IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M159 of 2016

BETWEEN: **THE QUEEN**

Appellant

HIGH COURT OF AUSTRALIA
FILED
27 JAN 2017
THE REGISTRY MELBOURNE

and

KRITSINGH DOOKHEEA

Respondent

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RESPONDENT'S ANNOTATED SUBMISSIONS

Part I: Suitability for publication on the internet

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

Part II: Concise statement of the relevant issues

2. The respondent broadly agrees that this appeal raises the questions identified by the appellant, but adds the following:
   a. As to the first question identified by the appellant, the impugned direction must
20 be considered in the context of the entire passage commencing at page 537 line 25 and concluding at page 538 line 7 of the trial transcript.[1] [**AB 209-210**]
   b. As to the second question identified by the appellant, the fact that the misdirection occurred in the context of the jury being directed about the critical issue in the case, and the fact that the jury was given a transcript of the trial judge's charge to the jury – including the impugned direction – must also be taken into account in considering whether a substantial miscarriage of justice has been occasioned.

Part III: Notice under the *Judiciary Act* 1903 (Cth)

30 3. Section 78B of the *Judiciary Act* 1903 (Cth) does not require that notice be given to the Attorneys-General of the Commonwealth and of the States in relation to this appeal.

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[1] Appellant's Submissions filed 16 December 2016, [2.1].

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Part IV: Contested material facts

Summary of facts

4. Given the nature of the appeal grounds, there are no material facts in issue on this appeal. It should be noted, however, that some of the matters referred to in the appellant's summary of facts remain in dispute and would be in issue on a re-trial. A more detailed summary of facts is contained in the (present) respondent's Revised Written Case filed in the Court below.[2]

5. In particular, whilst it has always been conceded that the respondent caused the deceased's death, the precise mechanism of death and point at which it was caused are not clear. Specifically, as the Court below recognised, it is possible that the cause of death was a *combination* of manual neck compression and mechanical asphyxiation, and that the latter occurred in the spare room inside the house *after* the altercation in the yard[3] (the relevance of these matters being that the respondent – who was obese – told police that he applied pressure to the deceased's back in the spare room because he was scared that the deceased would 'jump back up').

Summary of proceedings

6. The respondent agrees with the appellant's summary of proceedings, but adds the following. The Crown accepted Ms Ramjutton's guilty plea to manslaughter on the basis that she aided and abetted the *manslaughter* committed by the respondent, but did not accept the respondent's guilty plea to manslaughter;[4] accordingly, his trial for murder proceeded. The sole element in issue at the trial was whether the respondent had an intention to kill or cause really serious injury to the deceased at the time he committed the act or acts which caused the deceased's death.

Part V: Applicable constitutional provisions, statutes and regulations

7. The respondent agrees with the appellant's statement of applicable constitutional provisions, statutes and regulations.[5]

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[2] Mr Dookheea's Revised Written Case dated 1 October 2015, [5]-[15]. [**AB 280-282**]

[3] *Dookheea v The Queen* [2016] VSCA 67, [69] and [75] (Maxwell P, Redlich JA & Croucher AJA). [**AB 309-310**]

[4] The prosecution rejected the respondent's pre-trial offer to plead guilty to manslaughter. The respondent subsequently pleaded guilty to manslaughter (but not guilty to murder) upon his arraignment before the jury.

[5] As clarified by footnote 1 to the appellant's Annexure.

Part VI: Statement of argument

GROUND 1 – MISDIRECTION

8. At the commencement of her charge to the jury, the learned trial judge gave the conventional directions on the onus and standard of proof. Regrettably, despite the Courts' 'many admonitions to judges presiding over criminal trials to adhere to and not to attempt needless explanations of the classical statement of the nature of the onus of proof resting upon the Crown'[6] which 'so often end in error',[7] her Honour did not conclude her directions on these matters at that point. Rather, after directing the jury very briefly on the three elements which were not in dispute,[8] her Honour turned to the element of intention, making clear to the jury that this was the critical issue in the case.[9]

9. At that juncture, her Honour directed the jury as follows:[10]

> 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.*

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[6] *Green v The Queen* (1971) 126 CLR 28, 32. For examples of the 'very many warnings by Australian courts that judges should "adhere to the conventional formula that the burden is on the prosecution to prove the charge and each ingredient of the charge beyond reasonable doubt and no attempt should be made to explain or define reasonable doubt"', see *R v Compton & Barratt* (2013) 237 A Crim R 177, [81] fn 88 (Peek J).

[7] *R v Pahuja* (1987) 49 SASR 191, 194 (King CJ).

