IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M159 of 2016

BETWEEN:

THE QUEEN

Appellant

- v -

KRITSINGH DOOKHEEA

Respondent

APPELLANT'S SUBMISSIONS

PART I: SUITABILITY FOR INTERNET PUBLICATION

1.1 The appellant certifies that this submission is in a form suitable for publication on the internet.

PART II: CONCISE STATEMENT OF THE RELEVANT ISSUES

2.1 This appeal raises the following questions for consideration –

(a) does a direction on the standard of proof which includes an instruction that the prosecution does not have to prove its case "beyond any doubt, but beyond reasonable doubt" constitute misdirection under the common law? [**see ground 1**]

(b) if such an instruction constitutes misdirection, does an accused person suffer a substantial miscarriage of justice in circumstances where a trial judge otherwise repeatedly directs the jury on the standard of proof in conventional terms (in both the charge and provision of an "aide memoire" at time of deliberation)? [**see ground 2**]

PART III: NOTICE UNDER THE JUDICIARY ACT 1903

3.1 The appellant certifies that it considers that notice is not required to be given under section 78B, Judiciary Act 1903 (Cth) in this appeal.

PART IV: CITATION OF REASONS FOR JUDGMENT

4.1 The decision of the appellate court is cited as *Dookheea v R* [2016] VSCA 67.

PART V: STATEMENT OF RELEVANT FACTS

5.1 The respondent was charged on indictment in the Supreme Court with 1 count of murder.

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5.2 The respondent pleaded "not guilty" to murder but "guilty" to manslaughter [however such plea was not accepted by the prosecution]. After a 10 day trial before Emerton J, the respondent was convicted by jury verdict of murder.

Summary of facts

5.3 In short compass, the relevant facts are as follows.[1] On the evening of 9 May 2013, the respondent and his wife (Ms Ramjutton) assaulted the victim (Mr Faisal Zazai) at their home in Tarneit; and, the respondent then proceeded to kill the victim.

5.4 The victim owned a pizza store business. He came to the respondent's home to collect the takings from a store that was managed by Ramjutton. However, the takings were not able to be collected as the respondent had gambled the monies away at the Crown Casino earlier that day. At the relevant time, the respondent and his wife were in significant financial debt and faced eviction from their home.

5.5 The victim's murder was preceded by a violent physical altercation which began in the kitchen of the house and finished on the front lawn. At the relevant time, the victim was attempting to flee. The respondent placed his hands around the victim's neck and squeezed until he stopped resisting. The victim's body was then dragged back inside, placed in a spare room and the respondent sat on the victim's back just before the police arrived.

5.6 Medical evidence led at trial strongly pointed towards the victim dying as a result of neck compression (or strangulation).

5.7 When questioned by police, the respondent initially provided an account in which it was said that the victim had come to the home believing Ramjutton to be alone. The victim had attempted to sexually assault Rumjutton, she cried for help and the respondent intervened to assist his wife. A fight then ensued, the victim suddenly went limp on the front lawn and he was then taken back into the house to prevent him from escaping.

5.8 However, in a subsequent police interview, the respondent admitted that the above account was false. The respondent admitted he had a plan to assault and rob the victim in order to teach him a lesson. As part of this plan, the respondent contemplated hitting the victim on the head. Prior to the arrival of the victim at the house, the respondent had purchased duct tape and parked his vehicle away from the house in order to deceive the victim into thinking the respondent was not at home.

5.9 The respondent blamed the victim for his difficult financial circumstances due to a failed franchise agreement with the victim (the respondent had previously worked as employee of the victim in his business before acquiring a franchise store which later failed). The plan conceived by the respondent involved extracting money from the victim or persuading the victim to waive the debt owing to him.

Summary of proceedings

5.10 On 4 December 2014 the respondent was sentenced by Emerton J on 1 count of murder to 19 years imprisonment with a non-parole period of 15 years imprisonment fixed. Ramjutton was sentenced on 1 count of manslaughter to 8 years 6 months imprisonment with a non-parole period of 6 years imprisonment fixed.[2]

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[1] See *R v Dookheea* [2014] VSC 611, at [1]-[11]; *Dookheea v R* [2016] VSCA 67, at [7]-[27]
[2] See *R v Dookheea* [2014] VSC 611

5.11 On 24 December 2014 the respondent filed an application for leave to appeal against conviction citing 3 grounds. On 28 October 2015 the appeal hearing proceeded with leave granted to file an amended notice citing 2 grounds only – however, during oral argument leave was granted to argue an additional ground.

5.12 On 12 April 2016 the Court of Appeal held that ground 1 (in part) succeeded to the extent that the trial judge erroneously sought to explain the phrase "beyond reasonable doubt".[3]

5.13 The appellant filed an application for special leave and on 18 November 2016 this Court granted leave on 2 grounds of appeal [see notice].

PART VI: STATEMENT OF ARGUMENT

Summary of argument

6.1 The relevant part of ground 1 of the conviction appeal in the Court below reads as follows:

> The learned trial judge erred in directing the jury that, in order to convict the applicant, they did not have to be satisfied 'beyond any doubt' that he had the requisite mens rea, 'but beyond reasonable doubt'....

6.2 The Court of Appeal unanimously held that the ground succeeded on the basis that it was an error for the trial judge to explain the phrase "beyond reasonable doubt" and that such misdirection constituted a substantial miscarriage of justice.[4]

6.3 The appellant submits as follows –

(i) that the trial judge did not err in administering the relevant direction on the standard of proof – in short, the judge did not seek to define the relevant phrase but rather contrast it with a different standard of proof ("absolute certainty") **[ground 1]**; and

(ii) in any event, no substantial miscarriage of justice was occasioned in this particular case by the impugned direction when regard is had to the entirety of the trial (including addresses by counsel and charge to jury) **[ground 2]**.

Course of trial

6.4 The respondent's trial was conducted over 10 days – between 14 May and 27 May 2014.

6.5 On 15 May 2014 (day 2), a jury was empanelled. The trial judge administered preliminary directions to the jury before the calling of any evidence by the prosecution. In relation to the topic of the standard of proof, the judge stated:[5]

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

6.6 In her opening address to the jury on the same day, the prosecutor stated:[6]

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[3] See *Dookheea v R* [2016] VSCA 67
[4] See *Dookheea v R* [2016] VSCA 67, at [86]-[92]
[5] See Trial Transcript, 15/5/2014, at 88-89

I'm the prosecutor. It's my task to present the case on behalf of the Crown or the prosecution, if you don't like the word "Crown", both mean the same thing, and what it really means is that we are the people who bring the charge against the accused and we are the people who will prove it and prove it *beyond a reasonable doubt*....

The real issue in this trial will be what was the accused man's state of mind at the time that he did the acts that caused the death of the victim in this case, Faisal Zazai. How do you work out what his state of mind is? You look at the evidence as it unfolds, you consider, for example, the evidence of the pathologist who we will call and she will give evidence of the number of injuries and talk about the amount of force required, the time that it required to strangle somebody. So all of those things will be things that you'll ultimately consider as to whether you are satisfied *beyond a reasonable doubt* whether he is guilty of murder....

But the fourth element that we must prove *beyond a reasonable doubt* is that he had an unlawful justification or excuse and again, as I perceive it, that's unlikely to be an issue in this trial. In other words, again, it's my understanding, it won't be suggested he was acting in self-defence or anything of that nature and it would follow logically that's so because he has already pleaded guilty to you to manslaughter which involves an unlawful killing. All right.

