

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

SEYYED ABDOLZADEH FARSHCHI

APPELLANT

AND

THE KING

RESPONDENT

Farshchi v The King
[2025] HCA 46
Date of Hearing: 5 August 2025
Date of Judgment: 3 December 2025
M20/2025

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Victoria

Representation

D D Gurvich KC and M D Stanton SC with P J Smallwood and K E Brown for the appellant (instructed by Galbally & O'Bryan Lawyers)

R J Sharp KC with T M Wood and J R Wang for the respondent (instructed by Director of Public Prosecutions (Cth))

A D Pound SC, Solicitor-General for the State of Victoria, with E H Ruddle KC and J R Murphy for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Farshchi v The King

Criminal law – Appeal against conviction – Where appellant charged with two forced labour offences contrary to *Criminal Code* (Cth) – Where County Court of Victoria exercised federal jurisdiction for appellant's trial and conviction on indictment – Where trial judge proceeded on basis that ss 63 and 64 of *Jury Directions Act 2015* (Vic) applied in accordance with s 68(1)(c) of *Judiciary Act 1903* (Cth) – Where jury directed in accordance with s 64(1)(e) of *Jury Directions Act* that "[a] reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility" – Whether indication that "reasonable doubt is not ... an unrealistic possibility" alters, impairs, detracts from or diminishes criminal standard of proof "beyond reasonable doubt" – Whether indication inconsistent with s 13.2 of the *Criminal Code* (Cth).

Constitutional law – Whether explanation contained in *Jury Directions Act* inconsistent with requirements of "trial on indictment ... by jury" in s 80 of *Constitution* – Whether essential content of "trial on indictment ... by jury" includes requirement that jury be unanimously satisfied of guilt beyond reasonable doubt.

Words and phrases – "alter, impair or detract", "beyond reasonable doubt", "Commonwealth offences", "compound expression", "connotation", "controlling standard", "denotation", "essential feature", "explanation", "federal jurisdiction", "imaginary or fanciful doubt", "improbable", "inconsistency", "picked up and applied", "proof beyond reasonable doubt", "standard of proof", "sure", "trial on indictment by jury", "unreal possibility", "unrealistic possibility".

Constitution, ss 80, 109.

Criminal Code (Cth), ss 13.2, 270.6A.

Judiciary Act 1903 (Cth), s 68.

Jury Directions Act 2015 (Vic), ss 63, 64.

GAGELER CJ, GORDON, GLEESON AND BEECH-JONES JJ.

Introduction

1 The appellant was tried, on a joint indictment with his wife, by a jury in the County Court of Victoria for two forced labour offences contrary to s 270.6A(1) and (2) of the *Criminal Code* (Cth) ("the Code").¹ The appellant was convicted on both counts and sentenced to a total effective sentence of three years and six months' imprisonment, with a non-parole period of 18 months. The Court of Appeal of the Supreme Court of Victoria (Priest JA, Niall and Taylor JJA agreeing) refused leave to appeal against the convictions, and against the appellant's sentence.²

2 The County Court exercised federal jurisdiction with respect to the appellant's trial and conviction on indictment, conferred by s 68(2) of the *Judiciary Act 1903* (Cth). In the exercise of that federal jurisdiction, by s 68(1)(c) of that Act, the County Court was required to apply the laws of Victoria respecting the procedure for trial and conviction on indictment "so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred", except to the extent that the Victorian laws would be inconsistent with a Commonwealth law.³

3 The general principles of criminal responsibility under laws of the Commonwealth are codified by Ch 2 of the Code.⁴ Section 13.2(1) of the Code, in Pt 2.6 of Ch 2, provides that "[a] legal burden of proof on the prosecution must be discharged beyond reasonable doubt". In his charge to the jury, the trial judge (Chief Judge Kidd) explained to the jury the phrase "proof beyond reasonable doubt", proceeding on the basis that ss 63 and 64 of the *Jury Directions Act 2015*

1 "[F]orced labour" is defined in s 270.6(1) of the *Criminal Code* (Cth) as the condition of a person (the victim) who provides labour or services if, because of the use of coercion, threat or deception, a reasonable person in the position of the victim would not consider himself or herself to be free to cease providing the labour or services, or to leave the place or area where the victim provides the labour or services.

2 *Farshchi v The King* (2024) 390 FLR 97.

3 *Attorney-General (Cth) v Huynh* (2023) 280 CLR 341 at 363 [58], citing *Putland v The Queen* (2004) 218 CLR 174 at 179-180 [7], 189 [41], 215 [121].

4 *Criminal Code* (Cth), s 2.1.

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(Vic) were applicable in accordance with s 68(1)(c) of the *Judiciary Act*. Section 63(1) of the *Jury Directions Act* required the trial judge to "give the jury an explanation of the phrase 'proof beyond reasonable doubt' unless there [were] good reasons for not doing so". Section 64(1) provided:

"In explaining the phrase 'proof beyond reasonable doubt' under section 63, the trial judge may –

- (a) refer to –
 - (i) the presumption of innocence; and
 - (ii) the prosecution's obligation to prove that the accused is guilty; or
- (b) indicate that it is not enough for the prosecution to persuade the jury that the accused is probably guilty or very likely to be guilty; or
- (c) indicate that –
 - (i) it is almost impossible to prove anything with absolute certainty when reconstructing past events; and
 - (ii) the prosecution does not have to do so; or
- (d) indicate that the jury cannot be satisfied that the accused is guilty if the jury has a reasonable doubt about whether the accused is guilty; or
- (e) indicate that a reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility."

4

Over objection, and in accordance with s 64(1)(e), the trial judge's explanation included that "[a] reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility". In full, the trial judge's charge included the following explanation of the phrase "proof beyond reasonable doubt" that covered each of the elements of s 64(1):

"I want to emphasise again, and I think all counsel have done this, but you can probably never say enough on this topic. I want to emphasise again that under our justice system, people are presumed to be innocent unless and until they are proved guilty. Before you may return a verdict of guilty, the prosecution must satisfy you that each of the accused is guilty of the [charges] in question ... [W]hen you are considering a charge against an

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accused you must be satisfied that the prosecution has established the charge in question.

The accused do not have to prove anything. The prosecution must do this as in satisfy, prove the charge against the accused for each of the charges beyond reasonable doubt. Beyond reasonable doubt is the highest standard of proof that our law demands. It is not enough for the prosecution to prove that the accused is probably guilty or even very likely to be guilty ...

It is almost impossible to prove anything with absolute certainty when reconstructing past events and the prosecution does not have to do so. *A reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility.* You cannot be satisfied the accused is guilty if you have a reasonable doubt about whether the accused is guilty. I mentioned to you at the beginning of the trial that these words 'proof beyond reasonable doubt' mean exactly what they say, proof beyond reasonable doubt." (emphasis added)

5 Pursuant to a grant of special leave to appeal, the appellant raised two grounds of appeal against his convictions, both of which concerned that explanation of "proof beyond reasonable doubt" given to the jury. Ground one was that the words "a reasonable doubt is not ... an unrealistic possibility" in s 64(1)(e) of the *Jury Directions Act* are inconsistent with s 13.2(1) of the Code. Ground two was that those words are inconsistent with s 80 of the *Constitution*, which the appellant contended impliedly guaranteed the standard of proof beyond reasonable doubt for a trial of an indictable Commonwealth offence. The appellant argued that s 64(1)(e), to the extent that it describes a reasonable doubt as "not ... an unrealistic possibility", permits an indication to the jury that "alters, impairs or detracts"⁵ from and thus diminishes the criminal standard of proof beyond reasonable doubt, inconsistently with s 13.2 of the Code or s 80 of the *Constitution*. Accordingly, the appellant submitted, the impugned aspect of s 64(1)(e) is not picked up and applied by s 68(1)(c) of the *Judiciary Act*; the trial judge was wrong to include that aspect of s 64(1)(e) in his charge to the jury; and the Court of Appeal was wrong to refuse leave to appeal from the appellant's convictions.

6 The appellant acknowledged that ground one is dispositive of the appeal because, if it succeeded, he did not need to rely on ground two to obtain the relief sought and, conversely, if ground one failed, then ground two would necessarily

5 cf *New South Wales v The Commonwealth and Carlton* (1983) 151 CLR 302 at 330; *Masson v Parsons* (2019) 266 CLR 554 at 579-580 [43].

fail because of its shared premise that the criminal standard of proof beyond reasonable doubt is diminished by an indication to the jury in accordance with s 64(1)(e).

7 For the following reasons, the appeal must be dismissed. In short, s 64(1)(e) does not diminish the standard of proof beyond reasonable doubt. The Court of Appeal correctly held that s 64(1)(e) does not provide for a different standard of proof from s 13.2(1) of the Code, but simply provides for that standard of proof to be explained, and is thus picked up and applied by s 68(1)(c) of the *Judiciary Act*.⁶ Because the trial judge identified the correct standard of proof to the jury, the asserted inconsistency with s 80 of the *Constitution* does not arise.

Section 64(1)(e) explains the criminal standard of proof beyond reasonable doubt

8 The parties proceeded, correctly, on the basis that the proper approach to the analysis of a direction given under the *Jury Directions Act* was to: first, determine whether the text of s 64(1)(e) is picked up by s 68(1); and second, consider the effect of a direction containing that text given in the trial.

9 Applying this approach, at the first stage, analysis of the text in s 64(1)(e) is undertaken as a process of ordinary statutory construction, with the words to be understood against the background of their application in a jury trial. If the text is inconsistent with the criminal standard of proof, it is not validly picked up by s 68(1) of the *Judiciary Act* and consequently cannot be given at any trial of a Commonwealth offence. In that event the question would arise whether the wrongful inclusion of those words in the charge, considered in its entirety, occasioned a substantial miscarriage of justice or other basis for setting aside the conviction. This issue would fall to be addressed in accordance with established principles,⁷ although in this case the respondent conceded that, if s 64(1)(e) of the *Jury Directions Act* was not applicable because it was inconsistent with s 13.2(1) of the Code, then a substantial miscarriage of justice would have resulted from the inclusion of the explanation in the charge to the jury at the trial.

