SUPREME COURT OF QUEENSLAND

CITATION:	*R v Baldwin* [2009] QCA 337
PARTIES:	**R** **v** **BALDWIN, Jonathon Thomas** (appellant)
FILE NO/S:	CA No 84 of 2009 DC No 188 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	3 November 2009
DELIVERED AT:	Brisbane
HEARING DATE:	23 October 2009
JUDGE:	Chief Justice, Muir JA and A Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal against conviction is dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where appellant was found guilty after a trial of one count of maintaining an unlawful relationship with a child between 31 March 2004 and 9 October 2006, eight counts of indecent treatment of a child under 16 and one count of sodomy – where appellant was a youth pastor at local church – where appellant appeals against his conviction on the grounds that the guilty verdicts were "unsafe and unsatisfactory and not according to law" – whether it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty – whether the summing up was inadequate or unfair to the defence – whether the meaning of "beyond reasonable doubt" was given to the jury *Evidence Act* 1977 (Qld), ss 21A, 93A *Bourke v R* (1988) 62 ALJR 425, followed *Darkan v R* (2006) 80 ALJR 1250; (2006) ALR 334; [2006] HCA 34, followed *R v FL* [2005] QCA 104, followed *R v G* [1994] 1 Qd R 540; [1993] QCA 267; followed *R v Punj* [2002] QCA 333, followed

COUNSEL: A C Smith for the appellant
M B Lehane for the respondent

SOLICITORS: Kirwin Solicitors for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **CHIEF JUSTICE:** I have had the advantage of reading the reasons for judgment of A Lyons J, with which I agree.

[2] As to the first ground, that the conviction is unsafe, "an independent assessment of the evidence, both as to its sufficiency and quality" (*Morris v R* (1987) 163 CLR 454, 473) has satisfied me of the safety of the conviction.

[3] While the High Court has made it clear that issues of pure credibility nevertheless warrant appellate re-examination, it remains significant in this case that the evidence of the complainant, which was comprehensively tested over a lengthy period, was not inherently doubtful, was relatively cohesive and consistent, and gained some support from the evidence of surrounding circumstances (as to which one might consider the disturbingly close – allowing for age gap – nature of the relationship etc).

[4] There is another point which should be mentioned. If the complainant was dishonest in his account (and there was no ground for mistake), it was dishonesty of gross proportion, and the evidence disclosed no reason why the complainant would resort to such dishonesty, allowing for its potentially catastrophic consequence for the appellant.

[5] The direction on the standard of proof – "beyond reasonable doubt" – was not condemned by the reference to the concept's not being "commonly in everyday discourse, not the sort of thing you say around the dinner table at night": that was an observation of ordinary and, I venture, universal experience. Additionally, when His Honour concludes: "That's, in *simple* terms, what 'reasonable doubt' means", having given an orthodox direction, he was not downplaying the gravity of the standard: he was saying that it is a concept of uncomplicated proportion, as is indeed the case.

[6] In his direction, the Judge spoke of "a reasonable doubt about any element" of the charge. There was complaint he had not previously explained what were the elements of the charge. While I consider that would have been clear to the jury – and no further direction was sought, the Judge later referred to "the element that (the complainant) was under 16 at the relevant time", which should have been sufficient to remove any uncertainty.

[7] Finally, as to His Honour's statement that his view on factual matters "only carries *weight* if you agree with it", I have to say that I consider that was an unwise instruction (cf *R v Perera* (1986) 1 Qd R 211, 220-1). But this case is comparable with *Bourke v The Queen* (1988) 62 ALJR 425, where the challenged direction was immediately followed by this statement:

> "It is not my function or obligation to consider the question of (the accused's) guilt. It is yours. It is my function only to tell you what

> the rules are and to try to assist you by taking you to what seemed to me to be some of the important aspects of the evidence."

