IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M159 of 2016

BETWEEN:

THE QUEEN

Appellant

- v -

KRITSINGH DOOKHEEA

Respondent

APPELLANT'S REPLY [Annotated]

Part I: Suitability for internet publication

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

Part II: Reply to argument of respondent

Ground 1

2.1 As to para [10] of the Respondent's Submissions, the appellant disputes that the impugned passage [satisfaction of the relevant element not beyond any doubt, but beyond reasonable doubt] constitutes a misdirection at law. In short, this is so for the reasons essayed by Martin CJ in ***Ladd v R***:[1]

> It can be seen from this passage of the joint judgment [*in Green's case*] that a reasonable doubt is "a" doubt which the "jury" entertain. If this passage means "a" doubt in the sense that any doubt entertained by a "juror" is necessarily a "reasonable doubt", and I stress "if", then, with the greatest of respect to those eminent judges who have opined that "beyond reasonable doubt" is a well understood expression, in my opinion it is not. Further, if 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". In my view this explains why juries regularly ask for an explanation as to the meaning of "reasonable doubt". Jurors, not surprisingly, seek guidance as to the meaning of "reasonable" in this context. From the perspective of a juror untrained in the law and unaided by further explanation, the expression "beyond reasonable doubt" is likely to be perceived as having a significantly different meaning from "a doubt" experienced by a reasonable person or juror.
>
> ...
>
> 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.
>
> ...

[1] (2009) 27 NTLR 1, at 55 [155], 60-61 [176], 70 [213]

John Cain
Solicitor for Public Prosecutions
565 Lonsdale Street Melbourne
Victoria 3000

Telephone: 03 9603 7631
Fax: 03 9603 7460
Email: Caitlin.Seach@opp.vic.gov.au
Ref: 1302758 / C Seach

> Returning to the directions under consideration, in my view it would have been preferable if the trial judge had not directed the jury that the Crown was not required to prove its case "beyond all doubt". Literally speaking, that direction was not an error, but as the authorities demonstrate, elaborations of this nature risk straying into prohibited territory. In all the circumstances, however, having regard to the directions as a whole I am satisfied that this single statement did not stray into such prohibited territory or detract from the fundamental features required of directions as to the burden of proof.

2.2 As to para [14] of the Respondent's Submissions, the appellant disputes such a contention – the standard is set by the jurors in the discharge of their sworn duty rather than by mere virtue of empanelment as a juror. In short, this must be so as otherwise the *Black* direction would be otiose – for such a direction contemplates a juror (or jurors) holding a particular view [considered "unreasonable" by other jurors] and being persuaded to embrace a different view.

2.3 As to para [19] of the Respondent's Submissions, it is unclear as to why the Victorian decision in ***R v Neilan*** is said to be wrongly decided. The decision was handed down by a distinguished court comprising Young CJ, Brooking and Marks JJ. The Court of Criminal Appeal examined the South Australian decision of ***R v Pahuja*** and this Court's decision in ***Green v The Queen*** before concluding that "it was not wrong to tell the jury that a reasonable doubt was a doubt which they considered reasonable" (albeit undesirable to do so).[2] The doctrine of precedent applied, yet the court below appeared to simply prefer the South Australian line of authority. In short, it is somewhat surprising that the divergence in the lines of authority escaped any detailed analysis in the court's judgment.

2.4 As to para [21] of the Respondent's Submissions, the appellant contends that the expression "a doubt is a doubt is a doubt" simply ignore the composite nature of the expression "beyond reasonable doubt".

2.5 As to para [23] of the Respondent's Submissions, the difficulty in the respondent's contention ["a doubt held by a jury is, by definition, a reasonable doubt"] is neatly exposed therein – for, as this Court observed in ***Green v The Queen***, "fantastic or completely unreal possibilities" are not to be regarded as a proper source of reasonable doubt.[3] It is important to note that in this context the Court spoke of "reasonable doubt" rather than just "doubt" (as Kourakis CJ refers to in ***R v Compton & Barratt***).[4] In short, some mental analysis is required by the jury (the elimination of "fantastic or completely unreal possibilities") in order to return a conviction.

2.6 As to para [24] of the Respondent's Submissions, the trial judge did not contrast a "reasonable doubt" with "a doubt" – what the trial judge did say was that the prosecution did not have to prove an element "beyond any doubt" (this is synonymous with absolute certainty" and not some lesser standard of proof).

