SUPREME COURT OF QUEENSLAND

CITATION:	*R v Punj* [2002] QCA 333
PARTIES:	**R** **v** **PUNJ, Pars Ram** (appellant)
FILE NO/S:	CA No 331 of 2001 DC No 524 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	3 September 2002
DELIVERED AT:	Brisbane
HEARING DATE:	26 August 2002
JUDGES:	Williams and Jerrard JJA and Atkinson J Joint reasons for judgment of Jerrard JA and Atkinson J; separate reasons of Williams JA, concurring as to the orders made
ORDERS:	**1. Appeal allowed** **2. Convictions quashed** **3. Retrial ordered**
CATCHWORDS:	APPEAL AND NEW TRIAL – NEW TRIAL – IN GENERAL AND PARTICULAR GROUNDS – PARTICULAR GROUNDS – MISDIRECTION OR NON-DIRECTION – JUDGE'S SUMMING UP – OTHER MATTERS – where appellant convicted of two offences against the *Crimes Act* 1914 (Cth) – whether learned trial judge erred in attempting to explain to the jury the meaning of the expression "beyond reasonable doubt" – *Thomas v The Queen* and *Green v The Queen* followed *Crimes Act* 1914 (Cth) *Dawson v The Queen* (1961) 106 CLR 1, followed *Green v The Queen* (1971) 126 CLR 28, followed *R v Hepworth and Fearnley* [1955] 12 QB 600, not followed *R v Irlam ex parte Attorney-General* (Qld) [2002] QCA 235; CA No 157 of 2002, 28 June 2002, followed *R v Kritz* [1950] 1 KB 82, not followed *R v Onufrejczyk* [1955] 1 QB 388, not followed

R v Summers [1952] 1 All ER 1059, not followed
Thomas v The Queen (1960) 102 CLR 584, followed

COUNSEL: O P Holdenson QC, with P W Morley, for the appellant
M J Griffin SC for the respondent

SOLICITORS: Sharma Lawyers for the appellant
Director of Public Prosecutions (Cth) for the respondent

[1] **WILLIAMS JA:** The appellant was convicted after a trial of two offences against the *Crimes Act* 1914 (Commonwealth), namely forgery and attempting to pervert the course of justice. He appealed against the conviction on numerous grounds. The court heard oral argument on those grounds relating to the onus and standard of proof. At that stage the court ordered that, because of errors in the summing up, the convictions should be quashed and a re-trial held; it announced that full reasons would be published later.

[2] These reasons deal only with those matters which were the subject of oral submission.

[3] The learned trial judge invited each counsel to make an opening statement so that the jury was appraised of the matters to which their attention should be directed in the course of what was anticipated to be a lengthy trial. On that occasion counsel for the appellant said, correctly:

> "By this approach you should understand that the defence does not assume any burden of proving to you that Cathy Slack was the forger. The burden of proof at all stages of this trial rests upon the prosecution beyond a reasonable doubt, that high standard of proof that you heard about."

[4] The appellant gave evidence in his own defence, and other defence witnesses were called. It was part of the defence case that the real forger was Cathy Slack, who had been called as a prosecution witness.

[5] Counsel for the defence was the first to deliver a final address to the jury. At the very outset of that address he said:

> "Now, you will remember that you were told in this case that the prosecution in all criminal cases accepts the onus of proving the accused's guilt beyond a reasonable doubt. That means that every essential element of the offence must be proved beyond a reasonable doubt before you enter a verdict of guilty on the count.
>
> The onus of proof is different for the defence. The defence, if they want to establish a point, has to persuade you on the balance of probabilities that a particular fact is the case. We do not have to prove our facts beyond a reasonable doubt. The reason is, of course, that if we produce evidence which causes you to believe on the balance of probability that this may be correct, it would be impossible for you to say, in view of that conclusion, that certain other things have been proved beyond reasonable doubt."