10 Consistently with the approach outlined above, whether s 64(1)(e), in permitting an indication to the jury that "a reasonable doubt is not ... an unrealistic possibility", is inconsistent with the criminal standard of proof beyond reasonable doubt in s 13.2 of the Code is a question of statutory construction. The possibility

6 *Farshchi v The King* (2024) 390 FLR 97 at 108 [47].

7 See *Baini v The Queen* (2012) 246 CLR 469.

that, in the context of a particular charge to the jury, a direction in conformity with s 64(1)(e) might nevertheless convey a false perception of the basis for deciding whether the prosecution has proven its case, so as to occasion a substantial miscarriage of justice,⁸ is not relevant to the question of the meaning of s 64(1)(e).

11 The appellant's contention that s 64(1)(e) diminishes the criminal standard of proof, to the extent that it permits a trial judge to indicate to a jury that "a reasonable doubt is not ... an unrealistic possibility", depends upon a decontextualised and implausible interpretation of the words "unrealistic possibility". In a nutshell, the contention was that the plain and ordinary meaning of "unrealistic" includes "improbable" and therefore a jury would always construe an "unrealistic possibility" to include an "improbable event".⁹ The contention was not supported by extrinsic materials but relied solely upon the view of Priest JA in the Court of Appeal that, as a matter of ordinary language, an unrealistic possibility "is one that is unreasonable, irrational, illogical, improbable, foolish or similar", in contradistinction to an unreal possibility which his Honour considered to be "one that is absurd, bizarre, fanciful, fantastic, illusory, non-sensical, preposterous or similar".¹⁰ The language of "unreal possibilities" was the subject of this Court's decision in *Green v The Queen*.¹¹ There, this Court explained that where defence counsel had suggested to the jury possibilities that were "in truth fantastic or completely unreal", it would be both proper and necessary for the trial judge to instruct the jury that "fantastic and unreal possibilities ought not to be regarded by them as the source of reasonable doubt".¹² The appellant acknowledged that an "unreal possibility" could not preclude a finding of proof beyond reasonable doubt.

12 Priest JA allowed that there may be a semantic difference between an "unrealistic" and an "unreal" possibility, "although if one exists, it is finely

8 cf *La Fontaine v The Queen* (1976) 136 CLR 62 at 72; *R v Dookheea* (2017) 262 CLR 402 at 424 [37].

9 cf *Cody v J H Nelson Pty Ltd* (1947) 74 CLR 629 at 647.

10 *Farshchi v The King* (2024) 390 FLR 97 at 107 [40].

11 (1971) 126 CLR 28.

12 *Green v The Queen* (1971) 126 CLR 28 at 33.

nuanced".¹³ His Honour considered that there was "little or no practical difference between them".¹⁴

13 The comparison between "unreal possibilities", as used in *Green*, and "an unrealistic possibility", being the language in s 64(1)(e), isolated from its context, does not assist in the proper construction of s 64(1)(e). Section 64(1)(e) permits a trial judge, in an appropriate case, to "indicate that a reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility". The provision should be construed in its entirety.¹⁵ As in s 64(1)(b) to (d), the permitted indication is a composite phrase in which the words "unrealistic possibility" take their colour from the reference to "an imaginary or fanciful doubt".¹⁶ Both "fanciful" and "imaginary" have been accepted as appropriate descriptions of circumstances that do not give rise to a "reasonable" doubt. In *R v Dookheea*, this Court described, as the common law position in relation to explanations of the standard beyond reasonable doubt, that it is permissible, in certain circumstances, to explain that "a reasonable doubt does not include fanciful possibilities".¹⁷ In *R v Lifchus*,¹⁸ the Supreme Court of Canada's suggested instructions pertaining to proof beyond a reasonable doubt include, relevantly, that "[a] reasonable doubt is not an imaginary or frivolous doubt".

14 In the context of that composite phrase, and as a matter of its plain and ordinary meaning, an "unrealistic possibility" is no different in substance to the "fantastic and unreal possibilities" that, as *Green* explains, should not be regarded as a source of reasonable doubt.

15 This interpretation of s 64(1)(e) is further reinforced by the broader context of s 64(1) and the purpose of s 64. Section 64(1)(e) identifies one of five permissible ways in which the phrase "proof beyond reasonable doubt" may be explained. Its evident purpose is to facilitate trial judges explaining the beyond reasonable doubt standard to juries and not to alter, impair or detract from, or

13 *Farshchi v The King* (2024) 390 FLR 97 at 107 [40].

14 *Farshchi v The King* (2024) 390 FLR 97 at 107 [40].

15 *Westpac Securities Administration Ltd v Australian Securities and Investments Commission* (2021) 270 CLR 118 at 143 [54].

16 cf Pearce, *Statutory Interpretation in Australia*, 10th ed (2024) at 170-171 [4.19].

17 *R v Dookheea* (2017) 262 CLR 402 at 426 [41].

18 [1997] 3 SCR 320 at 337 [39].

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otherwise diminish, that standard. Section 64(1) is neither exhaustive of the explanations that a trial judge may give, nor does it mandate that an explanation must be given in line with its five paragraphs.

16 More specifically, by indicating what does not constitute a reasonable doubt, s 64(1)(e) is evidently intended to guide jurors away from applying a standard that is inappropriately stringent. Section 64(1)(e) does not seek to define the standard of beyond reasonable doubt but rather to carve out from consideration matters of a character that could not raise a reasonable doubt. Contrary to the appellant's submissions, it does not impermissibly define or control other references to "proof beyond reasonable doubt" in a trial judge's summing up.¹⁹

17 It follows that the Court of Appeal was correct to conclude that there is no inconsistency between s 64(1)(e) of the *Jury Directions Act* and s 13.2(1) of the Code, with the consequence that s 64(1)(e) is picked up in its entirety by s 68(1)(c) of the *Judiciary Act*. Ground one fails.

The constitutional issue should not be decided

18 As s 64(1)(e) does not diminish the criminal standard of proof, the constitutional premise of ground two does not arise for consideration. Because that ground concerns the interpretation of the *Constitution*, this Court should not decide it having regard to its well-established practice that the Court will not investigate and decide constitutional questions unless it is necessary to do justice in the given case and determine the rights of the parties.²⁰

Conclusion

19 The appeal must be dismissed.

19 *Thomas v The Queen* (1960) 102 CLR 584 at 593; *Green v The Queen* (1971) 126 CLR 28 at 31.

20 cf *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at 247-248 [56]-[58], 249 [60]; *Clubb v Edwards* (2019) 267 CLR 171 at 216-217 [136].

EDELMAN AND STEWARD JJ.

Explaining "beyond reasonable doubt" for Commonwealth offences

20 In Victoria, the *Jury Directions Act 2015* (Vic) generally requires that a trial judge must explain the meaning of the phrase "beyond reasonable doubt". Section 64(1)(e) of the *Jury Directions Act* permits an explanation of the phrase by a trial judge to contain a statement that indicates "that a reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility". In the present case, a statement to that effect was made at the trial of the appellant, Dr Farshchi. The issues on this appeal arise because Dr Farshchi's trial was for Commonwealth offences.

21 The questions raised by Dr Farshchi's notice of appeal are whether s 64(1)(e) of the *Jury Directions Act* cannot apply to Commonwealth offences either because the provision is inconsistent with s 80 of the *Constitution* or because it is inconsistent with s 13.2 of the *Criminal Code* (Cth).²¹ The former is a question of the jurisdiction of the courts of Victoria.²² The latter is a question of whether conflict between State and Commonwealth laws precludes State laws being picked up and applied within jurisdiction.²³ The logically anterior question of jurisdiction is whether the explanation contained in the *Jury Directions Act* is inconsistent with the requirements of a "trial on indictment ... by jury" in s 80 of the *Constitution*. If there is no inconsistency with s 80 then no different conclusion could be reached in this case in relation to s 13.2 of the *Criminal Code*.

22 At Federation, the essential content of a "trial on indictment ... by jury" in s 80 of the *Constitution* included (and necessarily still includes) a requirement that the jury be unanimously satisfied of guilt without any reasonable doubt, or an equivalent verbal formulation. But it is not inconsistent with a jury having no reasonable doubt as to guilt for a trial judge to have power in an appropriate case to indicate to a jury "that a reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility". The appeal must be dismissed.

The inconsistency issue

23 Section 63(1) of the *Jury Directions Act* provides that a trial judge "must give the jury an explanation of the phrase 'proof beyond reasonable doubt' unless there are good reasons for not doing so". That explanation must be given before

21 See *Criminal Code Act 1995* (Cth), Schedule.

22 *Judiciary Act 1903* (Cth), s 68(2).

23 *Judiciary Act 1903* (Cth), s 68(1).

any evidence is adduced, again unless there are good reasons not to do so.²⁴ The explanation can be repeated at any time in the trial.²⁵

24 Section 64 of the *Jury Directions Act* then provides as follows:

- "(1) In explaining the phrase 'proof beyond reasonable doubt' under section 63, the trial judge may—
- (a) refer to—
 - (i) the presumption of innocence; and
 - (ii) the prosecution's obligation to prove that the accused is guilty; or
 - (b) indicate that it is not enough for the prosecution to persuade the jury that the accused is probably guilty or very likely to be guilty; or
 - (c) indicate that—
 - (i) it is almost impossible to prove anything with absolute certainty when reconstructing past events; and
 - (ii) the prosecution does not have to do so; or
 - (d) indicate that the jury cannot be satisfied that the accused is guilty if the jury has a reasonable doubt about whether the accused is guilty; or
 - (e) indicate that a reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility.
- (2) If the trial judge explains the phrase 'proof beyond reasonable doubt' in response to a question asked by the jury as described in section 63(5), the trial judge may adapt the explanation to address the particular question asked."

25 The operation of ss 63 and 64 of the *Jury Directions Act* in federal jurisdiction depends upon s 68 of the *Judiciary Act 1903* (Cth). Section 68 of the *Judiciary Act* "fulfils an important role in ensuring that federal criminal law is

24 *Jury Directions Act 2015* (Vic), s 63(2).