So what is manslaughter? Well, manslaughter encompasses many of those elements that I've spoken to you about, but the real difference is this: that if you're not satisfied *beyond a reasonable doubt* that he intended to kill or cause really serious injury, then you would acquit him and his plea to manslaughter would remain, because manslaughter in this case is the unlawful killing, what we call unlawful and dangerous act killing.... [emphasis added]

6.7 On 20 May 2014 (day 5), the trial judge answered a question raised by the jury as to the meaning of "really serious injury" for the purposes of the crime of murder. In answering the question, the judge preceded her direction with the following statement:[7]

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

6.8 On 23 May 2014 (day 8), the prosecutor delivered a closing address to the jury. In her address, the prosecutor stated:[8]

Because there are four elements in relation to murder which the Crown must prove *beyond a reasonable doubt.* He and Mr Dempsey on his behalf do not have to prove anything, we do. We have to prove it *beyond a reasonable doubt.* Each element to murder we must prove *beyond a reasonable doub*t to your satisfaction, acting on the evidence.

Let's go through the elements because I should do that in any event.

The first one is the Crown must prove *beyond a reasonable doubt* that it was the acts of the accused that caused the death of Faisal. There's no argument in this case that he did cause his death.

Secondly, the Crown must prove *beyond a reasonable doubt* that at the time that he did that he was acting consciously, voluntarily and deliberately. There's no argument about that in this trial.

It is the third element that is in dispute, that is, at the time that he was performing the act or acts that killed Faisal, the Crown must prove *beyond a reasonable doubt* he was intending to kill or at the very least intending to cause really serious injury. That's the issue. Can we prove it? If we haven't proved it to your satisfaction you will acquit him, that is, you will bring back a verdict of not guilty. If you are not sure – and that is the collective state of your minds: did he, didn't we, we don't know - you will acquit him because you would not be satisfied *beyond a reasonable doubt*....

So we have embarked on this task - and I suppose I should mention the fourth element being that the Crown must prove *beyond a reasonable doubt* that the acts - that when he killed Faisal that he had no lawful justification or excuse, for example, acting in self-defence. That does not arise here. So there is no suggestion at all that he was acting in self-defence and the defence, as I understand it, concede that. So we're focusing on the narrow issue, that third element....

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

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[6] See Trial Transcript, 15/5/2014, at 91-93

[7] See Trial Transcript, 20/5/2014, at 313

[8] See Trial Transcript, 23/5/2014, at 425-426, 432, 456

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

6.9 Defence counsel also delivered a closing address to the jury on the same day. In his address, counsel stated:[9]

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

6.10 On 26 May 2014 (day 9), the trial judge charged the jury. On the topic of standard of proof, the judge directed the jury as follows:[10]

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

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

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

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

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

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

6.11 On the topic of inferential reasoning, the judge directed the jury as follows:[11]

You may not draw an inference about an important matter such as an element of the offence unless it is the

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[9] See Trial Transcript, 23/5/2014, at 509
[10] See Trial Transcript, 26/5/2014, at 526-527
[11] See Trial Transcript, 26/5/2014, at 534

only reasonable inference that can be drawn on the facts. As you probably appreciate, that stems from the burden of proof on the prosecution, that is, the burden to prove all the elements of the offence *beyond reasonable doubt*. In determining whether an inference is a reasonable one, you consider the evidence as a whole. You are not obliged to discard or disregard every piece of evidence that does not by itself establish the element of the offence *beyond reasonable doubt*. [emphasis added]

6.12 On the topic of motive, the judge directed the jury as follows:[12]

Circumstances can and do arise from time to time in which it may be established *beyond reasonable doubt* that a particular person committed a specific crime, yet to the outside observer the behaviour involved may be inexplicable. There may be no motive that can be discerned. On the other hand, the situation may arise when an accused person may be considered to have a powerful motive for engaging in the unlawful activity but nevertheless the jury may not be satisfied *beyond reasonable doubt* that the accused person committed the criminal offence. A jury can derive assistance from the absence or presence of motive as affecting the likelihood of the participation of a person in the illegal conduct, but ultimately the absence of motive cannot affect your judgment when you are satisfied *beyond reasonable doubt* on the evidence of the guilt of the accused person and nor can motive be used to fill a gap in the Crown case if you are not so satisfied. The presence or absence of motive is simply one of the factors to be taken into account when considering whether or not the accused may have been involved in the criminal activity the Crown is attempting to attribute to the accused. [emphasis added]

6.13 On the topic of elements of the crime of murder, the judge directed the jury as follows:[13]

I am going to move on to murder then and the elements of murder. You have heard this before. I will say it again. Before you could find Mr Dookheea guilty of murder there are four elements that the prosecution must prove *beyond reasonable doubt*. [emphasis added]

6.14 The impugned direction is found in the trial judge's charge to the jury when explaining the mental element of the crime of murder. The relevant passage reads as follows:[14]

The question you have to ask yourselves is "has the Crown established *beyond reasonable doubt* that at the time Mr Dookheea committed the relevant act or acts that caused Mr Zazai's death, he intended to kill Mr Zazai or cause him really serious injury?" As a corollary you might ask, "do I hold *a reasonable doubt* that at the time he committed the relevant act or acts that caused Mr Zazai's death, Mr Dookheea intended to kill Mr Zazai or cause him really serious injury?" In other words, you do not have to work out definitively what Mr Dookheea's state of mind was when he caused the injuries that killed Mr Zazai. You have to consider whether the Crown has satisfied you that Mr Dookheea had the intention that is required. *And the Crown has to have satisfied you of this not beyond any doubt, but beyond reasonable doubt.* [emphasis added]

6.15 The Court of Appeal held that the underlined passage (above) was erroneous stating:[15]

The short point, as highlighted in the applicant's written case, is that a doubt held by a jury is, by definition, a reasonable doubt. As the High Court said in *Green*, 'a reasonable doubt is a doubt which a particular jury entertain in the circumstances'. It is an error, therefore, to suggest to jurors that they may entertain a doubt which is not a 'reasonable' doubt and on that basis proceed to convict the accused.

6.16 The appellant challenges this conclusion – the trial judge has not sought to define the content of the phrase, nor encouraged the jury to engage in any analysis of their processes.

6.17 After the impugned direction, the judge continued to direct on intention as follows:[16]

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

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[12] See Trial Transcript, 26/5/2014, at 536
[13] See Trial Transcript, 26/5/2014, at 536-537
[14] See Trial Transcript, 26/5/2014, at 537-538
[15] See *Dookheea v R* [2016] VSCA 67, at [90]
[16] See Trial Transcript, 26/5/2014, at 539, 543

> The defence says that there is no evidence to satisfy you to the highest standard, that is, *beyond reasonable doubt*, that Mr Dookheea intended to end the life of Mr Zazai there and then, that is, on the front lawn or in the spare bedroom, or to cause him really serious injury. [emphasis added]

6.18 On the topic of post-offence conduct, the judge directed the jury as follows:[17]

> However, I must warn you that even if you find that Mr Dookheea thought he had committed murder, you must consider all the evidence when deciding whether the prosecution has proved guilt *beyond reasonable doubt*. In other words, even if you find that Mr Dookheea told lies because he believed that the truth would implicate him in the crime of intentionally killing Mr Zazai, that is, murder, it does not mean that you must necessarily find him guilty of that crime. His behaviour after the crime has been committed, including telling the lies, is just one piece of the evidence that you can use in making your final decision about whether or not the prosecution has proven his guilt *beyond reasonable doubt*. [emphasis added]

6.19 On the topic of returning a verdict, the judge directed the jury as follows:[18]

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

6.20 The jury retired to consider its verdict after conclusion of the charge. No exceptions were taken by either counsel.[19] This was particularly important in the circumstances as the trial judge had provided a draft copy of the charge to counsel for examination prior to delivery to the jury – the impugned passage [set out at para 6.14] was included in the document provided to counsel, yet defence counsel did not take issue with the relevant passage.[20]

6.21 Furthermore, at the conclusion of the charge, the trial judge provided an "aide memoire" document to the jury which explained the elements of murder and manslaughter.[21] That document was particularly relevant as it not only explained the elements of both crimes but reinforced (in written form) the direction on the burden and standard of proof. The relevant passages of the document are as follows (emphasis contained in original document):

> **A. Murder**
>
> Before you could find Kristingh Dookheea guilty of murder, there are **four elements** that **the prosecution must prove beyond reasonable doubt**: ...
>
> **B. Manslaughter**
>
> ***The alternative offence of manslaughter should only be considered if you are unanimous that the Crown has not established beyond reasonable doubt that Mr Dookheea intended to kill Mr Zazai or cause him really serious injury and have therefore found him 'not guilty' of murder.***
>
> Before you could find Kristingh Dookheea guilty of manslaughter, you would have to be satisfied **beyond reasonable doubt**: ...