[6] The experienced prosecutor was concerned that defence counsel had placed too high a burden on the defence and felt that it was a matter which he should address in his closing submissions to the jury; therein he said:

> "The prosecution must prove the case beyond a reasonable doubt. [Defence counsel] was a little wrong when he said the prosecution have got to prove its evidence beyond reasonable doubt. Well, of course, as you now know, all the prosecution has to prove are just those elements of the charge and the forgery, the effective element that has to be proved was is it Mr Punj who did it. Now [defence counsel] went on and said, and the defence if they prove some evidence just need to prove it on the balance of probabilities. Well that's not right. In fact, that's really putting it far too high and unfairly for his client. That's [simply] not the case. The evidence that goes in is just evidence and the only person in this trial who has to prove anything is the prosecution."

[7] Before the summing up commenced, counsel for the prosecution in effect asked the learned trial judge to correct the error made by defence counsel. The learned trial judge stated that he did not recall what defence counsel had said and indicated that in his view it would be sufficient if he directed the jury in the "usual way" when dealing with the burden and standard of proof.

[8] Because the trial had been lengthy (the summing up took place on the nineteenth day of trial) and the evidence was rather complex (there were many documentary exhibits) the learned trial judge provided the jury with some notes which he invited them to use like a checklist. Substantially the summing up followed the outline in those notes. The first two paragraphs in those notes were as follows:

> "1. The burden of proving an offence is always on the prosecution.
>
> 2. Before there can be a verdict of 'guilty', an offence must be proved beyond a reasonable doubt. If there is a reasonable doubt about the proof of any element of an offence, the accused is entitled to be acquitted."

[9] There was, of course, no objection to those statements; they accurately state the law.

[10] Very early on in the oral summing up the learned trial judge said:

> "In a case like this, the burden is on the prosecution from start to finish to prove that Mr Punj committed these offences. There is no burden on him to disprove anything, no responsibility. I think the prosecutor and [defence counsel] certainly made all of that basic approach perfectly clear to you right from the beginning."

[11] The learned trial judge immediately thereafter went on to say that the standard of proof the prosecution had to achieve was proof "beyond reasonable doubt". He said, correctly, that "if there is a reasonable doubt about the proof of any part of an

offence, any element of an offence, the accused is entitled to an acquittal". Then came the following critical passage in the summing up:

> "Now, I am not going to use other words to explain the expression 'beyond reasonable doubt', but I can *illustrate* it perhaps this way. We often use expressions in our everyday lives whereby we think something has happened but we are *not really sure* about it, don't we? We are *very suspicious* about something, we think it is very likely that so and so committed an offence, it is on the cards, expressions like that, or probably someone committed an offence. All those ideas have with them, don't they, the idea that we are not *really sure*, we just think probably or likely or something of that sort, so in all of those cases, what someone is saying is well, I've got a reasonable doubt about it, even though I have got suspicions or whatever. Do you see?
>
> What it *really means* is this? At the end of your deliberations, if you are to convict, you must *feel sure* that Mr Punj committed these two offences, and you will not *feel sure* if you have got a reasonable doubt in your minds about the proof of the cases. Do you understand what I am saying? To take a very concrete example arising out of this very case, if at the end of all your deliberations you think that there is a *reasonable chance* that Cathy Slack did this, well, then you could not possibly say you are persuaded beyond reasonable doubt that Mr Punj did it, could you? Because of the two things. Do you see what I mean? So, the doubt has got to be a reasonable one, but once there is a reasonable doubt, an accused person is entitled to be acquitted." (my emphasis)

[12] In the first paragraph of that quote the learned trial judge "illustrated" the meaning of the expression "beyond reasonable doubt" by contrasting being "really sure" about something with only being "very suspicious" about it. Then in the second paragraph he went further and told the jury what the phrase "really means". There he equated "beyond reasonable doubt" with "feeling sure". Lastly, in dealing with an essential part of the defence case (Slack not the appellant was the forger) he could be taken as equating a "reasonable doubt" with a "reasonable chance".

[13] It is true that on numerous occasions throughout the summing up the learned trial judge used the expression beyond reasonable doubt appropriately. But there was a very real risk that a reasonable juror would have equated that expression, each time it was used, with being "really sure" or "feeling sure".