[8] Trial transcript page 537 line 1 ('**Trial transcript 537.1**'). [**AB 209**]

[9] Trial transcript 537.17. [**AB 209**] The fact that this element was the sole element in dispute had already been made clear to the jury; see, for example: Trial transcript 526.25 & 527.2. [**AB 198 & 199**]

[10] Trial transcript 537.25 (emphasis added). [**AB 209**]

10. This direction drew a distinction between a 'doubt' and a 'reasonable doubt', suggesting to the jury that if they held a doubt that was not a 'reasonable' doubt, then they could proceed to convict the respondent.[11] This amounted to a misdirection for two reasons. First, it directed or invited the jury to subject their mental processes to objective analysis, by analysing whether a doubt they might hold was 'reasonable'. Secondly, it tended to undermine or dilute the standard of proof.

11. As observed concisely by the Court below, citing the decision of this Court in ***Green v The Queen***,[12] the direction was erroneous because 'a reasonable doubt is a doubt which a particular jury entertain in the circumstances'.[13]

12. That fundamental proposition is encapsulated in the following passage in ***Green v The Queen***:[14]

> 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. 'It is not their task to analyse their own mental processes': Windeyer J, *Thomas v The Queen*. A reasonable doubt which a jury may entertain is not to be confined to a 'rational doubt', or a 'doubt founded on reason' in the analytical sense or by such detailed processes as those proposed by the passage we have quoted from the summing up.

13. Jury members do not 'set the standard of what is reasonable' by considering whether any doubt they may have is 'reasonable'; such an interpretation would contradict the preceding sentence in ***Green v The Queen*** that '[a] reasonable doubt is a doubt which the particular jury entertain in the circumstances', and would require that jury members analyse their own mental processes, which this Court expressly admonished in the very same passage.

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[11] *Dookheea v The Queen* [2016] VSCA 67, [90]. [**AB 315**]

[12] (1971) 126 CLR 28.

[13] *Dookheea v The Queen* [2016] VSCA 67, [90]. [**AB 315**] See, more generally, *Dookheea v The Queen* [2016] VSCA 67, [86]-[92]. [**AB 314-315**]

[14] *Green v The Queen* (1971) 126 CLR 28, 32-33 (footnote omitted).

14. Rather, jury members set the standard of what is reasonable by being reasonable persons considering the evidence fairly and in accordance with the law, as directed by the trial judge.

15. As Johnston J explained in ***R v Pahuja***:[15]

> [I]f the jury, having considered the directions on the law given to them by the trial judge, and having considered the evidence, entertain a doubt, then the accused is entitled to a verdict of not guilty. The doubt so entertained is a reasonable doubt by definition, because it is entertained by the body of the jury which, in our constitutional concept and tradition, is the embodiment of the reasonableness of the members of the society whom the jury represent.[16]

16. Similarly, as King CJ observed in ***R v Pahuja***:[17]

> 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.[18]

17. As King CJ said in that same case, citing this Court's decision in ***Burrows v The King***:[19]

> The expression "reasonable doubt" is a composite expression meaning a doubt which would be entertained by a reasonable person in the circumstances, or as Latham CJ put it in ***Burrows v The King*** (1937) 58 CLR 249 at 256, "a doubt such as would be entertained by reasonable men, recognising their responsibility to the accused and to the law".[20]

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[15] (1987) 49 SASR 191.

[16] *R v Pahuja* (1987) 49 SASR 191, 220.

[17] (1987) 49 SASR 191. As King CJ pointed out, *Green v The Queen* is authority for the proposition that "'jurymen themselves set the standard of what is reasonable in the circumstances" and that, therefore, "a reasonable doubt is a doubt which the particular jury entertain in the circumstances"' (*R v Pahuja* (1987) 49 SASR 191, 194).

[18] *R v Pahuja* (1987) 49 SASR 191, 195.

[19] (1937) 58 CLR 249.

[20] *R v Pahuja* (1987) 49 SASR 191, 194.

18. As this Court recognised in ***Green v The Queen***, Kitto J meant no more than that when he said in ***Thomas v The Queen***[21] that '[w]hether a doubt is reasonable is for the jury to say' and that 'the accused must be given the benefit of any doubt which the jury considers reasonable'.[22]

19. The Court below was taken to a number of cases in oral argument, including ***R v Neilan***.[23] In that case, the Court accepted that the direction should not have been given – observing that '[i]n the absence of any request from the jury for elucidation, it is…undesirable for a judge to tell the jury that they should first consider whether they have a doubt and then consider whether that doubt is a reasonable one' – but found that in its context, the direction given in that case did not invite the jury to analyse their own mental processes.[24] Defence counsel in the Court below submitted that ***R v Neilan*** had been wrongly decided on this point, and that the Court was, of course, ultimately bound by this Court's decision in ***Green v The Queen***. The learned prosecutor made no submission about the case. In the event, the Court below agreed with the analysis of the relevant cases undertaken by Kourakis CJ and Peek J in ***R v Compton & Barratt***.[25] As Kourakis CJ noted,[26] ***R v Neilan*** (and indeed ***Ladd v The Queen***[27]) relied heavily on the reasoning of Cox J in ***R v Pahuja***,[28] which diverged from that of the majority.