Ground 1 – direction as to absolute certainty does not constitute error

6.22 The starting point of any analysis on this topic is this Court's decision in ***Green v The Queen*** which was handed down in 1971.[22] In that case, a trial judge directed the jury in a rape trial on the burden and standard of proof as follows:

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[17] See Trial Transcript, 26/5/2014, at 568
[18] See Trial Transcript, 26/5/2014, at 569-570
[19] See Trial Transcript, 26/5/2014, at 549, 573
[20] See Trial Transcript, 26/5/2014, at 518; and para [62] of the Draft Charge
[21] See Trial Transcript, 26/5/2014, at 572
[22] (1971) 126 CLR 28

Now I take you now to the burden of proof. The burden of proof, as you well know, is on the Crown, and it is on the Crown in respect of every issue in respect of every element of the crime. Well now, before you say you are satisfied for the purposes of a verdict about any issue, you of course have to reach a certain degree of satisfaction in your mind, and what degree of satisfaction must be reached? The answer is that you must be satisfied beyond reasonable doubt, and that is a time-honoured phrase and is usually thought to do very good work in seeing that nobody is convicted of a serious crime unless the court that tries him is satisfied of his guilt beyond reasonable doubt. And you may say, 'Well, how do I know when I have got to a stage of being satisfied about something beyond reasonable doubt?' and the answer to that is that it is when you have reached the stage that you either have no doubt at all, because if you have got no doubt at all you must have got rid of all reasonable doubts; or if there is some thing nagging in the back of your mind which makes you hesitate as to whether you are satisfied beyond reasonable doubt, you have got to try and take it out and identify this thing which is causing the hesitation, causing the doubt if you like, and you have a look at it and you try to assess it and you say to yourself is this doubt that is bothering me, does it proceed from reason; is it a rational doubt; is it something which raises a really sensible doubt; or is it a fantastic sort of doubt; is it something which arises from some prejudice that I may have; some quite unreasonable fear that I might go wrong; some perhaps reluctance to make an unpleasant finding. Well, if it is one of those doubts — merely one of those doubts, then of course it cannot be described as reasonable because it does not come from reason; it comes from something which is emotional or irrational or — at any rate it is not based upon reason, and if you have had a look at what is bothering you and you decide that it does proceed from something which is not reason but something fantastic or rising out of prejudice or one of these other things, then you should say to yourself, 'The only doubt I've got is one which is not based on reason, I have therefore got rid of all doubts which are not based in reason, and the result of that is that I am satisfied beyond reasonable doubt, because the only things that are worrying me are things which I now assess after looking at them as not based in reason.'

And of course it is a commonsense point of view before you find anybody guilty of a crime like this, you do need to feel comfortable about it; you do need to feel, 'Very well, I've considered everything and I'm really satisfied. I am satisfied beyond reasonable doubt; I have given it the best consideration I can.' There it is. And then you go away from the court and you are comfortable, and that is the way you ought to be. You might not enjoy it, but you will nevertheless be comfortable, and unless you can make a decision of guilt and feel comfortable that it is the right decision, well then you do not make it.

6.23 This Court unanimously held that the above direction was both confusing and erroneous. The Court (Barwick CJ, McTiernan and Owen JJ) held:[23]

A reasonable doubt is a doubt which the particular jury entertain in the circumstances. Jurymen themselves set the standard of what is reasonable in the circumstances. It is that ability which is attributed to them which is one of the virtues of our mode of trial: to their task of deciding facts they bring to bear their experience and judgment. They are both unaccustomed and not required to submit their processes of mind to objective analysis of the kind proposed in the language of the judge in this case.... A reasonable doubt which a jury may entertain is not to be confined to a "rational doubt", or a "doubt founded on reason" in the analytical sense or by such detailed processes as those proposed by the passage we have quoted from the summing up. Yet that is what they were directed to do in this case.

But the error, in our opinion, does not end there. If the jury could get any clear picture from the trial judge's directions, we think the predominant impression they would take to the jury room would be that a comfortable satisfaction of the accused's guilt would be enough to warrant conviction. It seems to us that the language used in this portion of the summing up equated satisfaction beyond reasonable doubt with that comfortable satisfaction felt by persons who have done their best and depart self-satisfied with their efforts. Such a standard of conduct on the part of a jury in a criminal trial would in our opinion be a denial of that traditional solicitude for certainty expressed in the traditional formula as to the onus of proof.

6.24 In allowing the appeal, the Court referred to the following observation of Kitto J in ***Thomas v The Queen*** with approval:[24]

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

6.25 Thus, it can be readily seen that this case dealt with an attempt by the trial judge to define the content of the phrase "beyond reasonable doubt" rather than the simple provision of a

[23] Ibid, at 32-33
[24] (1960) 102 CLR 584, at 595

different standard of proof by way of a contrast. Furthermore, the real vice in the charge relates to the instruction as to the "comfortable satisfaction of guilt" which represented a significant dilution of the requisite standard of proof in a criminal trial.

6.26 The next case is this Court's decision in ***La Fontaine v The Queen***.[25] In that case, the following direction on the standard of proof came under critical scrutiny:

> The Crown, of course, has to establish its case beyond reasonable doubt. *As you were told by the prosecutor himself, that does not mean beyond any doubt at all, but it must be beyond reasonable doubt.* The onus of proof is thus much higher than the onus of proof in civil cases where, you may know (if you do not it does not matter) that there proof is on the balance of probability.
>
> In a case like this, where the evidence is arranged as it is, before you reach a view that something has been established beyond reasonable doubt you also have to be satisfied that there is no other rational conclusion which is consistent with the innocence of the accused. If there is another rational explanation it follows that there is a reasonable doubt. So if you want to do it this way, as an approach, when considering whether the case for the prosecution has, in any particular respect, been established beyond reasonable doubt contrast with that a design to find out the answer to that question, whether there is an explanation which is reasonable and rational which is consistent with the innocence of the accused. If there is you need to think harder as to what you should do. [emphasis added]

6.27 Barwick CJ held that the direction was erroneous as it sought to equate "rational" with "reasonable" as decried in *Green*:[26]

> The passage I have quoted was, in my opinion, erroneous. It seems to have resulted from a confused co-mingling of the traditional formula with the formula at times appropriate to a case depending on circumstantial evidence. That the direction ought not to have been given in those terms needs no elaborate exposition. A rational conclusion and a rational explanation cannot be equated in the administration of the criminal law with a reasonable conclusion and a reasonable explanation. The jury set for themselves the perimeters of what is, in these contexts, reasonable.
>
> The objection to the summing up does not end there. It was erroneous — and indeed confusing — to tell the jury that finding a reasonable and rational explanation of the facts consistent with the innocence of the accused merely imposed a more difficult task upon them, because of a choice of verdicts which remained to them. If they found such an explanation, the accused was entitled to an acquittal. The jury in that case could not have been satisfied beyond reasonable doubt.