[14] For Australia the law is clear. The High Court in *Thomas v The Queen* (1960) 102 CLR 584 and *Green v The Queen* (1971) 126 CLR 28 has clearly stated the law which must be followed by all Australian judges in summing up to the jury. In *Thomas* Kitto J at 595 said: "Whether a doubt is reasonable is for the jury to say . . . the vital point [is] that the accused must be given the benefit of any doubt which the jury considers reasonable". The Court in *Green* at 32-3 said: "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."

[15] In a valiant attempt to save the convictions counsel for the respondent drew the court's attention to the fact that the expression "feel sure" used by the learned trial judge was approved of by the English Court of Criminal Appeal in *R v Hepworth and Fearnley* [1955] 2 QB 600. That was one of a series of cases in which Lord Goddard CJ deprecated the use of the expression "reasonable doubt" and favoured some other formula explaining the required standard of proof to the jury. Other relevant decisions of his in which those sentiments were expressed and adopted by other members of that court are *R v Summers* [1952] 1 All ER 1059, *R v Kritz* [1950] 1 KB 82, and *R v Onufrejczyk* [1955] 1 QB 388. But those English authorities have been expressly disavowed by the High Court.

[16] Kitto J in *Thomas* at 595 said: "It is also clear that the onus was to satisfy the jury beyond a reasonable doubt. Nothing in recent English cases should be taken as impairing this principle." In the same case Windeyer J said at 605: "The expression proof beyond a doubt conveys a meaning without lawyers' elaborations. . . . For generations jurymen have been directed in terms of 'reasonable doubt', 'moral certainty' and 'the benefit of the doubt'. Now it has been suggested in England, mainly by Lord Goddard, that these phrases should be abandoned. The third edition of Halsbury's Laws of England Vol 10, p 424 par 780 goes so far as to say that the phrase 'reasonable doubt' should be avoided (see among other cases *Reg v Summers*; *Reg v Onufrejczyk*). With great respect for those whose great experience has led them to this view I think that it would be unfortunate if it were adopted in Australia." Finally, Dixon CJ in *Dawson v The Queen* (1961) 106 CLR 1 at 18 said: "But the incident makes it proper to say that in my view it is a mistake to depart from the time-honoured formula. It is, I think, used by ordinary people and is understood well enough by the average man in the community. The attempts to substitute other expressions, of which there have been many examples not only here but in England, have never prospered. It is wise as well as proper to avoid such expressions." It is clear that each of those passages was primarily directed at those English cases in which Lord Goddard had attempted to reformulate the way in which the jury should be informed of the standard of proof which rested on the prosecution.

[17] As this is the second case within a number of months (see *R v Irlam ex parte A-G (Qld)* [2002] QCA 235) in which this court has had to comment upon a trial judge's attempt to give a jury an explanation of the expression "beyond reasonable doubt", it is desirable to restate, unfortunately at some length, critical passages from both *Thomas* and *Green* which clearly establish the relevant law as laid down by the High Court.

[18] The trial judge in *Thomas* said this in the course of his summing up: ". . . you consider it in an ordinary common sense manner and in the way you would consider the more serious matters which come up for consideration and decision in your lives, and if considering it in that way you come to the conclusion – you come to a feeling of comfortable satisfaction that the accused is guilty then you should find him so guilty . . ." The use of the word "feel" in that passage was the subject of criticism in the High Court. McTiernan J said at 588 that "there was a clear misdirection and one that was likely to mislead the jury as to the degree of certainty they ought to feel that Thomas was guilty of wilful murder in order to be justified in finding him guilty of that crime." Fullagar J at 593 concluded:

> "I do not think it can be doubted that the last quoted passage contains a misdirection. . . . It tends to water down and qualify the plain rule

> that what is required to justify a conviction is proof beyond reasonable doubt. . . . In truth, to 'come to the feeling' referred to in his Honour's charge is by no means the same thing as being satisfied beyond a reasonable doubt."

[19] Taylor J at 599 said that "the primary question is, of course, whether the words used might reasonably be understood as indicating to the jury that 'comfortable satisfaction' is equivalent to satisfaction beyond reasonable doubt. If so the direction was clearly erroneous . . ." His Honour at 601 applied the test whether the passage could reasonably be understood as having the offending meaning. If a reasonable juror could so regard the passage then it constituted a misdirection.