Comparably in this case, the challenged direction was immediately followed by a direction in these terms:

> "That's because you the jury are the sole judges of the facts. You decide what the facts are based on the evidence that's been placed before you during the course of the trial. And you, and you alone, based on your findings of fact, have to say whether Mr Baldwin is guilty or not guilty."

In *Bourke*, special leave to appeal against the conviction, based on the suggested misdirection, was refused.

[8] I agree that the appeal should be dismissed.

[9] **MUIR JA:** I agree with the separate reasons of the Chief Justice and A Lyons J. I agree also that the appeal should be dismissed.

[10] **A LYONS J:** After a four day trial in the District Court at Maroochydore, the appellant was convicted on 26 March 2009 of:

(a) one count of maintaining an unlawful relationship with a child between 31 March 2004 and 9 October 2006;
(b) eight counts of indecent treatment of a child under 16; and
(c) one count of sodomy.

[11] The appellant now appeals against that conviction on the following grounds:

1. that the conviction was unsafe and unsatisfactory and not according to law;
2. that the learned trial judge's summing up was inadequate and unfair in that it:
   (a) failed to properly or at all put the defence case to the jury;
   (b) afforded undue and disproportionate emphasis to the Crown;
   (c) failed to properly or at all comment on the inadequacies of the Crown case;
   (d) failed to fairly or at all balance the competing considerations of the defence case and the Crown case;
   (e) was such as to deprive the appellant of a fair chance of acquittal; and
3. the learned trial judge erred in law in giving a direction as to the meaning of the term "beyond reasonable doubt".

Background

[12] The offences were alleged to have occurred after the appellant became the "Youth Pastor" with a local church in January 2004, which was attended by the complainant. The complainant was a devoted parishioner of the church and attended church services and other meetings several times each week. He was having problems at home with his parents, but particularly with his father and turned to the appellant for guidance and counselling. The evidence indicated that the appellant showed the complainant extra attention and purchased expensive gifts for him. The sexual offending was alleged to have begun when the appellant was in his mid twenties and the complainant was 13 years of age and continued for 18 months until October 2006.

[13] The alleged sexual contact began early in 2004 when the church held a sleepover for young parishioners. Whilst the younger children were in the church, the appellant and the complainant sat on mattresses in an upstairs office watching a movie. During the movie the complainant alleged that the appellant touched his genitals on the outside of his clothing. From there the offending progressed to mutual touching of the genitals on the outside of the clothing.

[14] The complainant's evidence was that in September 2004 the sexual conduct went beyond touching on the outside of the clothes. He states that he was with the appellant in the appellant's car, in a car park at Dingle Beach after youth group on a Friday or Saturday night, which he thought was around September. The appellant then started to rub him in the genital area, which is the basis for count 2. The appellant then asked the complainant to masturbate him, which he did until the appellant ejaculated, which is the basis for count 3.

[15] The complainant's evidence was that in early 2005, he and the appellant performed oral sex on each other at a house at Pelican Waters and this became the subject of counts 4 and 5 on the indictment. The Crown alleged that between counts 2 and 3 and counts 4 and 5 there were frequent but non-specified incidents of mutual masturbation and that after counts 4 and 5 there were non-specific incidents of masturbation and oral sex.

[16] Count 6 was an allegation of sodomy which occurred in the middle of 2005. The complainant's evidence was that the anal intercourse then occurred very frequently every Friday night until the end of the year. Counts 7 and 8 relate to incidents just prior to the appellant's marriage on 31 December 2005, which involved ejaculation into each others' mouths. Counts 9 and 10 involve mutual masturbation in September or October 2006 at the Gold Coast, where the appellant had moved in February 2006 to take up a new position with a church there.

[17] The maintaining count, which was count 1, was comprised of all the specific incidents which were contained in counts 2 to 10 as well as other non-specified sexual activity which occurred during the period from May 2004 until September 2006. This occurred particularly on Friday nights after youth group, as well as during his stay with the appellant and his wife at Robina during the Easter, July and September school holidays in 2006.