6.28 However, and importantly, the instruction that the prosecution does not have to prove its case "beyond any doubt at all" (italicised above) escapes criticism. Furthermore, the erroneous direction was held by a majority (Barwick CJ, Gibbs and Mason JJ in separate judgments) <u>not</u> to have occasioned a substantial miscarriage of justice in light of the trial judge's repeated references elsewhere in the charge to the traditional formula on the criminal standard of proof.

6.29 The highlighted passages in *Green* must be read in their full context – when the Court is speaking of a jury not submitting their deliberative processes to "objective analysis", it is in the sense of requiring a jury to assign a reason (or rationale) for any doubt they may have. But that injunction does not preclude a juror from attending to his/her constitutional function which is to subject any degree of persuasion as to guilt felt through the prism of "reasonableness" – if he/she has a reasonable doubt, the accused is entitled to be acquitted. That this is so is amplified in the observations of McHugh J in ***Stevens v The Queen***:[27]

> [A]s Windeyer J pointed out in *Thomas v R*, it is not the task of juries "to analyse their own mental processes". Nor is a reasonable doubt "confined to a 'rational doubt', or a 'doubt founded on reason' in the analytical sense". Jurors may have a reasonable doubt about the guilt of the accused although they cannot articulate a reason for it other than they are not satisfied beyond reasonable doubt that the Crown has proved its case.

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[25] (1976) 136 CLR 62
[26] Ibid, at 72
[27] (2005) 227 CLR 319, at 331 [30]

6.30 Finally, in ***Darkan v The Queen***,[28] the plurality comment on the now well-entrenched position the Court has taken to any definition of the relevant expression:

> The stand which this court has taken on the expression "beyond reasonable doubt" – that it alone must be used, and nothing else – has not been shared elsewhere. Even in Australia it is an extreme and exceptional stand.

Statutory direction as to standard of proof in Victoria

6.31 The appellant accepts that the provisions of the Jury Directions Act 2013 (Vic) were not engaged in this case as the jury had not asked a question about the meaning of the relevant phrase. However, it is instructive to note that if the jury had done so, the trial judge would have been permitted to provide an explanation which indicated that "it is almost impossible to prove anything with absolute certainty when reconstructing past events" and that "the prosecution does not have to do so".[29]

6.32 Thus it can be readily seen that the trial judge did no more in her direction than what is provided for in Victorian legislation – and it has not been suggested anywhere in case-law or academic literature that such an instruction is productive of a miscarriage of justice. In fact, the Court of Appeal in its judgment commented on the policy benefits of removing the precondition to the exercise of the relevant statutory power.[30]

Direction as to absolute certainty – overseas jurisdictions

6.33 A direction that the prosecution does not have to prove its case "beyond any doubt" is no more than a simple observation that the prosecution need not prove its case with absolute certainty, or indeed "beyond all doubt". In short, like the instruction on the civil standard of proof, it is a reminder to the jury that there are differing standards of proof known to the law. Such a direction is not considered to be erroneous in many other overseas jurisdictions including England, Canada and New Zealand.

6.34 In England, an early case in which the standard of proof was discussed was ***Miller v Minister of Pensions***.[31] In that case, Denning J (as he then was) stated:[32]

> That degree [proof required in a criminal case] is well settled. *It need not reach certainty*, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the courts of justice. [emphasis added]

6.35 The leading case in England on this topic is ***R v Bracewell***.[33] In that case, the trial judge gave a direction to the jury explaining the scientific evidence led at trial as follows:

> You will remember ladies and gentlemen that your duty is not to judge scientifically or with scientific certainty. You judge so that as sensible people you feel sure and even say that what might not satisfy Dr Green as a scientific certainty, might with propriety, satisfy you so that you felt sure. Do not be misled. *There is no such thing as certainty in this life, absolute certainty.* [emphasis added]

6.36 The English Court of Appeal (Ormrod LJ, Waller LJ and Chapman J) held that the above direction correctly drew a distinction between scientific proof and legal proof – in short, the criminal standard of proof is not to be equated with absolute certainty.

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[28] (2006) 227 CLR 373, at 395-396 [69] per Gleeson CJ, Gummow, Heydon and Crennan JJ
[29] See section 21(1)(c), Jury Directions Act 2013 (Vic)
[30] See *Dookheea v R* [2016] VSCA 67, at [91]
[31] (1947) 2 All ER 372
[32] Ibid, at 373
[33] (1978) 68 Cr App R 44

6.37 In Canada, the leading case is ***R v Lifchus*** – a direction which explains that absolute certainty is not required was approved by the Supreme Court.[34] In that case, the accused was convicted of fraud. On appeal, the accused contended that the trial judge had erred in not providing an explanation of the phrase "beyond reasonable doubt". The Court of Appeal for Manitoba allowed the appeal. On a Crown appeal to the Supreme Court, it was held that a trial judge should provide an explanation of the relevant expression. In delivering judgment on behalf of the Court, Cory J stated:[35]

> It is true the term has come echoing down the centuries in words of deceptive simplicity. Yet jurors must appreciate their meaning and significance. They must be aware that the standard of proof is higher than the standard applied in civil actions of proof based upon a balance of probabilities yet less than proof to an absolute certainty....
>
> It will be helpful in defining the term to explain to jurors those elements that should not be taken into consideration. They should be instructed that a reasonable doubt cannot be based on sympathy or prejudice. Further they should be told that a reasonable doubt must not be imaginary or frivolous. As well they must be advised that the Crown is not required to prove its case to an absolute certainty since such an unrealistically high standard could seldom be achieved....
>
> Perhaps a brief summary of what the definition should and not contain may be helpful. It should be explained that: ...
>
> - it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt ...
>
> Instructions pertaining to the requisite standard of proof in a criminal trial of proof beyond a reasonable doubt might be given along these lines: ...
>
> 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....
>
> 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.

6.38 The Supreme Court of Canada has since emphasised in ***R v Starr*** that an effective way to explain the expression is to tell the jury that proof beyond a reasonable doubt "falls much closer to absolute certainty than to proof on a balance of probabilities."[36]

6.39 In New Zealand, the leading case is ***R v Wanhalla.***[37] In that case, the New Zealand Court of Appeal considered the practice of how trial judges should sum up to juries on the meaning of the phrase "beyond reasonable doubt". At trial, the judge had provided an elaborate direction on the standard of proof which had travelled beyond the conventional direction ordinarily administered to a jury. On appeal, the direction of the judge that the prosecution was not required to prove a charge "to the point of absolute scientific or mathematical certainty, in other words beyond all doubt or beyond any shadow of doubt" was challenged as erroneous.

6.40 In dismissing this particular complaint, the following observations are made in the joint judgment of William Young P, Chambers and Robertson JJ:[38]

> The criminal standard of proof is not to be equated with certainty (see *Miller v Minister of Pensions* [1947] 2 All ER 372 at p 373 per Denning J). Accordingly, it is open to a Judge to tell a jury that absolute certainty is

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[34] [1997] 3 SCR 320

[35] Ibid, at 327 [14], 334 [31], 335 [36], 336-337 [39] per Lamer CJ, Sopinka, McLachlin, Iacobucci and Major JJ; at 340 [48] per La Forest, L'Heureux-Dube and Gonthier JJ (agreeing in a separate judgment)

[36] [2000] 2 SCR 144, at 267-268 [242] per Iacobucci J (in delivering judgment on behalf of Major, Binnie, Arbour and Lebel JJ)

[37] [2007] 2 NZLR 573

[38] Ibid, at 580 [24], at 587-588 [48]-[49] – Glazebrook J agreeing on this point, at 604 [122], [126]; Hammond J agreeing, at 612 [173]

not required. In England, this point was settled in *R v Bracewell* (1978) 68 Cr App R 44 at p 49. There is also authority to the same effect in New Zealand. For instance, in *R v Batt* (Court of Appeal, CA 47/00, 3 August 2000) the Judge had told the jury "you do not have to be certain, absolutely certain". This Court dismissed a complaint as to that direction in this way at para [21]:

"Whilst the direction might have made the point more clearly if it had used the adjective 'scientific' in describing certainty, the direction has to be looked at in the round. In our view it did not allow the jury to depart from the high standard of proof which was proof beyond reasonable doubt or the requirement that they must be sure of guilt. We do not think that the additional words would have detracted from that requirement in all the circumstances of the case. The jury must have known full well what they were required to do and the proper standard of proof required in a criminal case. We feel constrained to repeat that individual amendments to the standard direction often cause more problems than they solve."