25 *Jury Directions Act 2015* (Vic), s 63(6).

administered in each State upon the same footing as State law and avoids the establishment of two independent systems of justice".²⁶ Relevantly, s 68(2) of the *Judiciary Act* confers federal jurisdiction on State and Territory courts in "the trial and conviction on indictment" of persons charged with offences against the laws of the Commonwealth and, within that federal jurisdiction, s 68(1) relevantly picks up and requires the application of the laws of a State or Territory respecting "the procedure for ... trial and conviction on indictment" of persons charged with offences against the laws of the Commonwealth. In other words, the starting point is s 68(2), which confers federal jurisdiction, before considering s 68(1), which confers the power within that jurisdiction.²⁷

26 The conferral of jurisdiction under s 68(2) of the *Judiciary Act* is made expressly "subject to ... section 80 of the *Constitution*". Since the consideration of a court's jurisdiction is the "very first duty of any Court",²⁸ with the trial judge's first duty in this case being to consider the jurisdiction to apply s 64(1)(e) of the *Jury Directions Act*, the starting point on this appeal is whether, as Dr Farshchi submits, s 64(1)(e) of the *Jury Directions Act* is inconsistent with s 80 of the *Constitution*. Contrary to the submissions of the respondent and the Attorney-General for the State of Victoria, intervening, it would be inappropriate in this case for this Court to invoke prudential considerations as a reason to exercise "restraint" to avoid dealing with an anterior jurisdictional issue that has been fully argued.²⁹

27 Dr Farshchi also submits that s 64(1)(e) of the *Jury Directions Act* is inconsistent with s 13.2(1) of the *Criminal Code*, which provides that "[a] legal burden of proof on the prosecution must be discharged beyond reasonable doubt".

26 *R v Murphy* (1985) 158 CLR 596 at 617.

27 See *Attorney-General (Cth) v Huynh* (2023) 280 CLR 341 at 360-361 [48], 412 [210].

28 *Hazeldell Ltd v The Commonwealth* (1924) 34 CLR 442 at 446. See also *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co Ltd* (1911) 12 CLR 398 at 415; *Old UGC Inc v Industrial Relations Commission (NSW)* (2006) 225 CLR 274 at 290 [51]; *Federal Commissioner of Taxation v Tomaras* (2018) 265 CLR 434 at 477 [132]; Leeming, *Authority to Decide: The Law of Jurisdiction in Australia*, 2nd ed (2020) at 37-38. Compare also *Wilkie v The Commonwealth* (2017) 263 CLR 487 at 521-522 [56]-[57] with the powerful arguments of Leeming, *Cowen and Zines's Federal Jurisdiction in Australia*, 5th ed (2025) at 16, 305.

29 See *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at 259-262 [100]-[107]. See also *Zhang v Commissioner of the Australian Federal Police* (2021) 273 CLR 216 at 230 [22].

If such inconsistency exists then s 64(1)(e) of the *Jury Directions Act* would not be picked up and applied in federal jurisdiction by s 68(1) of the *Judiciary Act*.³⁰ However, Dr Farshchi properly accepts that if his ground of appeal concerning s 80 of the *Constitution* is unsuccessful then his ground of appeal concerning s 13.2 of the *Criminal Code* also cannot succeed.

How the constitutional inconsistency issue arises in this case

28 Dr Farshchi was charged on indictment by the Commonwealth Director of Public Prosecutions with two charges of offences contrary to Div 270 of the *Criminal Code*. The two offences were: (i) causing a person to remain in forced labour;³¹ and (ii) conducting a business involving forced labour.³² Dr Farshchi's wife was charged on the same indictment with offences of: (i) aiding, abetting, counselling or procuring the offence of causing a person to remain in forced labour,³³ and (ii) conducting a business involving forced labour.³⁴

29 At Dr Farshchi's first trial, the trial judge (Chief Judge Kidd) received submissions from counsel about s 64 of the *Jury Directions Act* but declined to give any direction under s 64(1)(e) in his Honour's opening remarks to the jury. The jury were later discharged without reaching a verdict.

30 Dr Farshchi then faced a second trial. At the conclusion of the second trial, and following submissions again from counsel about s 64 of the *Jury Directions Act*, the trial judge gave the following direction:

"It is almost impossible to prove anything with absolute certainty when reconstructing past events and the prosecution does not have to do so. A reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility. You cannot be satisfied the accused is guilty if you have a reasonable doubt about whether the accused is guilty. I mentioned to you at the beginning of the trial that these words 'proof beyond reasonable doubt' mean exactly what they say, proof beyond reasonable doubt."

30 See *Putland v The Queen* (2004) 218 CLR 174 at 179 [7], 189 [41], 215 [121]; *Attorney-General (Cth) v Huynh* (2023) 280 CLR 341 at 363 [58], 390-391 [149], 407 [194].

31 *Criminal Code* (Cth), s 270.6A(1).

32 *Criminal Code* (Cth), s 270.6A(2).

33 *Criminal Code* (Cth), s 270.6A(1) and s 11.2(1).

34 *Criminal Code* (Cth), s 270.6A(2).

31 That direction was given by the trial judge in the context of a lengthy and careful summing up in which the trial judge: (i) emphasised that the prosecution must prove each of the charges beyond reasonable doubt, which "is the highest standard of proof that our law demands"; (ii) reiterated or applied, at least 15 times in his summing up, words to the effect that "[i]t is only if you are satisfied that the prosecution has proved all the elements of the charge beyond reasonable doubt that you may find the accused guilty of that charge"; (iii) further emphasised, at least twice, that an issue or argument or alternative view of the facts raised by the accused which is consistent with innocence must be excluded by the prosecution beyond reasonable doubt; (iv) gave an example of the application of the standard of beyond reasonable doubt; (v) referred to witnesses whose evidence would have to be accepted beyond reasonable doubt; (vi) explained that if a reasonable view of the facts consistent with innocence could not be excluded beyond reasonable doubt then the jury must acquit; and (vii) explained that the separate consideration of the case against each accused required a separate finding that the prosecution case against each accused had been proved beyond reasonable doubt.

32 There could have been no uncertainty in the mind of any juror that the controlling standard to be applied before any conviction could be reached was one of proof of the offences "beyond reasonable doubt".

33 Dr Farshchi was found guilty by the jury of both offences. The trial judge sentenced him to a total effective term of three years and six months' imprisonment with a non-parole period of 18 months. Dr Farshchi appealed from his conviction and sentence to the Court of Appeal of the Supreme Court of Victoria.

34 One of Dr Farshchi's grounds of appeal from conviction was that the trial judge erred by "directing the jury that a reasonable doubt is not an unrealistic possibility". Dr Farshchi submitted that such direction was inconsistent with s 80 of the *Constitution* and s 13.2(1) of the *Criminal Code* and therefore could not be picked up and applied in federal jurisdiction. The Court of Appeal (Priest JA, with whom Niall and Taylor JJA agreed) held that there was no inconsistency between s 64(1)(e) of the *Jury Directions Act* and either s 80 of the *Constitution* or s 13.2(1) of the *Criminal Code* because s 64(1)(e) "does not provide for a different standard of proof" and "does not diminish the standard of proof" but "simply provides for that standard of proof to be explained" and "permits that standard to be explained to a jury".³⁵ As explained below, that reasoning was correct.

35 *Farshchi v The King* (2024) 390 FLR 97 at 108 [47], 110 [54].

The essential meaning of "trial on indictment ... by jury" in s 80 of the Constitution

35 In the interpretation of constitutional phrases, it should be "beyond controversy"³⁶ or "beyond question"³⁷ that the "traditional[]" doctrine³⁸ and the "current doctrine of [this] Court"³⁹ are that the "essential characteristics"⁴⁰ or "essential meaning"⁴¹ of a phrase, its "connotation", expressed as a "concept"⁴² at the right level of generality by having regard to constitutional purpose and context,⁴³ cannot change from the time of Federation in 1901.⁴⁴

36 In *R v Snow*,⁴⁵ Griffith CJ described a trial by jury as an institution adopted in s 80 "with all that was connoted by that phrase in constitutional law and in the common law of England". The connotation (that is, "the essential features") of the constitutional institution of "trial by jury" thus has "what might be called a constitutionally entrenched status", determined by reference to the (unchanged) "purpose which s 80 was intended to serve" at a level of generality that permits the

36 *R v Jones* (1972) 128 CLR 221 at 229.

37 *Lansell v Lansell* (1964) 110 CLR 353 at 366.

38 *Eastman v The Queen* (2000) 203 CLR 1 at 45 [142].

39 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 551-552 [42].

40 *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 608.

41 *Street v Queensland Bar Association* (1989) 168 CLR 461 at 537.

42 Dworkin, *Law's Empire* (1986) at 70-71.

43 *Chetcuti v The Commonwealth* (2021) 272 CLR 609 at 637-638 [58].

44 See, for instance, *R v Barger* (1908) 6 CLR 41 at 68; *Ex parte Professional Engineers' Association* (1959) 107 CLR 208 at 267; *Damjanovic & Sons Pty Ltd v The Commonwealth* (1968) 117 CLR 390 at 406-407; *Attorney-General (Vict) v Ex rel Black v The Commonwealth* (1981) 146 CLR 559 at 578; *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 at 297; *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 302-303; *McGinty v Western Australia* (1996) 186 CLR 140 at 200; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 427-428 [111]-[112]; *Love v The Commonwealth* (2020) 270 CLR 152 at 255-256 [275]; *Chetcuti v The Commonwealth* (2021) 272 CLR 609 at 637 [57].

45 (1915) 20 CLR 315 at 323.

evolution of the institution.⁴⁶ The question of the essential meaning of the phrase "trial on indictment ... by jury" in s 80 of the *Constitution* arose in *Cheatle v The Queen*.⁴⁷

Cheatle v The Queen

37 In *Cheatle*, the appellants were convicted of a Commonwealth offence by a majority verdict of a jury. Section 57(1) of the *Juries Act 1927* (SA) authorised that majority verdict by a South Australian court constituted by a judge and jury but, as the matter was in federal jurisdiction, the South Australian courts could only have jurisdiction if it had been conferred by s 68 of the *Judiciary Act*. This Court unanimously held that s 68(2) of the *Judiciary Act* permitted the vesting of federal jurisdiction in a South Australian court for criminal trials otherwise than by a majority verdict.⁴⁸ A majority verdict on a criminal trial on indictment in federal jurisdiction was held to be inconsistent with s 80 of the *Constitution*. Although the Court in *Cheatle* primarily focused upon criminal trials by jury generally, the specific institution about which s 80 of the *Constitution* is concerned is a smaller subset of such trials, namely the "trial on indictment ... by jury".