[18] The trial was held over four days and there had been a two day pre-recording of the complainant's evidence pursuant to s 21A of the *Evidence Act* 1977, after he was declared a special witness. The appellant did not give or call evidence. He had no previous convictions, was married with one child, and his wife was expecting a second child at the date of the trial.

Ground One – that the conviction was unsafe and unsatisfactory and not according to law

[19] This ground essentially asserts that all of the convictions were unsafe and unsatisfactory and not according to law. The substance of the submission would appear to be that the Crown case depended almost solely on the testimony of the complainant, which was contained in his s 93A interview and the pre-recorded evidence. The appellant asserts that this testimony should not have been relied upon by the jury as it was vague, repetitive and lacking in detail. The appellant submits

that much of this testimony involved the complainant stating that he "couldn't remember" or that he "couldn't recall". The appellant also specifically points to the lack of any medical or forensic evidence to corroborate the complainant's evidence.

[20] The appellant, in particular, attacks the complainant's evidence that he hardly ever went home after church activities on a Friday or Saturday night in 2004, but that he stayed with the appellant at his home at Pelican Waters. The evidence of the appellant's brother was that the appellant did not live at Pelican Waters at that time but rather he lived at Currimundi in 2004. The appellant also submits that the complainant's father's evidence was that the complainant was at home most Friday nights.

[21] An examination of the transcript indicates that the evidence of the appellant's brother was that the appellant moved to the Pelican Waters property in early 2005. When this fact was put to the complainant during the pre-recording he replied, "I was a young boy; I didn't think about dates and when things occurred."[1] He also accepted that he must have made a mistake with the years and he conceded that he could not have been at the appellant's house every week in 2004, as follows:

> "Every week you say, at his house from 2004 to 2005? --Obviously not 2004 because we found out that's – he wasn't living there, but from 2005 yes."

[22] In addition, when counsel persistently tried to get the complainant to be specific about days of the week on which various events occurred he replied, "He used to pick me up. We just [sic] to hang out because we were best mates back then."[2] The jury obviously accepted that it was difficult for the complainant to be certain about specific dates and specific years. This was obviously on the basis that they accepted that the relationship was such that they were "hanging out" together frequently because they were best mates. The other evidence including that of the complainant's father supported the fact that the complainant and the appellant indeed spent a lot of time together. The complainant's father also gave evidence of the appellant arriving at the house to pick the complainant up to go to activities.

[23] The complainant's father also said:[3]

> "Over time, however, the - the thing that became obvious was that A was favoured over the other young people in many ways, and many situations, that we grew to be a little concerned about as did other parents."

[24] The evidence was clear that both the appellant and the complainant were involved in youth activities at the church. As well as regular Sunday attendances, there were youth group activities on Wednesdays, as well as music practice once a week, often on Friday nights but sometimes on Saturday night. Furthermore, the evidence of the complainant's father did not go so far as to indicate that the complainant was usually at home on a Friday night. What he actually said was that he did not have a good memory of the events in 2004 and 2005. When it was suggested the complainant was late home on Friday nights he agreed and when it was suggested he would be at home on Saturday nights he replied, "I wouldn't like to comment on

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1 Record Book at p 51, ll 4-6.
2 Record Book at p 53, ll 1-2.
3 Record Book at p 188, ll 16-20.

– on 2004, 2005; my memory of exactly when the chain of events took place, we – we didn't diarise 'cause we trusted, so no, I can't say 2004 or 2005".[4] Later in his evidence in response to the question "for the majority of Friday nights, he was sleeping at your house in 2005?", he replied, "I believe it was the majority of Friday nights."[5] He did not agree, however, that it would have been the same in 2004. He replied, "No. You're stretching my memory too far." [6]
He also stated:[7]

> "But there certainly were occasions when we didn't see him for one or two nights and---
> That would be rare - you wouldn't have been letting that happen weekend upon weekend?--It's not something you want to happen too often, but it did happen and---"

[25] He also confirmed in his evidence that he would drop his son over to the appellant's home and whilst he could not specifically remember what house it was, he said:[8]

> "The short answer is yes. I don't remember whether it was Johnny living in Bell Vista or Amanda living at Bell Vista. But we largely, for most of the time, felt we could trust Mr Baldwin and did deliver A to activities that were taking place in various places, for example, I do recall dropping him to one of those houses to watch videos with a group of young people one night, one evening."