...

But, for all that, the problems we have referred to suggest that there is something to be said for the Canadian approach, at least in broad terms:

(a) At one end of the probability continuum, jurors should be told that absolute certainty is not required. Otherwise there is a substantial risk that jurors will mistakenly assume that it is. Common sense, supported by the Montgomery and Zander articles, shows that this is so....

(c) For these reasons it seems sensible to ensure that juries at least exclude untenable concepts of proof beyond reasonable doubt (as equating it to more likely than not at one end of the continuum or absolute certainty at the other). This should at least make it likely that jurors will focus on the right area of the probability continuum....

In those circumstances we are inclined to the view that Judges should explain the concept of proof beyond reasonable doubt in these terms (which in part are borrowed from *Lifchus*):

...

It is not enough for the Crown to persuade you that the accused is probably guilty or even that he or she is very likely guilty. On the other hand, it is virtually impossible to prove anything to an absolute certainty when dealing with the reconstruction of past events and the Crown does not have to do so.

Direction as to absolute certainty – position in United States

6.41 The law relating to the standard of proof was recently examined by the United States Supreme Court in the decision of ***Victor v Nebraska***.[39] In that case, the Court held that there was no constitutional requirement to explain the expression "beyond reasonable doubt" in a criminal trial but nor was there any prohibition on any such explication by a trial judge. Importantly, in delivering the majority opinion, O'Connor J stated:[40]

But the beyond a reasonable doubt standard is itself probabilistic. "[I]n a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what *probably* happened." *In re Winship*, 397 U. S., at 370 (Harlan, J., concurring) [emphasis in original].

Direction as to absolute certainty – position in Victoria

6.42 The starting point in Victoria is the decision of ***R v Neilan***.[41] In that case, the Court of Criminal Appeal considered the question of whether a trial judge should explain to a jury the meaning of "beyond reasonable doubt". During the course of the charge to the jury, the trial judge had stated: "But beyond reasonable doubt is not no doubt, but reasonable doubt. If you have a doubt, which in your mind is reasonable in the circumstances, then indeed it must be resolved in favour of the accused man."

6.43 The Court (Young CJ, Brooking and Marks JJ) held that it was undesirable for a judge to seek to explain what is meant by the phrase "beyond reasonable doubt" except by way of contrasting it with the standard of proof in civil proceedings. Further, the Court opined that it was also undesirable for a judge to distinguish between a doubt and its reasonableness in

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[39] (1994) 511 US 1
[40] Ibid, at 14
[41] [1992] 1 VR 57

any instruction given. However, the Court stated that it was significant that no exception had been taken to the particular direction at trial.[42] Thus, the ground of appeal failed on the basis that the jury had not been misdirected in all the circumstances.

6.44 Interestingly, the Court drew attention to the dissenting judgment of Cox J in the South Australian decision of *Pahuja* (see below) and agreed that "it cannot be the law that a reasonable doubt is any doubt which a jury or juror is prepared to entertain at any stage of the deliberations".[43] Importantly, the Court also agreed that a degree of analysis was inevitable in any jury deliberation.[44]

6.45 In ***R v Chatzidimitriou***,[45] the jury had requested the trial judge to provide a definition of the criminal standard of proof. In addition, during their deliberations, the jury requested a dictionary. In dismissing an application for leave to appeal (by majority), Phillips JA emphasised that a reasonable doubt "is not any doubt at all". His Honour added:[46]

> But, of course, the jury must be left to itself to determine what is a reasonable doubt. The law is not that the jury must not consider what is or is not reasonable; the law is that the jury must alone be the arbiter of the issue. It is error on the part of the trial judge to intrude upon the jury's function in this respect. It is for that reason that the judge must not define the word "reasonable"; nor, it may be added, should the judge invite the jury to analyse their own mental processes too finely. The latter, however, does not mean that deciding what is reasonable is to be removed from the jury's province; quite the contrary.

6.46 Finally, in ***R v Hettiarachchi***,[47] the trial judge when directing on the standard of proof told the jury that "beyond reasonable doubt does not mean fanciful but just beyond reasonable doubt". The Court of Appeal held that the direction, whilst an error, was not productive of a miscarriage of justice – in support of this conclusion, the Court referred to the earlier decision of *Neilan* and the Northern Territory decision of *Ladd* (see below).

6.47 Somewhat perplexingly, there is no analysis in the judgment of the court below as to why the South Australian decision of *Compton* was to be preferred over both *Neilan* and *Ladd.*

Direction as to absolute certainty – position in South Australia

6.48 On this topic, there is a trilogy of cases in South Australia which reveal an uncompromising approach to any attempt by a trial judge to provide an explanation of the criminal standard of proof. The state of the law is perhaps best summarised in ***R v Fouyaxis***:[48]

> Trial judges have been repeatedly discouraged from giving to a jury during a summing up an explanation of what constitutes reasonable doubt. The decisions of the High Court in Green and of this Court in *Wilson*, *Pahuja* and *Forrest*, demonstrate that where members of a jury are asked to subject their thought processes to analysis or evaluation, where jurors are invited to examine their thought processes in some deliberative fashion or where jurors are invited to scrutinise a doubt they may have to see if it passes some test, then there will be a misdirection. The distinction that is drawn is between a doubt that a juror may entertain after analysis, evaluation and scrutiny and a doubt that is reasonable.

6.49 The first in the trilogy of cases is ***R v Wilson & Ors.***[49] In that case, the trial judge had instructed the jury that "if you think there is a doubt but that it is a fanciful doubt, you will convict because that is not a reasonable doubt: it is a doubt beyond reason".

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[42] Ibid, at 72
[43] Ibid, at 70
[44] Ibid, at 71
[45] (2000) 1 VR 493
[46] Ibid, at 496-497 [9]
[47] [2009] VSCA 270 (per Nettle and Weinberg JJA, Hollingworth AJA)
[48] (2007) 99 SASR 233, at 244-245 [47]
[49] (1986) 42 SASR 203

6.50 King CJ held that the trial judge had misdirected the jury on the standard of proof:[50]

> It is permissible, if thought necessary to warn a jury against unreasonable mental processes, but it is not permissible to suggest that they should disregard a doubt which, at the end of their deliberations, they think to exist, or that they are required to subject such a doubt to a process of analysis in order to determine its quality. If at the end of their deliberations, the jury have a doubt, that doubt is *ipso facto*, as *Green's* case established, a reasonable doubt.

6.51 King CJ held that the direction was defective as it required the jury to examine whether the doubt, which they think exists, is a reasonable one or not. His Honour stated:[51]

> Proof beyond reasonable doubt requires that doubts, *irrespective of degree of strength* which they attain, be given effect to if the jurors, as reasonable persons, are prepared to entertain them. [emphasis added]

6.52 Thus it can be seen that King CJ adopts the view that "a doubt" entertained by a jury, irrespective of the strength of the doubt, is *ipso facto*, "a reasonable doubt" – this is because the jury is comprised of reasonable persons and therefore no further analysis of a doubt is required. The decision in *Green* is cited as authority in support for this proposition – however, with respect, this involves a misunderstanding of the judgment. In short, a jury may entertain a doubt which is not considered "reasonable" by the body itself after first setting the standard of "reasonableness"– in such cases, the jury should move to convict an accused person rather than acquit.