38 In considering the essential features of the institution of criminal trial by jury before 1901, the Court observed that some features of the institution at that time, such as the exclusion of women and the existence of property qualifications, existed at too low a level of generality to be essential to the meaning of a provision designed to endure: "[t]he relevant essential feature ... was, and is, that the jury be a body of persons representative of the wider community". With the essential feature of representativeness expressed at the higher level of generality, although the perception in 1901 might have been "that the only true representatives of the wider community were men of property", in contemporary Australia "the exclusion of females and unpropertied persons would itself be inconsistent" with the essential feature of representativeness.⁴⁹

39 This Court in *Cheatle* was not, however, concerned with the essential feature of the representativeness of the decision-making body in a "trial on indictment ... by jury". The issue was whether unanimity was an essential feature. After a meticulous examination of the history of criminal trials by jury, particularly in the nineteenth century, this Court concluded that "in 1900, it was an essential

46 *Ng v The Queen* (2003) 217 CLR 521 at 526 [9].

47 (1993) 177 CLR 541.

48 *Cheatle v The Queen* (1993) 177 CLR 541 at 563.

49 *Cheatle v The Queen* (1993) 177 CLR 541 at 560-561.

feature of the institution [of criminal trial by jury] that an accused person could not be convicted otherwise than by the agreement or consensus of all the jurors".⁵⁰ This Court explained the reason that unanimity was an essential feature of a criminal trial by jury—part of the connotation, not merely the denotation or application of the phrase—as follows:⁵¹

"the common law's insistence upon unanimity reflects a fundamental thesis of our criminal law, namely, that a person accused of a crime should be given the benefit of any reasonable doubt".

The Court referred to a decision of the Supreme Court of Canada in which five members of that Court held that the need for unanimity upon any charge "flows from the proposition that a verdict stands for guilt, beyond a reasonable doubt, of that for which the accused has been charged".⁵²

40 In reaching the conclusion that, at Federation, unanimity was an essential feature of a criminal trial by jury, this Court also addressed a submission that at Federation some of the Australian colonies had provided in legislation for majority verdicts of civil juries. The Court explained that the requirement of unanimity as an essential feature in criminal trials was different from civil trials:⁵³

"the requirement of unanimity in the case of a criminal jury conforms with the fundamental thesis of the criminal law that a person should not be convicted of a criminal offence if there is any reasonable doubt of his or her guilt".

41 In short, a central, and repeated, part of the reasoning of this Court in *Cheatle* depended upon the proposition that a "fundamental thesis" of the criminal law at Federation was the lack of reasonable doubt by a jury which convicts an accused person. The Court thus considered that a lack of reasonable doubt of guilt by a convicting jury was an essential feature of a criminal trial; indeed, it was the foundation for the further essential feature of unanimity. This also seems to have been the assumption of Gleeson CJ and McHugh J in *Brownlee v The Queen*⁵⁴ in the course of considering the extension of the reasoning in *Cheatle* to a legislative provision permitting the reduction in the number of jurors below 12:

50 *Cheatle v The Queen* (1993) 177 CLR 541 at 552.

51 *Cheatle v The Queen* (1993) 177 CLR 541 at 553.

52 *R v Thatcher* [1987] 1 SCR 652 at 698.

53 *Cheatle v The Queen* (1993) 177 CLR 541 at 561.

54 (2001) 207 CLR 278 at 289 [22]. See also at 284-286 [5]-[9], 287 [17].

such a system was held to be consistent with "the prosecution's obligation to prove its case beyond reasonable doubt".

42 It may be that this reasoning in *Cheatle* was part of the ratio decidendi of this Court, which ought to be followed in this case in the absence of an application to re-open *Cheatle*. But it is unnecessary to consider that question because the reasoning in *Cheatle* that treated a standard at the level of beyond reasonable doubt in 1901 as an essential feature of a "trial on indictment ... by jury" is plainly correct.

The reasoning on "beyond reasonable doubt" in Cheatle was correct

43 In *R v Dookheea*,⁵⁵ this Court considered the different theories of why a standard of satisfaction beyond reasonable doubt emerged in the eighteenth century; the most likely (which, to some degree subsumed the others) was that it was introduced "simply as a means of expressing more clearly the then well-settled test of satisfaction as a matter of conscience or moral certainty". The verbal formulation, "beyond reasonable doubt", came to dominate as the expression of a standard of proof that was "somewhere between probable suspicion and complete certainty".⁵⁶ At the time of Federation in Australia, that verbal formulation, or versions of it, were well established in the United Kingdom and the United States, as well as the Australian colonies.

44 Leading texts in the United Kingdom in the latter half of the nineteenth century all expressed the standard as one beyond reasonable doubt. Thus, Starkie described the level of satisfaction of the jury, before conviction, as "exclusion of every reasonable doubt", the "high degree of probability as amounts to moral certainty" and "moral certainty to the exclusion of every reasonable doubt".⁵⁷ Taylor wrote of the satisfaction of the jury to a degree of "moral certainty" from

55 (2017) 262 CLR 402 at 419 [30], citing Shapiro, "*Beyond Reasonable Doubt*" and "*Probable Cause*": *Historical Perspectives on the Anglo-American Law of Evidence* (1991) at 20, 23, 40-41 and 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.

56 *R v Dookheea* (2017) 262 CLR 402 at 422 [33], referring to Franklin, *The Science of Conjecture: Evidence and Probability before Pascal* (2001) at 62-63 and Shapiro, "*Beyond Reasonable Doubt*" and "*Probable Cause*": *Historical Perspectives on the Anglo-American Law of Evidence* (1991) at 21.

57 Starkie, *A Practical Treatise of the Law of Evidence*, 4th ed (1853) at 817, 865.

"evidence which excludes from their minds all reasonable doubt".⁵⁸ And Stephen, reiterating remarks from his *Digest*, wrote of the entitlement of an accused person to the benefit of "reasonable doubt", noting that the expression "moral certainty" was as vague as "no reasonable doubt".⁵⁹

45 In the United States, also at the end of the nineteenth century, Thayer wrote that "[a]lways and everywhere great emphasis was placed on the rule that in criminal cases there can be no conviction unless guilt is established with very great clearness—as we say nowadays, beyond reasonable doubt".⁶⁰ That standard was reiterated in a series of decisions of the Supreme Court of the United States throughout the 1890s.⁶¹ In 1905, Wigmore wrote of the rule in criminal law that has "grown up that the persuasion must be *beyond a reasonable doubt*".⁶²

46 In Australia, in the 1880s and 1890s, colonial juries were regularly instructed to apply a standard of beyond reasonable, or rational, doubt.⁶³ In 1893, Windeyer J quoted from the well-known remarks of Abbott CJ,⁶⁴ saying that although "the certainty of mathematical demonstration cannot be required or expected", the unanimous judgment and conscience of the jury requires that

58 Taylor, *A Treatise on the Law of Evidence, As Administered in England and Ireland*, 8th ed (1885), vol 1 at 133. See also at 1-2, 329.

59 Stephen, *A General View of the Criminal Law of England*, 2nd ed (1890) at 183-184, referring to Stephen, *A Digest of the Law of Evidence* (1876) at 97.

60 Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898) at 552.

61 *Potter v United States* (1894) 155 US 438 at 448; *Coffin v United States* (1895) 156 US 432 at 460; *Cochran and Sayre v United States* (1895) 157 US 286 at 299-300; *Davis v United States* (1895) 160 US 469 at 488, 493; *Wiborg v United States* (1896) 163 US 632 at 655-656.

62 Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* (1905), vol 4 at 3542 §2497 (emphasis in original).

63 See, eg, *R v Camm* (1883) 1 QLJ 136 at 136; *R v Brown* (1888) 9 LR (NSW) 58 at 60; *R v Amora* (1897) 18 LR (NSW) 114 at 123; *R v McDermott* (1899) 5 Argus LR 12 at 12; *R v Cook* (1899) 20 LR (NSW) 264 at 264. See also *R v McNaughton* [1813] NSWSupC 8; *R v Ashcroft* [1826] NSWSupC 69; *R v Bensley* [1828] NSWSupC 42; *R v Feeby* [1828] NSWSupC 66; *R v Miller* [1851] SASupC 58; *R v Collins* [1888] NSWSupC 2.

64 *R v Burdett* (1820) 4 B & Ald 95 at 162 [106 ER 873 at 898].

"where reasonable doubt is entertained it is their duty to acquit".⁶⁵ The same standard was emphasised in another decision of the Supreme Court of New South Wales that year by Windeyer J, as well as Stephen J and Manning J.⁶⁶

47 These historical sources unequivocally support the widespread recognition at the time of Federation of a requirement for conviction that a jury be satisfied beyond reasonable doubt. The concept of a high standard of satisfaction, expressed as "beyond reasonable doubt", was part of the essential meaning of a "trial by jury"; as recognised in *Cheatle*, it was a core feature of the institution intertwined with unanimity. That high standard is also consistent with the purpose of s 80, discussed below, of preserving democratic participation in an institution of government, subject to Parliament's decision as to which offences will fall to be determined by that institution.

48 Nevertheless, the essential meaning of "trial by jury" at the right level of generality, the "concept" involved, does not constitutionally entrench a semantic fundamentalism. It is the requirement of a particularly high standard of satisfaction by which guilt is assessed rather than a requirement that particular words be uttered as a ritual incantation. Indeed, a high standard of satisfaction was a central institutional feature of trials by jury on indictment at the time of Federation, but the precise words of that standard were not. Despite the phrase "beyond reasonable doubt" being in widespread use at that time, Wigmore observed that it remained an "elusive and undefinable state of mind", which was not necessarily any clearer than earlier phrases, including a lack of "rational and well-grounded doubt".⁶⁷ The concept which is part of the essential meaning of "trial by jury" in s 80 is a standard equivalent to "beyond reasonable doubt". Whether other, equivalent, words can capture or elucidate that standard in language that is more easily comprehensible in contemporary Australia is addressed later in these reasons.