[26] It is clear that, despite the complainant's error with the dates and his evidence about the frequency of his stays at the appellant's home, the jury clearly accepted the complainant's version of events and his evidence as to what had occurred. The complainant's evidence took over six hours and the jury, therefore, had ample opportunity to observe him give his evidence and assess his reliability and honesty.

[27] In addition, there were aspects of the complainant's evidence which were in fact corroborated by other evidence, particularly the closeness of the association between the appellant and the complainant, the sleepovers, as well as the picking up and dropping off by the appellant. The circumstances of the revelation of the abuse to his current Pastor were also compelling.

[28] Overall the question as to the complainant's credibility and his evidence as a whole was a matter for the jury. In this regard, Fryberg J's statement in *R v FL*[9] is particularly apt:

> "Credibility of witnesses, more than any other issue, is a matter for the jury. Even with the assistance of a transcript an appellate court can gain no more than a partial and potentially misleading impression of a witness. It is no doubt true that a witness's demeanour is not always a reliable guide to his or her credibility; but I have no doubt that a transcript is an even less reliable guide. With the greatest respect to those, psychologists and others, who have expressed a contrary view, I also have no doubt that the jury is in the best position to make a judgment on this issue. There is no doubt

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4 Record Book at p 195.
5 Record Book at p 196, ll 12-14.
6 Record Book at p 198, l 5.
7 Record Book at p 198, ll 30-33.
8 Record Book at p 202, ll 50-58.
9 [2005] QCA 104 at [19].

> that that is the law as it presently stands. Whether it will be appropriate to change that law when appellate courts have the benefit of a complete video record of the trial can await determination at an appropriate time. In the present case the issues in relation to the complainant's credibility were central to the defence and were referred to by the trial judge in his summing up. The complainant's evidence was uncontradicted by any evidence from the appellant. It was a matter for the jury to assess what weight it should be given. We cannot second-guess the jury's assessment."

[29] I consider that in this case, similarly, the issue of the complainant's evidence was also central to the defence and I consider that this issue was specifically and clearly referred to by the judge in his summing up. It is true that in this case there was not a lot of corroborative evidence but the jury were clearly well aware of this and the need to be satisfied about the complainant's evidence. However the appellant did not call or give any evidence. It was indeed a matter for the jury to assess the weight the complainant evidence should be given and they did so. I do not therefore consider that this ground of appeal has been established.

Ground Two – the summing up was inadequate and unfair

[30] The appellant submits that in a case such as the present, where there were a bundle of charges and allegations, it was critical that the trial judge provide directions to ensure the jury focused on the evidence and that they needed to be regularly reminded that the onus of proof lay on the prosecution. I consider that a fair reading of the summing up, in fact, indicates that there is no basis for this criticism. The trial judge specifically reminded the jury at the end of the first part of his summing up that each element of each charge had to be proved beyond a reasonable doubt before they could find him guilty.[10] When it came to an analysis of the elements of each charge on the second day of his summing up, it was also clear that his Honour did, in fact, emphasise the need for each element to be proved by the prosecution beyond a reasonable doubt.[11] He stated this very clearly on a number of occasions, at one stage indicating:

> "As I told you at the start of the summing-up yesterday, you have to consider each charge separately and if you find that you have a reasonable doubt about an essential element of the charge, then you're obliged to find the defendant not guilty".[12]

[31] The appellant is also critical of parts of the following passage:[13]

> "It follows that because your verdicts must be based solely on the evidence, you're not allowed to have extraneous matters influence your judgment. For example, it's a perfectly ordinary and reasonable reaction to feel appalled when you hear about allegations of sexual abuse of a child by an adult. That's a normal human reaction. It's also a normal human reaction to have sympathy towards someone who's alleging that they've been dealt with in that way. And it may also be normal to feel antipathy towards people accused of such conduct. The important thing for you as a jury is that you are

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10 Record Book at p 286, ll 50-58.
11 Record Book at p 296.
12 Record Book at p 298, ll 11-20.
13 Record Book at p 281, ll 9-41.

