criminal standard. Indeed, as counsel for Dookheea conceded, a fanciful doubt would not require a juror to vote for an acquittal; and to reason, as was suggested, that a fanciful doubt is distinguishable as not a doubt

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47 (2000) 1 VR 493 at 498 [11].

48 (1987) 49 SASR 191 at 210 (dissenting). See also *Neilan* [1992] 1 VR 57 at 70-71; *Ladd* (2009) 27 NTLR 1 at 60-61 [176]-[177] per Martin (BR) CJ.

49 *Black v The Queen* (1993) 179 CLR 44 at 51-52 per Mason CJ, Brennan, Dawson and McHugh JJ; [1993] HCA 71.

at all is not at all convincing[50]. Not all jurors would regard a fanciful doubt as no doubt and nor logically should they do so.

37 Admittedly, it has been said that to invite a jury to consider the distinction between reasonable doubt and any doubt risks obfuscating the jury's understanding of their task[51]. Consequently, as the authority of this Court stands, it is generally speaking undesirable for a trial judge to contrast reasonable doubt with any doubt. But, for the reasons already given, in point of principle it is not wrong to notice the distinction; and, therefore, as a matter of authority, it is not necessarily determinative of an appeal against conviction that a trial judge may for one reason or another happen to do so. When and if a trial judge does mention the distinction, the question is whether the words spoken in terms of the record of the summing up are such that the jury would have derived a false perception of the basis for deciding whether the Crown has proved its case[52]. And as was held in *Green*[53] and stressed in *La Fontaine*[54], that is a question to be decided by taking the summing up as a whole and as a jury listening to it might understand it, not upon some subtle examination of its transcript record or by undue prominence being given to any of its parts. Moreover, where, as here, the accused has been represented at trial by competent counsel, the reaction of defence counsel on hearing the impugned portion of the summing up is a cogent consideration[55].

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50 See *Pahuja* (1987) 49 SASR 191 at 207-208 per Cox J; *Neilan* [1992] 1 VR 57 at 69-70; *Ladd* (2009) 27 NTLR 1 at 60-62 [173]-[179] per Martin (BR) CJ. Cf *Compton* (2013) 237 A Crim R 177 at 183 [14] per Kourakis CJ.

51 See *Thomas* (1960) 102 CLR 584 at 595 per Kitto J; *Green* (1971) 126 CLR 28 at 32-33; *La Fontaine* (1976) 136 CLR 62 at 84-85 per Stephen J.

52 *La Fontaine* (1976) 136 CLR 62 at 72 per Barwick CJ (Mason J relevantly agreeing at 87).

53 (1971) 126 CLR 28 at 32.

54 (1976) 136 CLR 62 at 72, 73 per Barwick CJ (Mason J relevantly agreeing at 87), 81 per Gibbs J.

55 *La Fontaine* (1976) 136 CLR 62 at 72 per Barwick CJ (Mason J relevantly agreeing at 87), 85 per Stephen J.

Jury not misled

38 Counsel for Dookheea argued that it was nothing to the point that the trial judge had several times directed the jury concerning proof beyond reasonable doubt in terms that were unexceptionable. Nor was it of much significance, it was submitted, that the jury were provided with the aide memoire. For in counsel's submission, given that the trial judge contrasted reasonable doubt with any doubt while directing the jury as to the element of murderous intent, and since that was in effect the only matter at issue in the trial, the jury were bound to have borne the contrast in mind. That was likely to have caused the jury to approach the element of intent by a two-stage reasoning process: first, deciding whether they had any doubt, and then discounting their doubt on the basis that it was not or might not be reasonable. And as counsel would have it, that surely deprived, or at least could have deprived, Dookheea of the benefit of any doubt which the members of the jury as a reasonable jury may have had.