[20] That was also the approach of Windeyer J; at 604 he said:

> "It is, I think, possible to read this passage that, when related to its context, it is not so 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."

[21] The summing up in question in *Green* contained phrases such as "something nagging in the back of your mind which makes you hesitate", "you try to assess it and you say to yourself is this doubt that is bothering me, does it proceed from reason", and "is it a rational doubt . . . or is it a fantastic sort of doubt".

[22] The court considered such a direction to be "fundamentally erroneous" (at 32).

[23] The court in *Green* went on to chastise judges for endeavouring "to explain that which requires no explanation, and endeavouring to improve upon 'the traditional formula'". Those remarks at 32 should be borne in mind by all trial judges summing up to a jury in a criminal matter. It will only be in exceptional cases (some instances being specified in *Green* at 33) where some further elaboration of the expression "beyond reasonable doubt" would be justified.

[24] Returning to the summing up in the present case. As already noted, the real risk was that an attentive member of the jury would equate the expression "beyond reasonable doubt" wherever used in the summing up as "really meaning" "feeling sure", because that is what the judge told them. Also, relying on the "illustration" they could have concentrated on the distinction between "really sure" and "very suspicious". In either event, reliance on such concepts could well have deprived the appellant of the benefit of a doubt set by the standard of what the jury regarded to be reasonable in the circumstances.

[25] Further and not without real significance in this case, is the misdirection with respect to the alleged involvement of Cathy Slack. Given the defence case at trial the appellant was entitled to an acquittal unless the jury could reject beyond reasonable doubt the proposition that Cathy Slack was the forger. It is logically true that if there was a "reasonable chance" that Cathy Slack was the forger the jury could not be satisfied beyond a reasonable doubt that the appellant was; but whilst the jury may have concluded there was not a "reasonable chance" that she was the

forger they may nevertheless have had a reasonable doubt on that issue. The appellant was entitled to the benefit of that doubt.

[26] The misdirection on the standard of proof would alone have necessitated a retrial. But that misdirection compounded the error in defence counsel's final address to the jury as to the burden of proof and the limited way in which that matter was dealt with by the learned trial judge in his summing up. The summing up only referred to the fact that there was no burden on the appellant to "disprove anything". The learned trial judge did not say that there was no burden on the appellant to "prove" anything. Counsel's statement to the jury impliedly, if not expressly, stated that the defence had to "prove our facts" on the balance of probability. Nothing said by the learned trial judge in his summing up negated that.

[27] Whether or not the failure to negate that erroneous statement by counsel for the appellant would alone have been sufficient to vitiate the trial need not be decided. It is sufficient to say that the cumulative effect of that failure and the misdirection on the standard of proof means that the verdicts cannot stand.

[28] As already ordered there must be a retrial.

[29] **JERRARD JA AND ATKINSON J:** We have read in draft and respectfully agree with the reasons for judgment of Williams JA. This court has already made the appropriate orders. We add that, acknowledging that the Court did not hear argument on the other, numerous grounds of appeal, the somewhat discursive remarks unfortunately made by the learned trial judge were the only obvious blemish in the manner in which the learned judge had handled the multitude of issues that arose in a relatively long and quite difficult criminal trial, which issues the learned judge otherwise dealt with and explained to the jury in an admirably clear fashion. This included the judge providing the jury with a helpful summary in note form of relevant events and dates not in contest, and a written note of both the general and specific directions the judge gave on matters the prosecution would need to prove to establish guilt beyond reasonable doubt.

[30] It is clear from the transcript of the summing up that the learned judge took the jury with care through that concise outline of the summing up, and that the judge ensured that the jurors followed the structure and the logic of the directions they were receiving. Regrettably those directions foundered on the feature of the criminal law of this country that except in exceptional circumstances[1] no assistance should be volunteered by individual trial judges to jurors in explaining the concept of proof beyond reasonable doubt.

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1 See para [23].