6.53 Johnston J agreed with the analysis of King CJ. Legoe J dissented, holding that the jury had not been misled due to the clear direction elsewhere as to the relevant standard.

6.54 The second case is ***R v Pahuja***.[52] In that case, the trial judge had provided some explication of the standard of proof, including an instruction that a guilty person should not be acquitted "by the jury allowing some fanciful doubt to take the place of a real doubt". In allowing an appeal, King CJ referred to his earlier judgment in *Wilson* and stated:

> Jurors are presumed to be reasonable persons. The test of reasonableness of a doubt is that the jury, properly aware of its responsibilities, is prepared to entertain it at the end of its deliberations. To direct or even invite a jury to subject a doubt which it entertains after deliberating upon the case, to a process of analysis or evaluation in order to determine whether it is reasonable, is an error of law.

6.55 Johnston J agreed that the direction was defective relying on the earlier decision in *Wilson*. Cox J joined in the orders of the Court on the basis of *Wilson* representing binding precedent. However, his Honour issued a minority judgment observing:[53]

> The notion conveyed by the expression "beyond reasonable doubt" is, of course, inexact. It is an acknowledgement of the impracticability, if not impossibility, of requiring that a charge be proved to the point of absolute certainty.... The expression "beyond reasonable doubt" is quantitatively and qualitatively imprecise, and there have bene practical studies that suggest it can be mean different things to different people.

6.56 Importantly, Cox J stated that the word reasonable" in the expression is one of limitation:[54]

> [I]t seems to me to be self-evident that the word "reasonable" is a word of limitation. It is generally accepted that "beyond reasonable doubt" does not mean beyond any doubt at all....

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[50] Ibid, at 206
[51] Ibid, at 207
[52] (1987) 49 SASR 191 – in refusing the Crown special leave to appeal, Mason CJ (speaking for the Court) stated: "It is to *Green's* case that one should look to find the law on this topic, rather than to other cases in which glosses have been put upon what the court said in that case." (see *R v Pahuja* [1988] 15 Leg Rep SL 4 [cited in *R v Ladd* (2009) 27 NTLR 1, at 62 [182])
[53] Ibid, at 204
[54] Ibid, at 205

> It must imply that there are some doubts that are reasonable and other doubts that are not, and that the jury must keep the distinction in mind in reaching its verdict. If that is right, it can hardly be an error of law to say so to the jury.

6.57 The third case is ***R v Compton & Barratt***[55] – in summing up, the trial judge included in his direction on the standard of proof the statement that "absolute certainty of guilt is not required. The prosecution does not have to prove guilt beyond all doubt".

6.58 After analysing the authorities (including *Wilson* and *Pahuja*), Kourakis CJ held that such a statement was an error of law as it invited (in a practical sense) the jurors to analyse any doubts they held for reasonableness.[56] His Honour noted that the impugned direction was identical to that under examination in both *Neilan* and *Ladd* but was of the view that both cases had been influenced by the minority judgment of Cox J in *Pahuja*.[57]

6.59 Peek J held that the direction was erroneous principally on the basis of King CJ's analysis in *Wilson*, namely a doubt held by a jury is, *ipso facto*, a reasonable doubt and no further analysis is warranted.[58] Likewise, Peek J preferred the views of King CJ (and Johnston J) in *Pahuja* to that of Cox J.[59]

6.60 Stanley J dissented on this point holding that, whilst the instruction was unhelpful, it did not cause a miscarriage of justice:[60]

> I do not consider that the jury, having heard the summing up as a whole, including, in particular, the impugned direction and the context in which it was given, could have understood the summing up as an invitation to them to analyse the character of any doubt they, as members of the jury, might have entertained about the reliability of the prosecution case. As was said by Cummins AJA in *R v Chatzidimitriou* the instruction was directed at a process of definition logically anterior to the identification of any doubt of a relevant kind. Moreover, it was similar in effect to the directions referred to in *Neilan, Wanganeeen, Fouyaxis* and *Ladd.*

6.61 Notwithstanding the approach adopted in the above cases, the appellant is able to draw upon the South Australian decision of ***R v Wanganeen*** in support of its primary argument.[61] In this case, the trial judge gave conventional directions on the standard of proof during the charge. However, in response to a jury question during deliberations, the trial judge re-directed the jury that the relevant expression "does not mean you have to be 100% sure that the defendant is guilty". On appeal, it was submitted that the re-direction was an error as a judge is not permitted to give a quantitative indication of what amounts to reasonable doubt. In dismissing this complaint, Gray J stated:[62]

> The jury's question was posed in terms of a percentage; did the jury need to be "100% sure" that the appellant was guilty? The response of the Judge was correct: beyond reasonable doubt does not mean "100% sure". The Judge then, having correctly answered the question, proceeded to remind the jury of the meaning of reasonable doubt in accepted conventional terms. The Judge's response to the jury question was entirely appropriate.

6.62 In short, the appellant submits that the South Australian line of authority (as represented by the trilogy of cases cited above) is erroneous – the decision of this Court in *Green* does not provide authority for the propositions expounded therein. Furthermore, the cases stand in direct conflict with decisions of intermediate courts elsewhere in Australia.

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[55] (2013) 237 A Crim R 177
[56] Ibid, at 180 [4], 182-183 [10], 184-185 [19], 185 [20]
[57] Ibid, at 185 [22]
[58] Ibid, at 186 [33], 190 [47]-[48], 191 [50], 191-193 [52]-[55], 205-206 [106]
[59] Ibid, at 193 [55]
[60] Ibid, at 214-215 [145]
[61] (2006) 95 SASR 226
[62] Ibid, at 243 [67]; at 228 [2] per Bleby J agreeing; at 257 [150] per Anderson J agreeing

Direction as to absolute certainty – position in other Australian jurisdictions

6.63 In the early case of ***R v Floyd***,[63] the New South Wales Court of Criminal Appeal held that it was not erroneous for a trial judge to direct a jury that "reasonable doubt" was not to be confused with a fanciful or flimsy doubt. Interestingly, in dismissing the appeal, Herron J remarked that "in the past I have known eminent judges of great experience tell juries that it does not mean proof beyond any doubt".

6.64 However, in the decisions of ***R v Blanch***[64] and ***R v Solomon***,[65] the New South Wales Court of Criminal Appeal overturned convictions where the directions about standard of proof contrasted beyond reasonable doubt with a state of "absolute certainty". This comparative exercise was found to have put the wrong emphasis on the traditional direction.

6.65 In ***R v Chami & Ors***,[66] the trial judge directed the jury that the expression "beyond reasonable doubt" does not mean "beyond reasonable doubt to the point of certainty". There were other conventional references to the criminal standard of proof in the summing up. There was no objection by defence counsel to the direction. Whilst the New South Wales Court of Appeal did not endorse this gloss on the traditional direction, nevertheless it was held that the trial did not miscarry.

6.66 In ***R v Ho***,[67] defence counsel at trial objected to a direction given by the trial judge that the criminal standard of proof was not "beyond any doubt". The trial judge declined to redirect. On appeal, the New South Wales Court of Criminal Appeal held that whilst the direction was undesirable, such a statement had to be viewed in the context of the entire directions on the standard of proof; and as the jury had been otherwise properly instructed on the standard of proof, the ground of complaint was not made out.

6.67 In ***R v Stirling***,[68] an instruction was given to a jury that proof beyond reasonable doubt does not mean proof "beyond any doubt". Further, the trial judge also spoke of the jury being "sure" of guilt and that a reasonable doubt did not involve something "fanciful or imaginative". The Queensland Court of Appeal held that the directions were erroneous but applied the proviso.

6.68 In ***R v Clarke***,[69] the trial judge referred to the crime al standard of proof as a high standard but "not an impossible standard". The direction was not held by the Queensland Court of Appeal to be erroneous.