> obliged by your oath or affirmation to put those normal human feelings aside. Prejudice, sympathy, antipathy for or towards any person involved in the case plays no part in your judgment as jurors. You are expected to approach your task or [sic] assessing the evidence and that involves assessing reliability and truthfulness in a dispassionate way based on the evidence and solely on the evidence."

[32] The appellant submits that the passage "could be said to reinforce the prejudice towards the accused in this matter". In particular counsel for the appellant submits that in a case such as the present, the prejudice towards the appellant would have been great given the offences involved, the age of the complainant and the fact that the defendant was a Pastor in the church. Counsel therefore submitted that it was particularly important for the judge to dilute any prejudice but that the trial judge in fact failed to dilute that prejudice. In considering the summing up taken as a whole, it is very clear to me that the trial judge was in fact ensuring that there was no possibility of prejudice. In my view the trial judge, in fact, left no doubt in the juror's minds that they were required to approach their task completely dispassionately and their decision was to be based entirely on the evidence without any such prejudice operating.

[33] In light of the previous criticism of the summing up, it is important to note that his Honour then continued:[14]

> "Again, as you've heard on a number of occasions, the prosecution represented by Mr Cummings, brings these charges, and by law, the prosecution has to prove them. When Mr Baldwin pleaded not guilty some time ago in this courtroom, he was presumed by law to be innocent, and I told you, that you must presume him to be innocent. That presumption of innocence remains in place until you are satisfied of his guilt beyond a reasonable doubt."

[34] Accordingly, I do not consider that there is any substance to the complaint that the judge failed to sufficiently remind the jury as to the onus of proof.

[35] The appellant also submits that the trial judge failed to properly comment on the inadequacies in the Crown case, failed to put the defence case, put undue emphasis on the Crown case and failed to balance the competing considerations of the Crown and defence cases.

[36] A review of the summing up indicates that the trial judge made it very clear that the evidence of the complainant was:[15]

> "the bulwark of the prosecution case: the prosecution case stands or falls on your assessment of it. … Indeed his evidence is so important that unless, in relation to the particular facts and circumstances relied upon by the prosecution in relation to particular charges, you're satisfied that he's both reliable and truthful beyond a reasonable doubt, you'd have to acquit the defendant."

[37] The trial judge also very clearly directed the jury about the complainant's evidence and the need to scrutinise it. He said:[16]

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14 Record Book at p 281, ll 45-55 and p182, ll 1-2.
15 Record Book at p 283, ll 8- 20.
16 Record Book at p 283.

> "You're entitled to do what the prosecutor has invited you to do, and that is form an impression of A overall as a result of hearing him give evidence for a number of hours which you saw and observed, and to ask yourself what impression do I have of this young man's evidence? Is he a calculating liar, I think was the expression or an expression like that that the Prosecutor used, or is he a young man who's carried a terrible burden who was doing his best to tell you the truth. You can use that sort of approach. It's a matter entirely for you.
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> It's also appropriate, as Ms Wilson has suggested that you compare A's evidence with other evidence in the prosecution case. And if you find there are inconsistencies, then that's certainly a matter that you can take into account. Obviously if there are consistencies, that's also something that will bear upon your assessment of this young man's reliability and credibility."