20. The prohibition on inviting or directing juries to objectively analyse their own mental processes does not exist because it would be 'beyond individual jurors and juries collectively'[29] to do so, as Martin CJ presumed in ***Ladd v The Queen***.[30] Rather, it is because a jury's task – 'deciding facts, bringing to bear their experience and judgment'[31] – does not require it. As this Court said in ***Green v The Queen***, juries 'are both

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[21] (1960) 102 CLR 584.
[22] *Thomas v The Queen* (1960) 102 CLR 584, 595.
[23] *R v Neilan* [1992] 1 VR 57.
[24] *R v Neilan* [1992] 1 VR 57, 71.
[25] (2013) 237 A Crim R 177. See *Dookheea v The Queen* [2016] VSCA 67, [90]. [**AB 315**]
[26] *R v Compton & Barratt* (2013) 237 A Crim R 177, [22].
[27] (2009) 229 FLR 386.
[28] (1987) 49 SASR 191.
[29] *Ladd v The Queen* (2009) 229 FLR 386, [176].
[30] (2009) 229 FLR 386.
[31] *Green v The Queen* (1971) 126 CLR 28, 33.

unaccustomed and not required to submit their processes of mind to objective analysis…'[32] Further, as Windeyer J recognised in ***Thomas v The Queen***,[33] 'it is not their task to analyse their own mental processes'.[34]

21. Moreover, a direction or invitation to jurors to subject their mental processes to objective analysis causes a real unfairness in the context of the standard of proof. It has, as King CJ recognised in ***The Queen v Wilson***:[35]

> a dangerous tendency to produce in the minds of the jurors an impression that a view held by them that there is a doubt about guilt is to be disregarded unless it passes some further test; that there must be some particular degree of doubt or even that a slight doubt is to be disregarded.[36]

In this way, such a direction tends to dilute the standard of proof. The prohibition on directing or inviting a two-stage reasoning process is a recognition that 'a doubt is a doubt is a doubt',[37] and that if the jury has a doubt as to an accused's guilt at the end of their deliberations after considering the evidence fairly, it would not be just to convict the accused.

Circumstantial cases and fanciful hypotheses

22. The appellant's contention that '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'[38] is misconceived. The standard direction regarding circumstantial evidence invites the jury to consider whether an inference or explanation *raised by the evidence in the case* (and usually explicitly by defence counsel) is reasonable; it does not invite the jury to analyse *their own mental processes* (as does a direction inviting the jury to analyse whether any doubt they may have is 'reasonable', as opposed to some lesser, unidentified, form of doubt).

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[32] *Green v The Queen* (1971) 126 CLR 28, 33 (emphasis added).
[33] (1960) 102 CLR 584.
[34] (1960) 102 CLR 584, 606 (emphasis added).
[35] *The Queen v Wilson* (1986) 42 SASR 203.
[36] *The Queen v Wilson* (1986) 42 SASR 203, 207.
[37] To adopt the language of Peek J in *R v Compton & Barratt* (2013) 237 A Crim R 177, [28].
[38] Appellant's Submissions filed 16 December 2016, [6.82].

23. It is important to note at this point that in observing that a doubt held by a jury was 'by definition, a reasonable doubt',[39] the Court below was not suggesting that fanciful (or unreasonable) hypotheses could give rise to a doubt such as to lead to an acquittal. The Court explicitly recognised as much in oral argument, and as Kourakis CJ observed in ***R v Compton & Barratt***[40] (whose analysis of the relevant cases the Court below adopted):

> [A] fanciful doubt is no doubt at all, in the sense that it is imagined, rather than arising from the jury's application of its common sense understanding of the world to the evidence before it.[41]

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24. Even if a 'fanciful doubt' is properly characterised as a 'doubt', the vice in the present case remains, for the learned trial judge did not contrast a 'reasonable doubt' with a 'fanciful doubt'. Rather, her Honour simply contrasted a 'reasonable doubt' with a 'doubt', giving rise to the risk that the jury could, after considering all of the evidence, hold a doubt greater than a fanciful 'doubt' and yet proceed to convict the respondent.