6.69 In ***R v Goncalves***,[70] the trial judge directed the jury that beyond reasonable doubt did not mean "proof to the point of absolute certainty". Whilst the Western Australian Court of Criminal Appeal held that the direction was undesirable, it was not a misdirection.

6.70 In ***Etherton v State of Western Australia***,[71] the trial judge instructed the jury that the criminal standard of proof is not set so high as to be insurmountable. The Western Australian Court of Appeal held that the instruction was undesirable but not erroneous.

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[63] [1972] 1 NSWLR 373
[64] Unreported, NSWCCA, 17 August 1998 ((per Roden, Allen and Mathews JJ)
[65] Unreported, NSWCCA, 15 November 1989 (per Carruthers, Finlay and McInerney JJ)
[66] [2004] NSWCCA 36 (per Mason P, Wood CJ at CL and Sully J)
[67] (2002) 130 A Crim R 545 (per Meagher JA, Hidden and Bell JJ)
[68] [1996] QCA 342 (per Fitzgerald P, Davies JA and Thomas J)
[69] (2005) 159 A Crim R 281 (per McMurdo P, Helman and Chesterman JJ)
[70] (1997) 99 A Crim R 193 (per Malcolm CJ, Heenan and Wheeler JJ); contra *R v Chedzey* (1987) 30 A Crim R 451
[71] (2005) 30 WAR 65 (per Steytler P, and Roberts-Smith and McLure JJ)

6.71 In ***W v R***,[72] the trial judge instructed the jury on the standard of proof that they did not have to be 100% satisfied that the accused person was guilty. The Tasmanian Supreme Court held that the direction was not an error.

6.72 In ***Ladd v R***,[73] the Northern Territory Court of Criminal Appeal examined the directions concerning the criminal standard of proof in trials and held, inter alia, that it was not a misdirection for a trial judge to tell the jury that proof "beyond reasonable doubt" does not mean proof beyond all doubt (albeit, it was preferable not to do so).[74] After referring to the relevant passages in *Green* (set out above), Martin (BR) CJ observed:[75]

> It can be seen from this passage of the joint judgment that a reasonable doubt is "a" doubt which the "jury" entertain.... [I]f the expression means any doubt entertained by a juror, standing alone without explanation, it has the potential to mislead jurors. In itself the expression "beyond reasonable doubt" invites jurors to analyse or assess the quality or strength of any doubt they, as individuals, might experience in order to determine whether the doubt is "reasonable".

6.73 Martin (BR) CJ also agreed with the observations of Cox J in *Pahuja* as to the inevitability of a jury subjecting their deliberative processes to analysis:[76]

> I respectfully agree that the task of the jury inevitably requires that jurors analyse and evaluate any doubt they experience to determine whether the doubt is reasonable. It is the very task with which jurors are entrusted. Further, if it ever was appropriate, in my view it is no longer appropriate to assume that jurors are not accustomed to analysing their mental processes or thoughts in order to determine whether they are reasonable. Implicit in the assumption that jurors are not accustomed to analysing their mental processes is a further assumption that such a task would be beyond individual jurors and juries collectively. That implicit assumption might reasonably be regarded as disclosing a somewhat patronising attitude. Jurors, individually and collectively, are quite capable of carrying out the necessary analysis and evaluation.

6.74 In dismissing the appeal, Martin (BR) CJ concluded:[77]

> The trial judge repeatedly and emphatically told the jury that the Crown must prove its case, and in particular the existence of the necessary intention, beyond reasonable doubt without any qualification as to the meaning of that expression. In the re-direction, his Honour merely informed the jury, correctly, that beyond reasonable doubt did not mean beyond all doubt and there is nothing in the directions that might have led the jury to the process of analysing a doubt in order to determine whether it was reasonable. Informing the jury that it did not mean beyond all doubt did not invite the jury to adopt a two stage process.

6.75 In refusing the accused special leave to appeal, French CJ (on behalf of the Court) stated:[78]

> As to the direction on the standard of proof, read in the context of the repeated references to proof beyond reasonable doubt, the direction was sufficient to properly inform the jury of its task. It was not compromised, when viewed as a whole, by the exclusion of a standard that would require the Crown to prove its case beyond all doubt.

Some legal propositions relating to criminal juries

6.76 First, the modern jury is a robust and sophisticated body called on by the community to render verdicts in criminal proceedings which are often complex both as to fact-finding and application of legal principles. As this Court recently observed, there is no suggestion that a jury does not have the capacity to do so.[79]

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[72] (2006) 16 Tas R 1 (per Slicer, Evans and Blow JJ)
[73] (2009) 27 NTLR 1
[74] Ibid, at 70 [213]
[75] Ibid, at 55 [155]
[76] Ibid, at 60 [176]
[77] Ibid, at 70 [214] – at 71 [224] per Angel J dissenting but agreeing on this point; at 75 [240] per Mildren J agreeing
[78] See *Ladd v The Queen* [2010] HCATrans 46 (12 March 2010), per French CJ and Crennan J
[79] See *Dupas v The Queen* (2010) 241 CLR 237, at 248-249 [29]; see also *W v R* (2006) 16 Tas R 1

6.77 Secondly, the expression "beyond reasonable doubt" is one of inherent indeterminacy. It relates to a standard of persuasion which is incapable of precision in a quantitative sense – in short, it involves a standard which may vary from individual juror to juror, or indeed as between different juries.[80]

6.78 Thirdly, a jury verdict is not a collective decision of a corporate body, but rather individual decisions of a corporate body which are then tallied to reach a conclusion (or verdict) in a particular case – each juror reaches his/her own decision regarding the required standard of persuasion rather than the corporate body reaching a single conclusion.[81] Whilst of course it can be accepted that jurors seek to act reasonably, that does not mean that each individual juror acts and reasons in the same manner as all others.

6.79 Fourthly, the observation in *Green* (and other authorities) that juries are not required to have their mental processes subjected to objective analysis can no longer hold true. The very essence of jury deliberations requires individual jurors to expose their reasoning processes to evaluation by other jurors particularly where consensus cannot be reached. Indeed, as Cox J observed in his minority judgment in ***R v Pahuja***:[82]

> The criminal standard of proof implies that there may be in any given case an uncertainty, objectively speaking, called a doubt, about the guilt of the accused. The jury is required to find the accused not guilty if, but only if, it considers that doubt to be a reasonable doubt. A degree of analysis and evaluation in this respect - Is this a reasonable doubt? - is inseparable, to my mind, from the test.

6.80 For example, in ***Moffatt v R***,[83] the trial judge instructed the jury that "if as reasonable people you have a doubt about the accused's guilt, and you think your doubt is a reasonable one then you have a reasonable doubt." The Queensland Court of Appeal dismissed an appeal against conviction holding that such a direction did not transgress the law as set down in both *Thomas* and *Green*.

6.81 The above point is of course fortified by the exhortation now routinely given to juries where they are unable to agree after a certain time has lapsed when deliberating. Underpinning this exhortation lays an unstated premise that the mental processes and analyses of individual jurors require re-examination. For example, in ***Black v The Queen***, the plurality stated:[84]

> Likewise, it is proper to remind the jurors that they should listen to each other's views, weigh them objectively and that an individual juror can change his or her mind if honestly persuaded that his or her preliminary view is not well founded.

6.82 Fifthly, the exposure of the jury's mental processes to some analysis is in reality no different to the task that confronts a jury in dealing with a prosecution circumstantial case. In such a case, a standard direction is given that the prosecution case succeeds only where guilt is the only reasonable inference which can be drawn from the circumstances established in the evidence, and that an acquittal must follow that if there is any reasonable explanation of those circumstances consistent with innocence.[85] Such directions stem from the general requirement that guilt must be proved beyond reasonable doubt.