Satisfaction beyond reasonable doubt and parliamentary choice

49 The respondent pointed to authority of this Court to the effect that it is for the Commonwealth Parliament to determine whether any class of offence can be tried summarily, thus avoiding s 80 which applies only to indictable offences.⁶⁸

65 *R v Makin* (1893) 14 LR (NSW) 1 at 17.

66 *R v Kops* (1893) 14 LR (NSW) 150 at 177, 197-198, 212, 214-215.

67 Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* (1905), vol 4 at 3542 §2497.

68 Referring to *R v Archdall and Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128; *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR

The respondent sought to rely on that authority to deny a "liberal" approach, and to support a sparse approach, to the identification of the essential features of s 80, treating representativeness, but not satisfaction beyond reasonable doubt, as an essential feature. The line of authority to which the respondent pointed can be accepted for the proposition that the Commonwealth Parliament can avoid the effect of s 80 by making an offence one which is not tried on indictment. That line of authority is based on the history of s 80. But it says nothing about the essential features of a trial by jury.

50 As McHugh J has meticulously explained, s 80 of the *Constitution* substantively departed from Art III of the *Constitution of the United States* when an initial draft by Inglis Clark guaranteeing a jury trial for "all crimes cognisable by any Court" was later amended by Griffith to confine the guarantee to indictable Commonwealth offences.⁶⁹ As a matter of history:⁷⁰

"it is clear that, from the beginning, the makers of our Constitution were concerned to avoid the rigidity of the United States counterpart. They wanted the Parliament, rather than the Constitution, to determine what offences against the laws of the Commonwealth should be tried by jury."

51 This history shows that although s 80 was "intended to be part of the structure of government",⁷¹ with democratic participation in the system of criminal justice,⁷² s 80 was not "a strong guarantee of trial by jury" at an individual level.⁷³ Rather, just as "[t]he architects of the Constitution placed great faith in the capacity of the elected senators and members to design statute law for a system of

556; *Sachter v Attorney-General for the Commonwealth* (1954) 94 CLR 86; *Zarb v Kennedy* (1968) 121 CLR 283; *Li Chia Hsing v Rankin* (1978) 141 CLR 182; *Kingswell v The Queen* (1985) 159 CLR 264 at 276-277; *Alqudsi v The Queen* (2016) 258 CLR 203 at 216-221 [25]-[32].

69 *Cheng v The Queen* (2000) 203 CLR 248 at 292 [131], citing Griffith, *Successive Stages of the Constitution of the Commonwealth of Australia* (1891), La Nauze, *The Making of the Australian Constitution* (1972) at 227-228 and Hanks, *Constitutional Law in Australia*, 2nd ed (1996) at 513.

70 *Cheng v The Queen* (2000) 203 CLR 248 at 293 [132]. See also *Vunilagi v The Queen* (2023) 279 CLR 259 at 323-326 [196]-[202].

71 *Brown v The Queen* (1986) 160 CLR 171 at 214.

72 See Evatt, "The Jury System in Australia" (1936) 10 *Australian Law Journal (Supp)* 49 at 67.

73 *Vunilagi v The Queen* (2023) 279 CLR 259 at 326 [202].

representative self-government",⁷⁴ so too was the intention concerning s 80 to "allow the federal government to avoid its scope where convenient".⁷⁵ This conclusion, however, says nothing about the content of the institution of trial by jury in circumstances where the Commonwealth Parliament has prescribed that an offence is indictable.

Unhelpful analogies and an unhelpful hypothetical

52 The respondent relied upon analogies such as: (i) the onus of proof on the prosecution, a "mere matter of procedure"⁷⁶ which was said not to be an essential feature of trial on indictment by jury; and (ii) the privilege against self-incrimination, a rule "of evidence [rather] than one relating to trial by jury".⁷⁷ The respondent also sought to invoke a hypothetical challenge to Commonwealth laws that specify a lower standard of proof for one element of the offence.

53 There is little assistance to be gained in attempting to draw comparisons between the privilege against self-incrimination, which this Court has treated as an inessential feature of the institution of trial on indictment by jury,⁷⁸ and the degree of satisfaction about guilt that a jury must reach to convict. As Griffith CJ said in 1909, that privilege "was introduced into English law long after the institution of trial by jury ... [and] its application has frequently been excluded by Statutes in the case of indictable offences".⁷⁹

54 It is also unnecessary for this appeal to consider whether, or the extent to which, the onus of proof for an offence, or some element of it, can be separated from the degree of satisfaction as to guilt that a jury must reach to convict as an essential feature of trial on indictment by jury. For instance, it might be possible to conclude that it is consistent with s 80 for an accused person to bear the onus of proving a defence (a label which can be used, at least, to describe justifications and

74 Reid and Forrest, *Australia's Commonwealth Parliament 1901-1988: Ten Perspectives* (1989) at 87.

75 Charlesworth, "Individual Rights and the Australian High Court" (1986) 4 *Law in Context* 52 at 54.

76 *Orient Steam Navigation Co Ltd v Gleeson* (1931) 44 CLR 254 at 262-263.

77 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 358.

78 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 358, 375, 385-386, 418; *Sorby v The Commonwealth* (1983) 152 CLR 281 at 298, 308-309.

79 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 358.

excuses⁸⁰). Certainly, there was a long history before Federation of defences to indictable crimes for which an accused person bore either an evidential or a substantive onus.⁸¹ Further, in the United States where "it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required",⁸² and where the *Constitution of the United States* requires that "[t]he government must prove beyond a reasonable doubt every element of a charged offense",⁸³ a majority of the Supreme Court of the United States nevertheless upheld the validity of a law requiring an accused person to establish insanity beyond reasonable doubt.⁸⁴

55 For the same reason, it is also unnecessary to decide in this case whether it is inconsistent with s 80 of the *Constitution* for a single element of a Commonwealth indictable offence to have a lower standard of proof than a standard beyond reasonable doubt. The respondent pointed to provisions such as s 31(1) of the *Financial Transaction Reports Act 1988* (Cth),⁸⁵ which included the requirement that having regard to a number of matters "it would be reasonable to conclude" that transactions were conducted for a particular sole or dominant contravening purpose. One view of that part of s 31(1)⁸⁶ is that "the words 'it would be reasonable to conclude' go to the standard of proof to be applied" and form part of the fault element of the offence.⁸⁷ It may be arguable that such a variation of the

80 *R v Anna Rowan (a pseudonym)* (2024) 278 CLR 470 at 497 [75], referring to Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (2007) at 133.

81 See, eg, *R v Mawgridge* (1706) Kel 119 [84 ER 1107]; *R v Ryley* [1824] TASSupC 20; *R v Flanagan* [1827] NSWSupC 8; *R v Macmanus* [1829] NSWSupC 71; *R v Gregory* [1843] SASupC 33; *M'Naghten's Case* (1843) 10 Cl & F 200 [8 ER 718]; *R v Denham* [1850] NSWSupCMB 11; *R v Dudley and Stephens* (1884) 14 QBD 273; *R v Ryan* (1890) 11 LR (NSW) 171; *R v Makin* (1893) 14 LR (NSW) 1 at 26, 32. See also *Lunacy Act 1878* (NSW), s 92; *Crimes Act 1900* (NSW), s 23.

82 *In re Winship* (1970) 397 US 358 at 362.

83 *Victor v Nebraska* (1994) 511 US 1 at 5.

84 *Leland v Oregon* (1952) 343 US 790.

85 See now *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), ss 142-143.

86 Compare *Leask v The Commonwealth* (1996) 187 CLR 579 at 592-593.

87 *Leask v The Commonwealth* (1996) 187 CLR 579 at 598-599. See also *Lee v The Queen* (2007) 71 NSWLR 120 at 124 [22]-[23].

standard of proof is consistent with the conclusion that the "verdict stands for guilt, beyond a reasonable doubt, of that for which the accused has been charged".⁸⁸ But that question does not arise in this case, there was no substantial argument on this issue, and the point is unnecessary to decide.

Is s 64(1)(e) of the *Jury Directions Act* inconsistent with a requirement of proof beyond reasonable doubt?

The constitutional question as it arises on this appeal

56 For the reasons above, an essential feature of trial on indictment by jury, required for Commonwealth offences by s 80 of the *Constitution*, is that "a person should not be convicted of a criminal offence if there is any reasonable doubt of his or her guilt".⁸⁹ Section 68(2) of the *Judiciary Act* confers no jurisdiction on a court of a State or Territory where a jury is purportedly empowered to convict despite having a reasonable doubt as to guilt. Section 13.2(1) of the *Criminal Code* can have no lesser effect and s 13.2(2) cannot apply to the extent that it detracts from that requirement of s 80.

57 Dr Farshchi accepted that the dispositive issue on this appeal was whether s 64(1)(e) of the *Jury Directions Act* contained a standard of satisfaction other than "beyond reasonable doubt". In the expression in s 64(1)(e) that "a reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility", Dr Farshchi fastened upon the words "an unrealistic possibility". He submitted that in some circumstances an unrealistic possibility could nevertheless be a reasonable doubt. He gave examples from ordinary language use of "an unrealistic possibility" where a reasonable doubt might still be held: "[a] political party might have an unrealistic possibility of winning an election; a football team an unrealistic possibility of winning a game". As Dr Farshchi observed, the Court of Appeal itself had recognised that the list of synonyms for an "unrealistic possibility" included a possibility that is "improbable".⁹⁰ He illustrated this concern by a graphic example where a doubt might arise from a circumstance that is "unrealistic" or "improbable" yet that doubt might nevertheless be a reasonable doubt about guilt.⁹¹

88 *R v Thatcher* [1987] 1 SCR 652 at 698. See also *Cheatle v The Queen* (1993) 177 CLR 541 at 551, citing *R v Thatcher* [1987] 1 SCR 652 at 705.

89 *Cheatle v The Queen* (1993) 177 CLR 541 at 561.

90 *Farshchi v The King* (2024) 390 FLR 97 at 107 [40].

91 See Moss, "Knowledge and Legal Proof", in Gendler, Hawthorne and Chung (eds), *Oxford Studies in Epistemology* (2023), vol 7, 176 at 176, referring to Nesson,

"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."