25. The test applied by this Court in ***Thomas v The Queen***[42] was whether the relevant passage could reasonably be understood as having the offending meaning.[43] Windeyer J observed in that case:

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> It is, I think, possible to read this passage that, when related to its context, it is not objectionable. But that, I think, is to give it a somewhat forced construction; and the question is what meaning would it have had for an attentive juryman. Might it on a vital matter have conveyed a wrong impression to him? I think it might. We cannot be sure it did not.[44]

26. Further, there had been no fanciful hypotheses put by defence counsel in his closing address such as to call for any elaboration on the standard of proof. As this Court said in ***Green v The Queen***:

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[39] *Dookheea v The Queen* [2016] VSCA 67, [90]. [**AB 315**]
[40] (2013) 237 A Crim R 177.
[41] *R v Compton & Barratt* (2013) 237 A Crim R 177, [15]. Kourakis CJ specifically agreed with Peek J on this point; see, in particular, *R v Compton & Barratt* (2013) 237 A Crim R 177, [66]-[69].
[42] (1960) 102 CLR 584.
[43] *Thomas v The Queen* (1960) 102 CLR 584, 601 (per Taylor J) and 604 (per Windeyer J).
[44] *Thomas v The Queen* (1960) 102 CLR 584, 604.

> If during the course of a trial, particularly in his address to the jury, counsel for the accused has laboured the emphasis on the onus of proof to such a degree as to suggest to the minds of the jury that possibilities which are in truth fantastic or completely unreal ought by them to be regarded as affording a reason for doubt, it would be proper and indeed necessary for the presiding judge to restore, but to do no more than restore, the balance. In such a case the judge can properly instruct the jury that fantastic and unreal possibilities ought not to be regarded by them as the source of reasonable doubt.[45]

27. As King CJ said in ***The Queen v Wilson***:[46]

> It is clear…that the High Court in *Green's case* set about discouraging judges from qualifying the direction as to onus of proof beyond reasonable doubt by references to fanciful or unreasonable doubts except in cases in which that was considered to be rendered necessary by the arguments of counsel. Where the judge considers such a qualification to be necessary, it is essential that he frame the qualification in terms which do not diminish the jury's sense of their obligation not to convict upon supposed proofs about which they, as reasonable persons, feel a doubt…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* establishes, a reasonable doubt.
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> As was stressed in *Green's case*, judges have been admonished time and time again to adhere to the conventional formula that the burden is on the prosecution to prove the charge and each ingredient of the charge beyond reasonable doubt. No attempt should be made to explain or define reasonable doubt. If amplification is desired it should go no further than to tell the jury that a reasonable doubt is one which they, as reasonable persons, are prepared to entertain. The judge may, in an appropriate case, warn the jury against resorting to fanciful or unreasonable possibilities as affording reasons for doubt, but if he does so, he should be careful, in my opinion, to add that if the jurors, at the end of their deliberations, as reasonable persons are in doubt about the guilt of the accused, the charge has not been proved beyond reasonable doubt.

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[45] *Green v The Queen* (1971) 126 CLR 28, 33.

[46] *The Queen v Wilson* (1986) 42 SASR 203, 206-207.

28. The present case is to be contrasted with ***La Fontaine v The Queen***.[47] The direction from that case in which the appellant now seeks solace – and which was not the subject of any appeal in ***La Fontaine v The Queen*** – was given by the trial judge immediately before a direction on circumstantial evidence, and in the context of endorsing a submission made by the prosecutor in his closing address. That address is not excerpted in the decision; it is not known whether the defence had raised any fanciful hypotheses consistent with innocence, or whether the learned prosecutor was making reference to such a hypothesis. Further, despite the literal meaning of the words 'does not mean beyond any doubt at all', the wording of the broader direction actually served to emphasise how *high* the standard of proof was:

> 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…[48]

In those circumstances, it is not surprising that the appellant did not take the point, and that this Court did not comment upon it. In all of the circumstances, ***La Fontaine v The Queen*** could not be seen as providing tacit approval of the relevant direction.

29. Whether at common law it is an error *in and of itself* for a judge to elaborate on the meaning of 'beyond reasonable doubt', or whether to do so is simply unwise because it invites error,[49] history is littered with examples of trial judges embarking on that 'dangerous sea' and thereby falling into error. In addition to the cases identified by the appellant and those set out above, ***R v Dam***,[50] ***Lazarevich v The Queen***,[51] ***Punj v The Queen***,[52] and ***Graham v The Queen***[53] are but a few illustrations of trial judges falling into error by elaborating on the standard of proof.

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[47] (1976) 136 CLR 62.
[48] *La Fontaine v The Queen* (1976) 136 CLR 62, 71 [17].
[49] *Graham v The Queen* (2000) 116 A Crim R 108, 125.
[50] (1986) 43 SASR 422, 429-430.
[51] (unreported, NSW Court of Criminal Appeal, 10 December 1979).
[52] (2002) 132 A Crim R 595.
[53] (2000) 116 A Crim R 108, 125.