39 Those submissions should be rejected, for two reasons. First, as has been explained, a reasonable doubt is not just any doubt that the members of a jury as a reasonable jury might entertain, but is rather what a reasonable jury considers to be a reasonable doubt. Dookheea was not entitled to the benefit of any doubt, but rather to the benefit of what the jury as a whole considered to be a reasonable doubt. Secondly, and in light of the correct understanding of reasonable doubt, it cannot realistically be supposed that the jury might have been left in any uncertainty as to the true meaning of the need for proof beyond reasonable doubt. At the outset of the trial, the trial judge correctly explained to the jury that proof beyond reasonable doubt is the highest standard of proof known to the law, and therefore requires a much higher state of satisfaction than proof on the balance of probabilities; both the Crown prosecutor and defence counsel emphasised that proof beyond reasonable doubt meant that the jury had to be *sure* of guilt and that, if they were not, they were bound to acquit; the trial judge emphasised the need for proof beyond reasonable doubt in answering the jury's question as to the meaning of really serious injury; the trial judge began the relevant part of her summing up with the statement that the words "beyond reasonable doubt" are common English words which mean what they say, and are not capable of expression on some sort of percentage basis, and later reminded the jury of what she had told them at the outset of the trial as to proof beyond reasonable doubt being a far higher standard of proof than proof on the balance of probabilities; the trial judge re-emphasised on more than 20 further occasions during the charge that the jury must be satisfied of guilt beyond reasonable doubt, and five of those occasions followed the impugned passage; the jury were left with an aide memoire which stressed in bold type the need for proof of each of the elements

of the offence beyond reasonable doubt; and defence counsel took no exception to the impugned passage of the trial judge's directions and did not seek any further directions in that regard. There can be no doubt that the jury would clearly have understood that it was up to them to decide whether there was what they considered to be a reasonable doubt as to Dookheea's guilt and that, if there were, they were bound to acquit him.

Further matters

40 So to conclude is sufficient to dispose of the appeal. For the sake of completeness, however, two points remain to be mentioned. First, as has been noticed, previous decisions in Victoria approached the issue of proof beyond reasonable doubt correctly, on the basis that a reasonable doubt is not just any doubt which the members of a jury as a reasonable jury might entertain, but is rather what a reasonable jury considers to be a reasonable doubt[56]. Why the Court of Appeal departed from that approach in this case is less than clear. Apparently, the earlier decisions were drawn to their Honours' attention, and there is no suggestion in their Honours' reasons that they regarded them as wrongly decided. Nor is there any mention of this Court's conclusion in *La Fontaine*[57], and still less an explanation of why the approach in *La Fontaine* was regarded as inapplicable. If the Court of Appeal had followed their own earlier decisions on the subject, or this Court's decision in *La Fontaine*, the need for this appeal might have been avoided.

41 Secondly, although, as authority stands, it is generally speaking unwise for a trial judge to attempt any explication of the concept of reasonable doubt beyond observing that the expression means what it says and that it is for the jury to decide whether they are left with a reasonable doubt (and in certain circumstances explaining that a reasonable doubt does not include fanciful possibilities[58]), the practice ordinarily followed in Victoria, as it was in this case, and often followed in New South Wales, includes contrasting the standard of proof beyond reasonable doubt with the lower civil standard of proof on the

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56 See for example *Neilan* [1992] 1 VR 57 at 71; *Chatzidimitriou* (2000) 1 VR 493 at 495 [5], 496-497 [8]-[9] per Phillips JA, 509 [46] per Cummins AJA; *Hettiarachchi* [2009] VSCA 270 at [59], [61].

57 (1976) 136 CLR 62 at 72-73 per Barwick CJ.

58 *Green* (1971) 126 CLR 28 at 33.

balance of probabilities[59]. That practice is to be encouraged. It is an effective means of conveying to a jury that being satisfied of guilt beyond reasonable doubt does not simply mean concluding that the accused may have committed the offence charged or even that it is more likely than not that the accused committed the offence charged. What is required is a much higher standard of satisfaction, the highest known to the law: proof beyond reasonable doubt.

Conclusion

42 For these reasons, the appeal should be allowed. The orders of the Court of Appeal should be set aside. In their place, it should be ordered that leave to appeal to the Court of Appeal be granted and the appeal be dismissed.

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59 Judicial College of Victoria, *Victorian Criminal Charge Book*, (2017) at 1.7.2. See also Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book*, (2017) at [1.480], [1.490]; *Ho* (2002) 130 A Crim R 545 at 548 [15] per Bell J (Meagher JA and Hidden J agreeing at 562 [66], [67]); *Ward v The Queen* [2013] NSWCCA 46 at [54] per McClellan CJ at CL (Latham J and Adamson J agreeing at [246], [247]).