58 Dr Farshchi and the Court of Appeal are correct that "unrealistic" is a term that, in some contexts, could extend to circumstances where a reasonable doubt existed. An accurate assessment in any particular instance of the likelihood that "unrealistic" would have such a denotation may require a study of applied linguistics. But, in the context of this case, it can be confidently concluded that "unrealistic" would not have such a denotation. As explained below, "unrealistic" was used as an explanation, and not anything like a definition, of "beyond reasonable doubt". It was used only as a negative or exclusionary explanation to clarify or remove uncertainty. And it was used as part of a compound expression where the denotations of the other words were narrower than a reasonable doubt.

The difference between: (i) definition; and (ii) explanation short of definition

59 Although no clear line can be drawn between definition and explanation, there can sometimes be a difference between a definition of a phrase and an explanation of a phrase. A definition of a phrase, in the true sense of definition, is controlling. In ordinary language if a person is asked to define what they mean by a word or phrase, the usual expectation is that the definition can be substituted for the word or phrase and then interpreted in the context in which the word or phrase was spoken. So too, in statutory interpretation, even where definitional words are words of potential extension or confinement, "the only proper ... course is to read the words of the definition into the substantive enactment and then construe the substantive enactment—in its extended or confined sense—in its context^[92] and bearing in mind its purpose and the mischief that it was designed to overcome".⁹³

"Reasonable Doubt and Permissive Inferences: The Value of Complexity" (1979) 92 *Harvard Law Review* 1187.

92 Which might include the term that has been replaced: *SkyCity Adelaide Pty Ltd v Treasurer (SA)* (2024) 98 ALJR 1273 at 1278-1279 [32]; 419 ALR 361 at 367-368.

93 *Kelly v The Queen* (2004) 218 CLR 216 at 253 [103]. See *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568 at 574-575 [12]; *Garlett v Western Australia* (2022) 277 CLR 1 at 33 [71]; *Qantas Airways Ltd v Transport Workers' Union of Australia* (2023) 278 CLR 571 at 608 [80]. See also Pearce, *Statutory Interpretation in Australia*, 10th ed (2024) at 307-308 [6.3].

60 Explanation of a term, where the explanation is short of a true definition (in the sense described above), can be different. Although some explanations of a term have been described as non-exhaustive "inclusive definitions", where the term being explained remains the controlling concept to be applied the explanations are not true definitions. Since the focus remains upon the controlling concept, the explanation is less likely to make a significant change to the concept being applied than a true definition. Commonly, the explanation will remove doubt about the boundaries of a term. For instance, whether in ordinary language or contained in a statute, an explanation might be given to remove doubt that a reference to an "aeroplane" includes a "glider" and excludes a "hot air balloon".⁹⁴ Nevertheless, there are instances where an explanation can expand or contract the meaning that the term would otherwise have in its context. The more that an explanation does so, and therefore the more that the explanation alters the contextual meaning of the word or concept being defined, the more that the explanation will operate like a true definition.

Explaining "beyond reasonable doubt"

61 Although he considered the phrase to be "elusive" and "undefinable", Wigmore wrote that the expression "beyond reasonable doubt" was "invented by the common-law judges for the very reason that it was capable of being understood and applied" by juries.⁹⁵ As Othello remarked, "so prove it, that the probation bear no hinge nor loop to hang a doubt on".⁹⁶ Wigmore thought that any detailed elaboration of the concept "tends to become one of mere words, and the actual effect upon the jury, instead of being enlightenment, is rather confusion, or, at the least, a continued incomprehension".⁹⁷

62 The same view was historically taken by this Court. Barton ACJ described the phrase "reasonable doubt" as one which is "in ordinary and common use" and "a well understood expression".⁹⁸ Dixon CJ wrote of the phrase "satisfied beyond reasonable doubt" that it was "used by ordinary people and is understood well enough ... in the community" and that "attempts to substitute other expressions ...

94 See Pearce, *Statutory Interpretation in Australia*, 10th ed (2024) at 311 [6.10].

95 Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* (1905), vol 4 at 3542, 3545 §2497, quoting Thompson, *A Treatise on the Law of Trials in Actions Civil and Criminal* (1889), vol 2 at 1816.

96 See *Thomas v The Queen* (1960) 102 CLR 584 at 605.

97 Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* (1905), vol 4 at 3544 §2497.

98 *Brown v The King* (1913) 17 CLR 570 at 584.

have never prospered".⁹⁹ Windeyer J cited the concerns of Wigmore and added that "[t]he expression proof beyond a doubt conveys a meaning without lawyers' elaborations".¹⁰⁰ Kitto J referred to the "danger that invests an attempt to explain what 'reasonable' means".¹⁰¹ And Barwick CJ, McTiernan and Owen JJ described these remarks and others as "some of many admonitions to judges presiding over criminal trials to adhere to and not to attempt needless explanations of the classical statement of the nature of the onus of proof resting on the Crown".¹⁰²

63 The consequence of this cautious approach in this country has been for trial judges generally to offer only the simplest explanations of "beyond reasonable doubt", if at all. Some explanations provide little more than verbal rearrangement of the phrase: "the accused must be given the benefit of any doubt which the jury considers reasonable";¹⁰³ "[a] reasonable doubt is a doubt which the particular jury entertain in the circumstances. [Jurors] themselves set the standard of what is reasonable in the circumstances."¹⁰⁴ Other simple explanations, sometimes given where a trial judge thinks that the jury might be "influenced by advocacy" to "conjure up mere chimeras of doubt", are that "for a doubt to stand in the way of a conviction of guilt it must be a real doubt and a reasonable doubt—a doubt which after a full and fair consideration of the evidence the jury really on reasonable grounds entertain".¹⁰⁵ Jury comprehension is "scarcely advanced" by such explanations.¹⁰⁶

64 Language is not static. Even if the expression "beyond reasonable doubt" were once well understood, this may no longer be the case. In 1994, in the United States, Ginsburg J referred to studies of jury behaviour that concluded that without definition of the term, "jurors are often confused about the meaning of reasonable

99 *Dawson v The Queen* (1961) 106 CLR 1 at 18.

100 *Thomas v The Queen* (1960) 102 CLR 584 at 604-605.

101 *Thomas v The Queen* (1960) 102 CLR 584 at 595.

102 *Green v The Queen* (1971) 126 CLR 28 at 32.

103 See *Thomas v The Queen* (1960) 102 CLR 584 at 595.

104 *Green v The Queen* (1971) 126 CLR 28 at 32-33.

105 *Thomas v The Queen* (1960) 102 CLR 584 at 605.

106 See *Victor v Nebraska* (1994) 511 US 1 at 25.

doubt".¹⁰⁷ In 1999, the New Zealand Law Commission published its findings from a study of jurors which showed that jurors generally thought of the standard in terms of percentages ranging from 50 per cent to 100 per cent certainty.¹⁰⁸ A widely cited, peer-reviewed, study by the New South Wales Bureau of Crime Statistics and Research¹⁰⁹ which surveyed around 1,200 jurors found a wide range of views as to the level of satisfaction about guilt that was required: 55.4 per cent thought that the phrase "beyond reasonable doubt" meant that they needed to be "sure"; 22.9 per cent thought that they needed to be "almost sure"; 11.6 per cent thought that guilt needed to be "very likely"; and 10.1 per cent thought that guilt needed to be "pretty likely". Survey evidence in Queensland, albeit with a small sample size, has suggested that one of the three leading hindrances seen by juries to the performance of their duties was the meaning of the phrase proof "beyond reasonable doubt".¹¹⁰

65 Perhaps prompted by similar concerns, this Court has twice observed that the historical antipathy in Australia to any substantial explanation of the expression "beyond reasonable doubt" is "an extreme and exceptional stand" which "has not been shared elsewhere".¹¹¹ In 1994, in the Supreme Court of the United States, Ginsburg J supported a instruction proposed by the Federal Judicial Center which

107 *Victor v Nebraska* (1994) 511 US 1 at 26, referring to Diamond, "Reasonable Doubt: To Define, or not to Define" (1990) 90 *Columbia Law Review* 1716 at 1723.

108 New Zealand Law Commission, *Juries in Criminal Trials—Part Two: A summary of the research findings*, Preliminary Paper No 37 (1999), vol 2 at 54 [7.16].

109 Trimboli, "Juror understanding of judicial instructions in criminal trials", in NSW Bureau of Crime Statistics and Research, *Crime and Justice Bulletin No 119* (2008) 1. See, for instance, Keane and McKeown, "Time to Abandon 'Beyond Reasonable Doubt' and 'Sure': The Case for a New Direction on the Criminal Standard and how it should be used" [2019] *Criminal Law Review* 505 at 511-512; Keane, "Not so sure about the criminal standard of proof", *New Law Journal*, 12 June 2020 at 15; New South Wales Law Reform Commission, *Jury directions*, Report No 136 (2012) at 64 [4.36].

110 See Queensland Law Reform Commission, *A Review of Jury Directions*, Report No 66 (2009) at 21 [2.18], quoting McKimmie, Antrobus and Davis, *Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials* (2009) at 26.

111 *Darkan v The Queen* (2006) 227 CLR 373 at 395 [69]; *R v Dookheea* (2017) 262 CLR 402 at 416 [23].

explained "beyond reasonable doubt" with expressions such as "firmly convinced" and contrasted the standard with "a real possibility" that the accused is not guilty.¹¹²

66 In 1997, in the Supreme Court of Canada, Cory J (with whom Lamer CJ, Sopinka, McLachlin, Iacobucci and Major JJ joined) endorsed the prevalent practice in Canada of explaining the meaning of "beyond reasonable doubt" due to the "fundamental importance that jurors fully understand the nature of the burden of proof that the law requires them to apply".¹¹³ Part of the proposed direction, which formed the basis of the model jury instruction by the Canadian Judicial Council,¹¹⁴ and has been endorsed in broad terms in New Zealand,¹¹⁵ included the following:¹¹⁶

"A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.

On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.

In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt."

67 The courts of England and Wales have gone further than mere explanation and have defined the expression "beyond reasonable doubt" with a new controlling standard of being "sure": "judges do not usually use the formula 'beyond

112 *Victor v Nebraska* (1994) 511 US 1 at 27.

113 *R v Lifchus* [1997] 3 SCR 320 at 329 [22].

114 *R v Layton* [2009] 2 SCR 540 at 544 [2].