Overseas authorities and the vice of a partial direction

30. The overseas authorities cited by the appellant do not support the direction given in this case. Those authorities actually serve to demonstrate that, if a direction elaborating on the meaning of the phrase 'beyond reasonable doubt' be given, then it must be sufficiently detailed so as not to risk diluting the standard of proof (and, on the other hand, not to set such a high standard that it would seldom be achieved). *Inter alia*, juries in Canada, New Zealand and England are told that they must be 'sure' of the accused's guilt and also given the *reason* why absolute certainty is not required: either because there is no such thing or because the standard would be virtually impossible to achieve. In that context, a direction that absolute certainty is not required does not tend to dilute the standard of proof. Further, unlike the impugned direction in the present case, the directions given in Canada, New Zealand and England do not invite the jury to convict an accused despite their having a doubt as to his or her guilt, nor do they invite the jury to subject their own mental processes to objective analysis.

31. In **England**, juries are told that they must be 'sure' that the accused is guilty, and further that 'there is no such thing as certainty in this life, absolute certainty'.[54]

32. In **Canada**, juries are given a detailed direction in accordance with ***The Queen v Lifchus***.[55] (It should be noted that the Appellant's Submissions do not contain the endorsed direction in its entirety.) Canadian juries are not told simply that the Crown need not prove its case to an absolute certainty; they are told it is because it is impossible to prove anything to an absolute certainty and that such an unrealistically high standard could seldom be achieved. Further, whilst ambiguous in isolation, the Court's observation that 'it is not proof beyond any doubt' was made in the immediate context of observing that 'it is not an imaginary or frivolous doubt',[56] and was in fact a summary of the Court's earlier observation that:

> 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

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[54] *The Queen v Bracewell* (1979) 68 Cr App R 4. As to this Court's disavowal of the English approach of replacing the phrase 'reasonable doubt' with more modern terms, see *Thomas v The Queen* (1960) 102 CLR 584, 595 (per Kitto J) and 605 (per Windeyer J).

[55] [1997] 3 SCR 320.

[56] *The Queen v Lifchus* [1997] 3 SCR 320, [37].

> 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.[57]

That is consistent with the model direction suggested by the Court thereafter:

> 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.[58]

Further, Canadian juries are told at the conclusion of the direction that 'in short' they should convict the accused if they are 'sure' that he committed the offence.[59] (It should be noted that this passage is not extracted in the Appellant's Submissions.)

33. Similarly, in **New Zealand**, in accordance with ***The Queen v Wanhalla***,[60] juries are not told simply that 'absolute certainty is not required'. *Inter alia* they are told: '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'. They are then told that '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'. They are also told they must be 'sure' of the accused's guilt. In that detailed context, the direction that absolute certainty is not required does not tend to dilute the standard of proof.

***Jury Directions Act* 2013 (Vic)**

34. The *Jury Directions Act* 2013 (Vic) was in force at the time of the respondent's trial.[61] Section 20 of that Act permits trial judges to explain the phrase 'beyond reasonable doubt' if the jury asks a question regarding the meaning of the phrase, directly or indirectly. Section 21 sets out a number of matters which a trial judge may include in response to a question, and indicates that the judge may adapt his or her explanation in order to respond to the particular question.

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[57] *The Queen v Lifchus* [1997] 3 SCR 320, [31].
[58] *The Queen v Lifchus* [1997] 3 SCR 320, [39].
[59] *The Queen v Lifchus* [1997] 3 SCR 320, [39].
[60] [2007] 2 NZLR 573, [7].
[61] That Act has been repealed and replaced by the *Jury Directions Act* 2015 (Vic). Sections 63-64 of the *Jury Directions Act* 2015 (Vic) replicate sections 20-21 of the *Jury Directions Act* 2013 (Vic) precisely.

35. The Act's text[62] demonstrates that the purpose of ss 20-21 is to allow trial judges to *explain* the meaning of the phrase 'beyond reasonable doubt' where the jury raises the issue, and does not suggest that Parliament intended to change the phrase's common law *meaning*. This is supported by the extrinsic materials.[63] If Parliament had intended to change such a fundamental aspect of the criminal law they would surely have said so.

36. The Act gives flexibility to judges in answering questions – both in terms of the precise words used,[64] and in not requiring that judges incorporate the contents of every sub-paragraph of s 21(1) in their answer in every case (as indicated by the repeated use of the word 'or' in that subsection) – because the appropriate answer in any individual case will depend on the question asked. Notably, s 21(2) allows trial judges to adapt their explanations *in order to respond to the particular question asked.*

37. The flexibility afforded by the Act does not mean that it will necessarily be sufficient for a judge to give just one of the explanations in s 21(1) (using the text or equivalent words). Depending on the question asked, to do so may either dilute the standard of proof on the one hand, or set the standard impossibly high on the other. It is the explanations *in combination* which properly convey the meaning of the composite phrase 'beyond reasonable doubt'. The use of the word 'elements' in the explanatory memorandum to describe the sub-paragraphs in s 21(1),[65] and the acknowledgement in both that document[66] and the second reading speech[67] that those elements are drawn from the cases of ***The Queen v Lifchus***[68] and ***The Queen v Wanhalla***,[69] confirm as much.