[38] Counsel for the appellant is critical of the passage quoted and submits that it really only gave the jury two options, that is, that the complainant was either a "compulsive liar" or "carrying an intolerable burden". Counsel submits that there was a third option which should have been put. This third option was discussed in *R v G*[17] by Macrossan CJ:

> "The judge below, in drawing the attention of the jury to the stark contrast between the respective versions of the complainant and the appellant and the impossibility of concluding that both versions were true, used words, the effect of which would be to induce the jury to consider that one version, and only one, was false and that they should decide which. The judge said that the two versions were:
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> > '… poles apart. They cannot possibly be explained away by mistake. One side is untruthful. One side is lies. In your fact-finding task, difficult as it may be, you have to face that head on.'
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> It should be added that the judge did not make the jury's assigned task of choosing between the two versions any easier by the strong and inflammatory language with which he committed this aspect to their attention.
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> The effect of the judge's direction in this respect was to induce the jury to choose between the two versions and bring in their verdict in accordance with that choice. He did not, in presenting them with that choice, draw to their attention the fact that their task was to decide whether, on a consideration of all the evidence, they were satisfied beyond reasonable doubt that the prosecution case was true, whether or not they were persuaded by the defence evidence. In short there was the further possibility that on the whole of the evidence they may have been left in doubt."

[39] In that case the court held that as the trial judge did not indicate that there was a third possibility there should be a new trial. As Davies JA said;[18]

> "Those passages could have led the jury to think that, unless they were satisfied the complainant was a liar, they should convict. The

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17 *R v G* [1994] 1 Qd R 540 at 541.

18 *R v G* [1994] 1 Qd R 540 at 543.

> learned trial judge did not, in either context, indicate that there was a third possibility; that they could not be satisfied beyond reasonable doubt that the complainant's story was true."

[40] In my view however, the passage which is criticised does not only offer two versions, but rather simply summarises the approaches of counsel to the question of the complainant's credit. The trial judge had in fact sufficiently raised the third option as part of the whole issue of credibility as he had emphasised the need for the jury to consider the complainant's evidence carefully and clearly said that "unless … you're satisfied that he's both reliable and truthful beyond a reasonable doubt you'd have to acquit the defendant".[19]

[41] I consider that the approach of the trial judge was balanced and appropriate and there is no basis for the submission that the summing up was either inadequate or unfair. I also note that no redirections were sought by defence counsel at the time. Counsel for the Crown in this appeal has submitted that an analysis of the summing up indicates that, in fact, far more time was allocated to the summary of the defence case than to the summary of the Crown's case.

Ground Three – the learned trial judge erred in law in giving a direction as to the meaning of the term "beyond reasonable doubt"

[42] The appellant submits that the trial judge erred in law by attempting to give a direction as to the meaning of the term "beyond reasonable doubt" and that this was a "dangerous voyage to embark upon" because an attempt to do so in any measure might have obscured the vital point "that the accused must be given the benefit of any doubt which the jury considers reasonable". The words which are criticised occur in the following passage:[20]

> "I can't give you a definition of that phrase 'beyond a reasonable doubt'. I think it's probably a well known phrase in the community. People know that it's the standard of proof in criminal trials. It's not the sort of phrase that you use commonly in everyday discourse, not the sort of thing you say around the dinner table at night, but it simply means this: if, after you've considered all the evidence and you're considering a particular charge for example, counts 2 and 3 which involve allegations that A says involved sexual activity between he and the defendant in the defendant's car at Dingle Avenue, Kings Beach in late 2004, if you have a reasonable doubt about any element of that charge , then you're obliged by your oath or affirmation to find the defendant not guilty. If you have no reasonable doubt, your duty is to find him guilty. That's, in simple terms, what reasonable doubt means."

[43] In *R v Darkan*[21] the High Court clearly stated that the expression "beyond reasonable doubt" was an expression which was not to be elaborated upon and that "it alone must be used, and nothing else".[22] Counsel also relied on the views of Williams JA in the decision of *R v Punj*[23] where his Honour indicated that trial

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19 Record Book at p 283, ll 17-21.
20 Record Book at p 282, ll 7-37.
21 (2006) 80 ALJR 1250.
22 (2006) 80 ALJR 1250 at [69].
23 [2002] QCA 333.

judges should not endeavour to elaborate on the expression "beyond reasonable doubt" in the following terms:[24]

> "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."