2.7 As to para [28] of the Respondent's Submissions, the appellant submits that the present case cannot be distinguished from this Court's decision in ***La Fontaine v The Queen***[5] – in the latter decision, Barwick CJ points to the deficiencies in the extracted trial judge's direction, yet does not criticise a passage where the jury is informed that the expression "beyond reasonable doubt" does not mean "beyond any doubt at all" (this is of course particularly important as Barwick CJ was a member of the Court that delivered judgment in the earlier

---

[2] [1992] 1 VR 57, at 71
[3] (1971) 126 CLR 28, at 33
[4] (2013) 237 A Crim R 177, at 183-184 [15]
[5] (1976) 136 CLR 62, at 71

case of ***Green v The Queen***). In short, the decision in ***La Fontaine v The Queen*** is quite fatal to the respondent's primary contention.

2.8 As to para [30] of the Respondent's Submissions, the appellant relies on the overseas authorities to demonstrate that the impugned passage does not constitute misdirection in a conventional direction on the standard of criminal proof.

2.9 As to para [39] of the Respondent's Submissions, it is true that the trial judge did not explain to the jury why the prosecution was not required to prove its case beyond any doubt [because as section 21(1)(c), Jury Directions Act 2013 (Vic) makes plain, "it is almost impossible to prove anything with certainty when reconstructing past events"] – however, such an explanation would have been obvious to a jury. In any event, the impugned passage merely highlighted what indeed was required of the jury, namely that the prosecution case had to be proved beyond reasonable doubt.

2.10 Otherwise, the appellant joins issue with the respondent's argument under cover of this ground.

Ground 2

2.11 As to para [43] of the Respondent's Submissions, it is not correct to contend that the appellant did not make such argument in the court below. In the appellant's Revised Response,[6] it was contended, inter alia:

- the terms of the direction were unfortunate but strictly speaking not wrong as a matter of logic;
- it does not follow that because the direction was volunteered [relevant statutory provision not engaged], the direction was an error of such magnitude as to cause a substantial miscarriage of justice;
- the direction was inconsequential; and
- in the context of the overall directions and the single issue in the trial, there has not been a substantial miscarriage of justice.

2.12 In short, the appellant contended that the impugned passage was not erroneous; but in the alternative, if so, no substantial miscarriage of justice had been occasioned. This was not a crown appeal, nor did the appeal involve the review of a discretionary judgment – either the impugned passage was an error of law or not; and, if so, the issue then arose of whether such an error occasioned a substantial miscarriage of justice. The respondent initiated the appeal and persuaded the court below to find both error of law and a substantial miscarriage of justice – the cases now relied upon by the appellant do not reveal any different line of argument but simply provide more eloquent support for the propositions unsuccessfully advanced by the appellant. It should be noted that both parties relied on very few cases in argument on this ground in the court below.

2.13 In relation to para [45] of the Respondent's Submissions, the appellant submits that the South Australian line of authority is inconsistent with both legal principle and this Court's decision in ***Green v The Queen*** and thus should not be followed.

2.14 In relation to para [46] of the Respondent's Submissions, it is accepted that there are pages of excised transcript between the various extracts of reference to the phrase "beyond

[6] See Revised Response to Applicant's Written Case dated 23 October 2015 **[NR]**

reasonable doubt" – however, that does not diminish the potency of the appellant's submission but rather highlights the constancy of reference to the relevant phrase by the trial judge throughout her charge.

2.15 In relation to para [47] of the Respondent's Submissions, the appellant disputes the contention that the impugned passage permeated the entirety of the charge – again, with the benefit of the handout [setting out the elements of the charge and the governing standard of proof], the jury no doubt approached their task with a focus on the real issues informed by repeated references to the relevant standard in conventional terms.

2.16 In relation to para [48] of the Respondent's Submissions, the relevant handout was referred to in the trial transcript and was mentioned in the court's judgment in respect of a different ground of appeal.[7] The document speaks for itself – thus, it is somewhat surprising the terms of the document escapes attention in the resolution of the ground the subject of this appeal.

2.17 In relation to para [49] of the Respondent's Submissions, it is accepted that the impugned passage was included in the direction on intention which was the only live issue in the trial. However, after the impugned direction, the judge continued to direct on intention as set out at para 6.17 of the Appellant's Submissions – thus, with respect, any vice was immediately cured.

2.18 In relation to para [51] of the Respondent's Submissions, true it is that the jury was provided with a copy of the charge – thus, it is even more surprising that defence counsel did not take any exception to the impugned passage (particularly in circumstances where counsel was provided with a copy of the charge over the weekend to consider and he requested a change on an unrelated topic before its delivery to the jury).[8]

2.19 Otherwise, the appellant joins issue with the respondent's argument under cover of this ground.

Dated: 6 February 2017

.....

Name: Brett L. Sonnet
Crown Prosecutor (Victoria)
Telephone: 03 9603 7566
Email: brett.sonnet@opp.vic.gov.au

[7] See *Dookheea v R* [2016] VSCA 67, at [77] **[AB, 311]**
[8] See Trial Transcript, 26/5/2014, at 518 **[AB, 189]**