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[62] See, in particular, ss 1(f), 20 and 21.

[63] Clauses 1, 20 and 21, Explanatory Memorandum to the Jury Directions Bill 2012 (Vic); Statement of Compatibility and Second Reading Speech of the Jury Directions Bill 2012 (Vic), Hansard, 13 December 2012, 5555-5560.

[64] Section 6, *Jury Directions Act* 2013 (Vic).

[65] Clause 21, Explanatory Memorandum, Jury Directions Bill 2012 (Vic).

[66] Clause 21, Explanatory Memorandum, Jury Directions Bill 2012 (Vic).

[67] Second Reading Speech, Jury Directions Bill 2012 (Vic), Hansard, 13 December 2012, 5560.

[68] [1997] 3 SCR 320.

[69] [2007] 2 NZLR 573.

38. The word 'or' is repeated in s 21(1) because, in an individual case, a partial explanation may be sufficient to address the jury's concern or misconception (as indicated by *the particular question asked by the jury*).[70] In the absence of any question, however, an incomplete direction is likely to mislead the jury on the meaning of the phrase 'beyond reasonable doubt'.

39. Regrettably, the jury in the present case was so misled. Indeed, not only did the jury not ask any relevant question – and therefore selecting only some of the s 21(1) elements was liable to mislead the jury – but the impugned direction was even *less* detailed than any one of the s 21(1) 'elements'. Unlike the direction in s 21(1)(c), the impugned direction in this case emphasised that absolute certainty was not required (by distinguishing between a doubt and a reasonable doubt shortly after advising the jury that they did not need to work out the respondent's state of mind 'definitively'), but did not clarify that explanation by saying that it was almost impossible to prove anything with absolute certainty in reconstructing past events (as would a direction in accordance with ***The Queen v Wanhalla***[71] or ***The Queen v Lifchus***.[72]). Further, unlike s 21(e), the direction given in the present case did not explain that a reasonable doubt was not an imaginary or fanciful doubt or an unrealistic possibility; it simply emphasised that a mere 'doubt' was not sufficient to amount to a reasonable doubt.

Conclusion

40. The impugned direction drew a distinction between a doubt and a reasonable doubt, and thereby invited the jury to analyse their own mental processes by considering whether any doubt they may have was 'reasonable' or some lesser form of doubt. In the absence of any suggestion by counsel that 'fantastic or completely unreal' possibilities could afford a reason for doubt; in the absence of any question by the jury calling for clarification by the trial judge pursuant to the *Jury Directions Act* 2013

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[70] It would, however, usually be safer for judges to give a 'full' s 21(1) direction if the jury asks a question such as to enliven s 20. Notably, the example given in the explanatory memorandum at page 12 refers to the judge explaining what the phrase means using the 'matters' in subclause 2 as guidance.

[71] [2007] 2 NZLR 573.

[72] [1997] 3 SCR 320.

(Vic); and in the absence of a more fulsome explanation as to the meaning of the phrase 'beyond reasonable doubt' (in the vein of ***The Queen v Lifchus***.[73], ***The Queen v Wanhalla***,[74] or s 21(1) of the *Jury Directions Act* 2013 (Vic)) there exists a very real risk that the jury would have understood that they could hold some doubt (not simply a 'doubt' based on some fanciful possibility) and yet proceed to convict the respondent. The direction therefore tended to dilute the standard of proof required in a criminal trial. It also tended to 'blunt the jury's proper sense of reluctance to act whilst what they might consider a reasonable doubt had not been removed'.[75] Compounding those errors was the fact that the broader passage also tended to dilute the standard of proof and, indeed, reverse the onus of proof.[76] The Court below was correct to set aside the respondent's conviction for murder and order that he be re-tried.

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GROUND 2 – SUBSTANTIAL MISCARRIAGE OF JUSTICE

41. The Court below found that the misdirection in this case had occasioned a substantial miscarriage of justice (in the terms of s 276 of the *Criminal Procedure Act* 2009 (Vic)), holding that '[t]he standard of proof being fundamental to a fair trial, the failure to take exception could not stand in the way of the ground succeeding'.[77]

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[73] [1997] 3 SCR 320.

[74] [2007] 2 NZLR 573.

[75] *Green v The Queen* (1971) 126 CLR 28, 34.

[76] See paragraph 50 below.

[77] *Dookheea v The Queen* [2016] VSCA 67, [89]. [**AB 315**] The relationship (at common law) between defence counsel's failure to take exception to a misdirection and the existence of a substantial miscarriage of justice had been raised in the (present) respondent's Revised Written Case and ventilated in oral submissions. In had been submitted that the error was fundamental and so could not be waived by defence counsel and that, in any event, in this case it could not be inferred that defence counsel failed to take exception to the misdirection because no substantial miscarriage of justice had occurred: there was no conceivable forensic advantage to the defence in failing to take exception to the direction, and it was possible that defence counsel laboured under the same misapprehension regarding the law as did her Honour (saying to the jury in his closing address 'if you have a doubt, if you have a *reasonable* doubt...': Trial transcript 509.13). [**AB 184**] It should be noted that, pursuant to s 9 of the *Jury Directions Act* 2013 (Vic), ss 11-15 of that Act (which relate to the obligation of counsel to seek directions at trial and the consequences of a failure to do so) specifically do not relate to 'general directions', which (pursuant to the definition in s 3) include directions regarding the standard and onus of proof.