[44] In that case Williams examined the words of the trial judge;[25]

> "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:[26]

> "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?"

[45] Williams JA considered that whilst the trial judge had used the expression "beyond reasonable doubt" appropriately on many occasions he considered there was a real risk that a reasonable juror would have equated the expression with being "really sure" or "feeling sure" and went on to say;[27]

> "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.'"

[46] His Honour then continued:[28]

> "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

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24 [2002] QCA 333 at [23].
25 [2002] QCA 333 at [11].
26 [2002] QCA 333 at [11].
27 [2002] QCA 333 at [14].
28 [2002] QCA 333 at [17-19].

> 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.
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> 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:
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> > '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.'
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> 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."

[47] Having considered those authorities I do not consider that the trial judge in the present case actually elaborated on the meaning of the expression "beyond reasonable doubt". Nor in my view did he in fact embark upon a definition of that expression. In my view, what his Honour did was to indicate to the jury the extent to which the phrase was required to be applied in the case before them and to emphasise that they, in fact, needed to be satisfied about every element of every charge beyond reasonable doubt. His Honour did not, in fact, further define the phrase. Neither do I consider that the trial judge attempted to water down the meaning of the phrase in any way.

[48] In my view the trial judge in no way sought to align the requirement of satisfaction beyond reasonable doubt with a requirement that they simply needed to "feel" satisfied, which was the criticism in the cases relied upon above. Counsel has also suggested that the summing up invited the jury to examine their own mental processes, but I do not consider that his Honour's summing up was such as to invite any such process.

[49] Neither do I consider that his Honour misled the jury as to the degree of certainty required, as I consider he actually emphasised that the degree of certainty required

was beyond reasonable doubt and that this degree of satisfaction was required for each and every element of every offence. I do not consider that the appellant's criticisms of that aspect of the summing up are valid.

[50] Furthermore, in my view, the trial judge did in fact refrain from making any comments that may have led the jury to be distracted from the evidence. I do not consider that the summing up "bore a slant to the prosecution" or that the approach adopted by his Honour deprived the appellant of a real chance of an acquittal.

[51] The appellant also criticises the summing up where his Honour referred to his opinion of the facts carrying weight in certain circumstances as follows:[29]

> "It will also be necessary as part of my duty in this case to mention the evidence and I intend to do that. That's designed to assist you. If you think I have a particular view about the evidence or I've formed an opinion about the evidence, my view and/or opinion only carries weight if you agree with it. That's because you the jury are the sole judges of the facts. You decide what the facts are based on the evidence that's placed before you during the course of the trial. And you, and you alone, based on your findings of fact, have to say whether Mr Baldwin is guilty or not guilty."

[52] Counsel has indicated that in *Bourke v The Queen*[30] the High Court referred to the undesirability of a judge commenting on guilt or innocence and endorsed Dowsett J's view that, "it could leave the jury with the mistaken impression that they were to treat the Judge's opinion as to guilt or innocence as a relevant factor for their consideration". In the present case however, his Honour's comment was not as to the guilt or innocence of the appellant but was a direction in the standard terms that the jury were the sole determiners of the facts and that if the jury considered that he had expressed a view on the evidence then it needed to accord to their own view before they could take it into account. I do not consider that the jury could have been mislead by the use of the words "makes weight" in the summing up such that they could have been misled into substituting the judge's views for their own. Furthermore, it is quite clear from a review of the transcript that the judge had not, in fact, expressed a view on the evidence.

[53] The appeal should be dismissed.

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29 Record Book at p 278, ll 55-57 – p 279, ll 1-15.

30 (1988) 62 ALJR 425 at 427.