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[80] See *R v Southammavong & Sihavong* [2003] NSWCCA 312, at [32]-[33], [42] per Spigelman CJ (O'Keefe and James JJ agreeing)
[81] See *Walters v R* [1969] 2 AC 26, at 30 per Lord Diplock; *R v Pahuja* (1987) 49 SASR 191, at 210 per Cox J
[82] (1987) 49 SASR 191, at 201
[83] [2003] QCA 95
[84] (1993) 179 CLR 44, at 51 per Mason CJ, Brennan, Dawson and McHugh JJ
[85] See *R v Hodge* (1838) 2 Lew CC 227; *Peacock v The Queen* (1911) 13 CLR 619; *Plomp v The Queen* (1963) 110 CLR 234; *Shepherd v The Queen* (1990) 170 CLR 573; *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521

6.83 Sixthly, as the relevant expression embodies "reasonableness" as the controlling standard in relation to the degree of persuasion, it is perhaps not surprising that further explication often founders. As this Court emphasised in *Green*, the jury sets the standard of what is "reasonable" in the circumstances of the particular case. However, unlike the majority judgments delivered in *Compton*, that does not mean that "a doubt" experienced by a jury is, *ipso facto*, "a reasonable doubt". As the Court in *Green* expressly recognised, a doubt entertained may be entirely fantastic or completely unreal; and if so, such a doubt should not be the source of reasonable doubt (that such an instruction is permissible in a re-direction demonstrates the fallacy inherent in the judgments of King CJ in *Wilson* and *Pahuja*).

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6.84 Seventhly, the relevant expression "beyond reasonable doubt" itself admits of another proof, namely "beyond doubt" (the expression "beyond doubt" is a synonym for "beyond any doubt', beyond all doubt", 'absolutely certainty" and the like). That this is so is hardly likely to escape the attention of a jury acting conscientiously in the discharge of its duty.

6.85 Eighthly, a criminal prosecution involves a reconstruction of past events. Such events can never be established with absolute certainty.[86] Furthermore, even if a relevant act could be so proven, the intent of an actor is invariably dependent upon the drawing of an inference – and such inferential reasoning is entirely probabilistic-based.[87]

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6.86 Ninthly, it is routine in any direction on the standard of proof to include a contrast with the civil standard of proof ("balance of probabilities"). This contrast is thought to be helpful to an accused person in ensuring that the jury is aware of the high threshold required for the return of any guilty verdict. If so, it is difficult to understand why an instruction in relation to "absolute certainty' would also not be helpful in setting the appropriate standard.

6.87 And finally, Hammond J in ***R v Wanhalla*** provides an additional justification for the inclusion of an instruction that absolute certainty is not required, namely fairness:[88]

30 In my view both clarity and fairness to the Crown (in a trial which is supposed to be even-handed) support the importance of a statement that absolute certainty is not required.

6.88 In conclusion on ground 1, an instruction that the prosecution does not have to prove its case "beyond any doubt" does <u>not</u> constitute legal error – there is no High Court authority to this effect, and the common law positions in England, New Zealand and Canada provide no support for the decision of the court below. As demonstrated by the analysis of Martin (BR) CJ in *Ladd*, the contrary line of South Australian authority is not to be preferred. Here the trial judge did not seek to define or provide content to the relevant phrase, but rather helpfully contrasted it with both the civil standard and absolute standard of proof.

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<u>Ground 2</u> – no substantial miscarriage of justice occasioned

6.89 As set out at paras 6.5 - 6.10 above, the jury had been directed (or informed) on some 45 occasions during the course of the trial that the prosecution had to prove its case "beyond reasonable doubt". Such directions occurred:

- on 4 occasions by the trial judge prior to the charge;
- on 16 occasions by counsel (prosecutor and defence) prior to the charge; and
- on 25 occasions by the trial judge during the charge (including on 5 occasions
50 subsequent to the impugned passage).

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[86] See *R v Wanhalla* [2007] 2 NZLR 573, at 588 [49] per William Young P, Chambers and Robertson JJ
[87] See *Martin v Osborne* (1936) 55 CLR 367; *Plomp v The Queen* (1963) 110 CLR 234
[88] [2007] 2 NZLR 573, at 611

6.90 In addition, as set out at para 6.21 above, the jury was provided a handout on the elements of the relevant offences which also incorporated 3 further references to the standard of proof – and the references to the standard of proof were in bold print. In short, it is the appellant's contention that this "aide memoire" would have provided a sensible anchor for the jury in their deliberations and cured any possible vice in the oral instructions.

6.91 Furthermore, the impugned passage did not find its way into the standard direction on the burden and standard of proof either in the judge's opening directions to the jury on the topic nor in her final directions to the jury on the same topic. Subsequent to the impugned passage, the judge directed the jury on the standard of proof in conventional terms on no less than 5 occasions. And, at the end of the charge, the judge provided the handout to the jury.

6.92 In conclusion on ground 2, when viewed in their entirety, the directions did not dilute or diminish the criminal standard of proof. In this vein, it is important to remember the salutary observation of Gibbs J (as he then was) in ***La Fontaine v The Queen***:[89]

> Many charges when subjected to close scrutiny will be found to contain misstatements which are corrected elsewhere in the charge. Notwithstanding the criticisms levelled at the charge in the present case I am satisfied that, taken as a whole, it was fair and sufficient.

6.93. In short, the respondent has not suffered a substantial miscarriage of justice by virtue of the inclusion of the impugned passage in the charge to the jury.[90]

Part VII: Applicable constitutional provisions, statutes and regulations

7.1 The applicable statutory provision has been annexed to these submissions – such provision is still in force in the same form at the date of these submissions.

Part VIII: Orders sought

8.1 The orders sought are that the appeal be allowed, the orders of the Supreme Court (Court of Appeal) of Victoria be set aside and that the appeal to that Court be dismissed.

Part IX: Presentation of oral argument

9.1 The appellant estimates 1 hour is required for the presentation of oral argument.

Dated: 15 December 2016

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[89] (1976) 136 CLR 62, at 81
[90] See section 276(1)(b), Criminal Procedure Act 2009 (Vic) [see Annexure]

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M159 of 2016

BETWEEN:

THE QUEEN

Appellant

- v -

KRITSINGH DOOKHEEA

Respondent

ANNEXURE

Section 276 of the Criminal Procedure Act 2009 (Vic) is reproduced as follows:

Determination of appeal against conviction

(1) On an appeal under section 274, the Court of Appeal must allow the appeal against conviction if the appellant satisfies the court that –

(a) the verdict of the jury is unreasonable or cannot be supported having regard to the evidence; or

(b) as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice; or

(c) for any other reason there has been a substantial miscarriage of justice.

(2) In any other case, the Court of Appeal must dismiss an appeal under section 274.

Sections 20 & 21 of the Jury Directions Act 20013 (Vic) are reproduced as follows:[1]

When trial judge may explain "proof beyond reasonable doubt"

(1) A trial judge may give the jury an explanation of the phrase "proof beyond reasonable doubt" if the jury asks the trial judge –

(a) a direct question about the meaning of the phrase; or

[1] The 2013 Act has now been repealed and replaced with the Jury Directions Act 2015 (Vic) – sections 63 & 64 replicate (in identical terms) sections 20 & 21 of the 2013 Act

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(b) a question that indirectly raises the meaning of the phrase.

(2) Subsection (1) does not limit any other power of a trial judge to give the jury an explanation of the phrase "proof beyond reasonable doubt".

How explanation may be given in response to jury question

(1) If the jury has asked a direct question about the meaning of the phrase, or a question that indirectly raises the meaning of the phrase, "proof beyond reasonable doubt", 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) The trial judge may adapt his or her explanation of the phrase "proof beyond reasonable doubt" in order to respond to the particular question asked by the jury.