42. In ***Krakouer v The Queen***,[78] McHugh J recognised that misdirections of law regarding the standard or onus of proof fall into a special category.[79] His Honour observed that, unless the error be trivial, a misdirection regarding the standard or onus of proof goes to the root of a criminal trial according to law.[80] It is, of course, well-established that fundamental errors or irregularities going to the root of a criminal trial necessarily amount to a substantial miscarriage of justice,[81] rendering the strength of evidence against an accused and the failure of defence counsel to take exception immaterial.[82]

10 43. The cases in which it has been held that no miscarriage of justice occurred despite a relevant misdirection on the standard of proof – now relied upon by the Crown for the first time – are explicable on the basis that the error was trivial in the context of the particular trial. The Crown did not pursue that point in the Court below and, as a matter of fairness, should not now be permitted to litigate the matter in this Court.[83]

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[78] (1998) 194 CLR 202.

[79] See also *The Queen v Lifchus* [1997] 3 SCR 320, [46], wherein the Supreme Court of Canada observed: 'A serious error was made on a fundamental principle of criminal law. The correct explanation of the burden of proof is essential to ensure a fair criminal trial. To expect less is to alter one of the basic concepts of the criminal trial process. Indeed, Lamer C.J. in Brydon, at p. 257, sagely raised the very real concern whether "s. 686(1)(b)(iii) would ever be available to cure an erroneous instruction which may have misled a jury into improperly applying the burden of proof or reasonable doubt standard". It cannot be said that, had the trial judge not erred, the verdict would necessarily have been the same.'

[80] *Krakouer v The Queen* (1998) 194 CLR 202, [74]-[75].

[81] *Baini v The Queen* (2012) 246 CLR 469, [34], [65] and [69].

[82] Even if the misdirection in the present case did not amount to a fundamental error, the misdirection nevertheless amounted to a substantial miscarriage of justice because the respondent's conviction was not inevitable: *Baini v The Queen* (2012) 246 CLR 469, [30]-[35].

[83] The (present) appellant's Revised Written Case filed in the Court below on 23 October 2015 broadly asserted that the impugned direction '[is] to be considered in the context of all directions given during the trial', that '[t]he jury could not have been left with the impression they had to quantify their doubt', and that '[i]n the context of the overall directions and the single issue in the trial, there has not been a substantial miscarriage of justice'. However, the Crown's written submissions made no arguments in support of those assertions, simply noting that her Honour directed the jury on the standard of proof at the commencement of the trial and during the charge, and that her Honour used the phrase at least 14 more times during the trial, giving 14 transcript references. The Crown made no reference to the cases upon which it now seeks to rely. In oral submissions, the learned prosecutor did not make any submission about the matter at all, nor did she assert that she relied upon the written submissions. Rather, the learned prosecutor submitted simply that the impugned direction was not erroneous because it did not invite the jury to analyse their mental processes and did not 'quantify' the doubt, and that although the jury had not asked any relevant question such as to enliven ss 20-21, the impugned direction was 'in the spirit' of the *Jury Directions Act* 2013 (Vic) and therefore did not give rise to any unfairness to the accused.

44. In any event, six points of significance converge to demonstrate that the misdirection was not trivial in the context of the respondent's trial.

45. First, the cases in which it has been held that no miscarriage of justice occurred despite a misdirection on the standard of proof are rare, due to the fundamental nature of such errors.[84] Indeed, in ***R v Compton & Barratt***[85] even a direction in accordance with ***Green v The Queen*** given immediately after the misdirection[86] did not prevent the occurrence of a miscarriage of justice (with this being the basis of Stanley J's dissent[87]). Notably, the Court below raised that matter during oral argument, yet the learned prosecutor made no submission on the issue.

46. Secondly, by extracting every use of the phrases 'beyond reasonable doubt' and 'beyond a reasonable doubt', the Appellant's Submissions[88] produce an artificial narrative of the trial.[89] Not only were these directions and addresses given over the two-week course of the trial, but some of the ellipses within individual extracts in the Appellant's Submissions represent very large bodies of excised text.[90] Further, paragraph 6.17 of the Appellant's Submissions states that 'after' the impugned passage the learned trial judge 'continued' to direct the jury on intention; however, the passages set out by the appellant thereunder did not immediately follow the impugned passage: the first appears more than a page later in the transcript, and the second (following the ellipsis) appears five pages after the impugned direction. (In any event, in the Court below, the Crown did not rely upon the directions set out at paragraph 6.17 of the Appellant's Submissions as remedying the misdirection.)