115 See *R v Wanhalla* [2007] 2 NZLR 573 at 588-589 [49]-[52], 604 [121]-[122], 612 [173]. But see the more abbreviated direction in *Do v The King* [2024] NZSC 80 at [8]; *Singh v The King* [2024] NZSC 171 at [10].

116 *R v Lifchus* [1997] 3 SCR 320 at 337 [39].

reasonable doubt', but the standard remains the same".¹¹⁷ An early endorsement of the language of being "sure" was made by Lord Goddard CJ, who apparently thought that a standard of being "reasonably satisfied" would be sufficient.¹¹⁸ The definitional direction, using "sure", has prompted jurors to ask, "[h]ow sure do we have to be? Do we have to be 100% with no doubt? Would 99% be acceptable for example?"¹¹⁹ The use of "sure" has also been the subject of strong academic criticism¹²⁰ and the observation by six Justices of the Supreme Court of Canada that it is an instruction that, standing alone, is "both insufficient and potentially misleading".¹²¹ And more recently, the Supreme Court of the United Kingdom has reverted to the traditional language of "beyond reasonable doubt" in describing the standard of proof.¹²²

The explanation authorised by s 64(1)(e)

68 The reform in ss 63 and 64 introduced by the *Jury Directions Act* was a response to a 2009 report by the Victorian Law Reform Commission and a consequent review by the Victorian Department of Justice.¹²³ In the course of recommending a further reform to s 63 in a 2021 report, the Victorian Law Reform Commission, relying upon literature that discussed some of the studies mentioned above, reasoned that "[j]urors can find it hard to understand what 'beyond

117 *R v Mohammad* [2022] EWCA Crim 380 at [28]. See also *Walters v The Queen* [1969] 2 AC 26 at 30; Judicial College, *The Crown Court Compendium* (2025) at 5-1, 5-2; *Archbold: Criminal Pleading, Evidence and Practice* (2025) at 512 [4-444].

118 *R v Kritz* [1950] 1 KB 82 at 89.

119 *R v Mohammad* [2022] EWCA Crim 380 at [9].

120 Keane and McKeown, "Time to Abandon 'Beyond Reasonable Doubt' and 'Sure': The Case for a New Direction on the Criminal Standard and how it should be used" [2019] *Criminal Law Review* 505; McKeown, "The Crown Court Compendium and the Criminal Standard of Proof: Suggestions to Aid Juror Comprehension and Help Judges" [2022] *Criminal Law Review* 893; Keane, "Not so sure about the criminal standard of proof", *New Law Journal*, 12 June 2020 at 15.

121 *R v Lifchus* [1997] 3 SCR 320 at 334 [33].

122 *R v Perry* [2025] 1 WLR 2055 at 2065 [29].

123 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 December 2012 at 5556. See also Victorian Law Reform Commission, *Jury Directions: Final Report 17* (2009).

reasonable doubt' means"¹²⁴ and referred to a study that had concluded that explanations about the meaning of "beyond reasonable doubt" led to the phrase being "more appropriately understood and applied" by jurors.¹²⁵ The Victorian Department of Justice reasoned in a similar fashion but referred to approaches that substitute the expression "beyond reasonable doubt" with "sure", expressing the concern that "these approaches simply substitute one definition for another and do not provide any greater assistance in understanding the meaning of proof beyond reasonable doubt".¹²⁶

69 The explanation of "beyond reasonable doubt" that is authorised by s 64(1) is modest. None of the matters in s 64(1) that the trial judge can "refer to" or "indicate" to the jury in explaining the phrase "proof beyond reasonable doubt" purports to be a definition of "beyond reasonable doubt". The criticised expression "sure" is not used. And even the impugned explanation in s 64(1)(e) is only a negative explanation, pointing to matters that will fall outside the concept.

70 Further, whether or not s 64(1)(e) authorises a direction that refers only to an "unrealistic possibility", the authorisation in s 64(1)(e) is, at least, for the use of a compound expression, which was the direction given by the trial judge. The compound expression is concerned with the whole collocation "an imaginary or fanciful doubt or an unrealistic possibility". The scope of the term "unrealistic possibility" is thus coloured by the notions of an "imaginary doubt" or a "fanciful doubt", which are not reasonable doubts.¹²⁷

71 Finally, the explanation authorised by s 64(1)(e) is optional. As the opening words of s 64(1) make clear, it is an explanation that the trial judge "may" give. A trial judge should not give such an explanation if the context in which the explanation is given might give rise to confusion or might suggest a permissible application of a probabilistic standard incompatible with a standard of beyond reasonable doubt. The context in this case, for example, and the terms of the trial judge's direction concerning the controlling concept of beyond reasonable doubt

124 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (2021) at 448 [20.93]-[20.94].

125 See Essex and Goodman-Delahunty, "Judicial directions and the criminal standard of proof: Improving juror comprehension" (2014) 24 *Journal of Judicial Administration* 75 at 93.

126 Victoria, Department of Justice Criminal Law Review, *Jury Directions: A New Approach* (2013) at 91 [7.4]. See also 87-89 [7.3].

127 *R v Lifchus* [1997] 3 SCR 320 at 337 [39]. See also *Green v The Queen* (1971) 126 CLR 28 at 33.

would not have caused such confusion or suggested the permissibility of such an application.

72 Ultimately, therefore, Dr Farshchi's submission should be rejected for the reason given by the Court of Appeal: s 64(1)(e) provides for the standard of proof beyond reasonable doubt to be explained; it does not provide a different standard of proof and does not alter the boundaries of the standard of proof.

Conclusion

73 The appeal must be dismissed.

JAGOT J.

The determinative question

74 The determinative question in this appeal is whether ss 63(1) and 64(1)(e) of the *Jury Directions Act 2015* (Vic), in part, are inconsistent with s 13.2(1) of the *Criminal Code* (Cth). Section 63(1) of the *Jury Directions Act* provides that "[t]he trial judge must give the jury an explanation of the phrase 'proof beyond reasonable doubt' unless there are good reasons for not doing so". Section 64(1) of the *Jury Directions Act* provides that "[i]n explaining the phrase 'proof beyond reasonable doubt' under section 63, the trial judge may" do one or other of the matters specified in s 64(1)(a)-(e). By s 64(1)(e) of that Act one of the matters the trial judge may do in explaining the phrase "proof beyond reasonable doubt" to the jury is "indicate that a reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility".

75 According to the appellant, insofar as s 64(1)(e) authorises a trial judge in explaining the phrase "proof beyond reasonable doubt" as required by s 63(1) of that Act to indicate to a jury in a criminal trial that "a reasonable doubt is not ... an unrealistic possibility", by reason of the inclusion of the words "or an unrealistic possibility", the provisions are inconsistent with, in the sense of detracting from, s 13.2(1) of the *Criminal Code* which provides that a "legal burden of proof on the prosecution must be discharged beyond reasonable doubt". That is, the appellant contends that the provisions enable a trial judge to instruct a jury that a standard of proof less than the standard of "proof beyond reasonable doubt" applies in a criminal trial. This is ground one of the appellant's appeal.

76 If the answer to the determinative question is "yes", the condition in s 68(1)(c) of the *Judiciary Act 1903* (Cth) to the application of s 64(1)(e) in the trial of the appellant, that the "laws of a State ... respecting the ... procedure for [a person's] trial and conviction on indictment ... apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred on the several courts of that State" by s 68, would not be satisfied. In that event, the appellant's trial in the County Court of Victoria before a jury in respect of offences against Commonwealth law may have miscarried because the trial judge gave directions to the jury in accordance with ss 63(1) and 64(1) of the *Jury Directions Act* including s 64(1)(e) by explaining that, in the phrase "proof beyond reasonable doubt", "a reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility".

77 If the answer to the determinative question is "no", s 68(1) of the *Judiciary Act* operated in accordance with its terms to apply s 64(1)(e) of the *Jury Directions Act* to the appellant's trial. In that event, the appellant's trial in the County Court of Victoria before a jury could not have miscarried because the trial judge gave directions to the jury in accordance with ss 63(1) and 64(1) of the *Jury Directions*

Act including s 64(1)(e). Nor could the appellant's second ground of appeal – that s 64(1)(e) of the *Jury Directions Act*, insofar as it includes the words "or an unrealistic possibility", is inconsistent with s 80 of the *Constitution* (the "trial on indictment of any offence against any law of the Commonwealth shall be by jury ...") – arise for consideration. That is, if s 64(1)(e) of the *Jury Directions Act* insofar as it includes the words "or an unrealistic possibility" is not inconsistent with the standard of proof of beyond reasonable doubt specified in s 13.2(1) of the *Criminal Code* for trials of Commonwealth offences, it also cannot be inconsistent with s 80 of the *Constitution* requiring the trial of Commonwealth offences to be by jury.

78 For the following reasons the determinative question is to be answered "no". The rejection of ground one relating to the alleged inconsistency of that part of s 64(1)(e) of the *Jury Directions Act* referring to "or an unrealistic possibility" and s 13.2(1) of the *Criminal Code* is sufficient to require rejection of the appeal. Accordingly, no circumstance arises in which ground two of the appeal is to be considered.

A short answer to the determinative question

79 The appellant accepted that if s 64(1)(e) of the *Jury Directions Act* had referred to an "unreal possibility", rather than an "unrealistic possibility", there would be no inconsistency between s 64(1)(e) and s 13.2(1) of the *Criminal Code*.¹²⁸ According to the appellant, as a matter of statutory construction, an "unreal possibility" means an "imaginary" or "fanciful" possibility as that is how the intended audience, a jury, would understand the word "unreal" in context. In contrast, the appellant argued, as a matter of statutory construction, an "unrealistic possibility" includes an "improbable possibility" as that is how the intended audience, a jury, would understand the word "unrealistic" in context. Because an "improbable possibility" may nevertheless involve a "reasonable doubt", according to the appellant, the reference in s 64(1)(e) to an "unrealistic possibility" necessarily and impermissibly purports to authorise a trial judge to instruct a jury that they may apply a standard of proof less than the criminal standard required by s 13.2(1) of the *Criminal Code* of proof "beyond reasonable doubt".

80 Taking into account that the statutory context of s 64(1)(e) of the *Jury Directions Act* is, as s 63(1) of that Act provides, the requirement that a "trial judge must give the jury an explanation of the phrase 'proof beyond reasonable doubt' unless there are good reasons for not doing so", it is necessary to give the language of s 64(1)(e) its ordinary grammatical meaning recognising that:

- (1) the language of s 64(1) is permissive ("the trial judge may ..."), which is reinforced by the terms of both s 63(8) ("[n]othing in this section limits any

¹²⁸ Presumably with *Green v The Queen* (1971) 126 CLR 28 at 33 in mind.

other power of the trial judge to give the jury an explanation of the phrase 'proof beyond reasonable doubt') and s 64(2) (permitting the trial judge to adapt the explanation to address a particular question asked by the jury);

- (2) the language of s 64(1) is disjunctive in that each of (a) to (e) of s 64(1) is separated by "or", indicating that a trial judge may give any one or more of the explanations in those provisions); and
- (3) while the better view is that s 64(1)(e) constitutes a composite phrase, the language of that provision is both disjunctive (in that it says the trial judge may "indicate that a reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility", whereas s 64(1)(a) and (c) use the conjunctive "and") and inexplicit (in that it says that in "explaining the phrase 'proof beyond reasonable doubt'" the trial judge may "indicate that ... ").

81 In these circumstances, it is necessary to test the appellant's case of inconsistency between the *Jury Directions Act* and the *Criminal Code* on the basis that a trial judge would not necessarily err by explaining the phrase "proof beyond reasonable doubt" by indicating only that a "reasonable doubt is not an unreal possibility" but would (and, in this case, did) err by explaining the phrase "proof beyond reasonable doubt" by indicating that a "reasonable doubt is not an unrealistic possibility".

82 Contrary to the appellant's case, there is no material distinction between a statutory authority of a trial judge to explain the phrase "proof beyond reasonable doubt" to a jury by indicating that a "reasonable doubt is not an unreal possibility" or by indicating a "reasonable doubt is not an unrealistic possibility". A jury could not permissibly take the former explanation to exclude and the latter explanation to include mere improbable possibilities.

83 Importantly, the hypothesised context in which the statutory language is to be construed is a trial judge giving to a jury "an explanation of the phrase 'proof beyond reasonable doubt'" in a criminal trial. A jury is taken to know that the thing to be proved beyond reasonable doubt is the criminal charge which, if proved, would have serious consequences for the accused including a potential fine and imprisonment. In the hypothesised context of a trial judge explaining to a jury in a criminal trial the phrase "proof beyond reasonable doubt", a jury could not and, indeed, would not attribute to either "an unreal possibility" or "an unrealistic possibility" a meaning of a possibility that is merely improbable or unlikely.

84 That Priest JA in the Supreme Court of Victoria, Court of Appeal, listed one of the meanings of an "unrealistic possibility" as an "improbable" possibility and did not list that as a potential meaning of an "unreal possibility",¹²⁹ albeit that his

129 *Farshchi v The King* (2024) 390 FLR 97 at 107 [40].

Honour also (and rightly) concluded that "there [was] little or no practical difference between" the two,¹³⁰ is irrelevant. The appellant's purported permissible adjective, "unreal", in the relevant hypothesised context, means simply "not real", so that an "unreal possibility" is a possibility that is "not real". The appellant's purported impermissible adjective, "unrealistic", being the word "unreal" with the suffix "-istic", in the same relevant hypothesised context, means simply a possibility that has the character or quality of being "not real". That is, within s 64(1)(e), a possibility that has the character or quality of being "not real" is not a reasonable doubt. Accordingly, by reason of ss 63(1) and 64(1)(e) of the *Jury Directions Act*, a trial judge explaining to a jury that the prosecution must prove the offence charged "beyond reasonable doubt" does not err merely by reason of explaining that, in the phrase "proof beyond reasonable doubt", a reasonable doubt is not an "unrealistic possibility".

A further answer to the determinative question

85 Even if the appellant had not accepted that in explaining the phrase "beyond reasonable doubt" to a jury as required by s 63(1) of the *Jury Directions Act* a trial judge indicating that a reasonable doubt is not an "unreal possibility" would involve no inconsistency with s 13.2(1) of the *Criminal Code*, the appellant would have failed in the appeal.

86 As discussed, s 64(1)(e) of the *Jury Directions Act* does not operate in a vacuum. In every case where the elements of an offence must be proved "beyond reasonable doubt" s 63(1) of the *Jury Directions Act* requires the trial judge to explain that phrase ("unless there are good reasons for not doing so") and the *Jury Directions Act* authorises the trial judge to give that explanation in accordance with s 64(1). That being the context of s 64(1)(e), the proper construction of the words "indicate that a reasonable doubt is not ... an unrealistic possibility" does not include a mere improbable possibility. That is, nothing in s 64(1)(e) authorises a trial judge to "indicate" that a "reasonable doubt is not ... an improbable possibility". Nor, in being instructed that a "reasonable doubt is not ... an unrealistic possibility", is a jury permitted to interpret that instruction as meaning a "reasonable doubt is not ... an improbable possibility". A jury that did so interpret the instruction would have misunderstood the instruction. Finally, and as explained above, instructed in context, a jury would not so misunderstand the instruction.

Other observations

87 The other concluding observations which should be made are that ss 63 and 64 of the *Jury Directions Act* operate against the background of the one common law of Australia. In contrast with other common law jurisdictions, this Court has consistently expressed the view that, in the ordinary course of a criminal trial, trial

130 *Farshchi v The King* (2024) 390 FLR 97 at 107 [40].

judges should not attempt to explain the phrase "proof beyond reasonable doubt" to a jury lest the explanation give rise to a miscarriage of justice. Accordingly, it has been said that: a judge "embarks on a dangerous sea if he attempts to define with precision a term which is in ordinary and common use with relation to this subject matter, and which is usually stated to a jury ... as a well understood expression";¹³¹ "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";¹³² and "it is a mistake to depart from the time-honoured formula [of 'proof beyond reasonable doubt']. It is ... used by ordinary people and is understood well enough by the average man in the community";¹³³ and a "reasonable doubt is a doubt which the particular jury entertain[s] in the circumstances. Jurymen themselves set the standard of what is reasonable in the circumstances."¹³⁴

88 More recently, this Court explained that "[a]s 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".¹³⁵ In so explaining the Court observed that in *Darkan v The Queen*,¹³⁶ "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'".¹³⁷ Further, the Court

131 *Brown v The King* (1913) 17 CLR 570 at 584.

132 *Thomas v The Queen* (1960) 102 CLR 584 at 595. See also at 587, 604-605.

133 *Dawson v The Queen* (1961) 106 CLR 1 at 18.

134 *Green v The Queen* (1971) 126 CLR 28 at 32-33. See also *La Fontaine v The Queen* (1976) 136 CLR 62 at 71.

135 *R v Dookheea* (2017) 262 CLR 402 at 407 [1].

136 (2006) 227 CLR 373 at 395-396 [69].

137 *R v Dookheea* (2017) 262 CLR 402 at 416 [23]. "[E]lsewhere" includes: the United States where it has been held that a "reasonable doubt" does not include a "mere possible doubt" (*Victor v Nebraska* (1994) 511 US 1 at 17); Canada where it has been held that a reasonable doubt is not an "imaginary or frivolous" doubt (*R v Lifchus* [1997] 3 SCR 320 at 334 [31], 335 [36]); England and Wales where the Crown Court Compendium includes a statement that to prove a defendant guilty "the prosecution must make the jury sure that D is guilty. Nothing less will do" (Judicial College, *The Crown Court Compendium Part I – July 2024* (April 2025 update) at 5-2 [8(2)]); and New Zealand where the recommended direction concludes with the

observed that "[t]oday, 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".¹³⁸

89 In enacting the *Jury Directions Act* it is apparent that the Victorian Parliament shared the same reservation about the extent to which members of a jury would understand the phrase "proof beyond reasonable doubt" without assistance from a trial judge. As a result of that legislation, it can no longer be said that in Victoria a trial judge should not attempt to explain the phrase "proof beyond reasonable doubt" to a jury. Rather, by s 63(1) of that Act, a trial judge "must give the jury an explanation of the phrase 'proof beyond reasonable doubt' unless there are good reasons for not doing so" and, in explaining that phrase, may refer to or indicate any or all of the matters in s 64(1)(a)-(e).

90 This has particular significance in respect of Commonwealth offences. In short, if it is not inconsistent with s 13.2(1) of the *Criminal Code* for a trial judge to explain the phrase "proof beyond reasonable doubt" in accordance with ss 63(1) and 64(1) of the *Jury Directions Act* to a jury before which an accused is being tried for a Commonwealth offence in Victoria, it would make little sense to conclude that a trial judge giving the same explanation to a jury before which an accused is being tried for a Commonwealth offence in a State other than Victoria or in a Territory has erred. The mere fact that there is no equivalent legislation in the other State or Territory so that s 68(1) of the *Judiciary Act* does not operate to apply that legislation to the trial of a Commonwealth offence in the other State or Territory may be accepted. But a trial judge's explanations and directions either are or are not consistent with s 13.2(1) of the *Criminal Code*. This case decides that a trial judge's direction merely explaining the phrase "proof beyond reasonable doubt" to a jury in terms that a reasonable doubt is not "an unrealistic possibility" involves no such inconsistency in and of itself. Given the principle that an alleged misdirection is to be evaluated "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",¹³⁹ the result in this case is one more step towards the ultimate calming of the "dangerous sea" on which a trial judge has been said to embark by attempting to explain to a jury the phrase "proof beyond reasonable doubt".

statement that "[i]n summary, if, after careful and impartial consideration of the evidence, you are sure that the accused is guilty you must find him or her guilty. On the other hand, if you are not sure that the accused is guilty, you must find him or her not guilty" (*R v Wanhalla* [2007] 2 NZLR 573 at 588 [49]).

138 *R v Dookheea* (2017) 262 CLR 402 at 417 [27].

139 *R v Dookheea* (2017) 262 CLR 402 at 424 [37].

Conclusion and orders

91 The rejection of ground one disposes of the appeal. Gageler CJ, Gordon, Gleeson and Beech-Jones JJ are correct that, in this circumstance, ground two should not be entertained. I agree that the appeal should be dismissed.