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[84] As an illustration of the point, see *Graham v The Queen* (2000) 116 A Crim R 108, 125 [20]-[21] per Cox CJ.
[85] (2013) 237 A Crim R 177.
[86] Immediately following the impugned direction, the trial judge in that case directed the jury that a reasonable doubt is a doubt which a particular jury entertains in the circumstances and, a little later, that a reasonable doubt is simply a doubt which they, as reasonable people, were prepared to entertain on the evidence: see *R v Compton & Barratt* (2013) 237 A Crim R 177, [130].
[87] *R v Compton & Barratt* (2013) 237 A Crim R 177, [144] (Stanley J).
[88] Appellant's Submissions filed 16 December 2016.
[89] Appellant's Submissions filed 16 December 2016, [6.4]-[6.21].
[90] See, in particular, the Appellant's Submissions filed 16 December 2016, [6.8] and [6.17]; and Trial transcript 424-456 and 539-543. **[AB 97-129 and 211-215]**

47. Thirdly, and more importantly, the many references by her Honour and trial counsel to the phrase 'beyond reasonable doubt' did not cure the fact that her Honour impermissibly and incorrectly directed the jury as to the *meaning* of that phrase. There was 'a very real risk that the jury would have equated that phrase, each time it was used'[91] with the meaning which the learned trial judge had erroneously and impermissibly ascribed to it.

48. In this Court the appellant relies for the first time upon the fact that the jury was given a handout summarising the elements of the offences which contained three further references to the standard of proof ('**the elements handout**').[92] Those references were just that – references – giving no content to the phrase and failing to remedy the faulty direction. The very real risk that the jury viewed each oral reference to the phrase through the prism of the misdirection as to its meaning applies equally to the references in the elements handout.

49. Fourthly, the misdirection was given on the critical issue – the only issue in the trial – and the jury was told as much. Immediately before the impugned passage, her Honour directed the jury as follows:

> **Elements one, two and four are not disputed.** You heard Mr Dookheea plead guilty [to] manslaughter. In doing so, he does not dispute that all the elements of manslaughter are made out, namely that he intentionally applied force to part of Mr Zazai's body, part or parts. Secondly, that the act was dangerous and thirdly, that he was not acting in self-defence. This means he admits causation and voluntariness which is the conscious, voluntary and deliberate element and that there was no lawful justification or excuse for his actions. So although technically you have to be satisfied that these elements are proven in order to find Mr Dookheea guilty of murder, you will have no difficulty in finding these elements proven having regard to his plea of guilty for manslaughter. **So it is the third element that you are concerned with** and I will move straight to that element and that is the question of intent.[93]

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[91] *R v Punj* (2002) 132 A Crim R 595, 597-598 (Williams JA).

[92] Appellant's Submissions filed 16 December 2016, [6.90].

[93] Trial transcript 537.9 (emphasis added). [**AB 209**] See also Trial transcript 526.9-526.12 and 526.25-527.6. [**AB 198 and 198-199**]

50. Fifthly, the misdirection occurred in the context of a broader passage which tended to invite the jurors to analyse their own mental processes, undermine the standard of proof, and indeed reverse the burden of proof.

    a. The direction immediately before the impugned direction suffered from all three of those vices:

> 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.[94]

    b. The direction immediately after the impugned direction further increased the likelihood of the jury analysing the nature, magnitude or strength of their doubt:

> As I said to you in answer to your question a couple of days ago, when I say "really serious injury" I am not using a technical legal phrase, they are ordinary English words, and it is for you as jurors to determine what that phrase means to you.[95]

51. Sixthly, the error was compounded by the fact that the jury was given a transcript of the charge, including the misdirection and the references to the fact that the element to which it related – that of intention – was the critical issue in the case.

52. In those circumstances, the misdirection was not trivial. It occasioned a substantial miscarriage of justice and the Court below was correct to so find.

[94] Trial transcript 537.29. [**AB 209**]

[95] Trial transcript 538.8. [**AB 210**]

Part VII: Notice of contention

53. The respondent has not filed any notice of contention.

Part VIII: Presentation of oral argument

54. The respondent estimates that one hour is required for the presentation of the respondent's oral argument.

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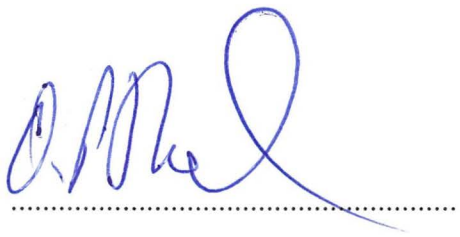
Dated this 27th day of January 2017



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