# Do Juries Understand the Criminal Standard of Proof of Beyond Reasonable Doubt?

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*The High Court has stated that it is both unnecessary and unwise for a trial judge to seek to explain to the jury the meaning of "beyond reasonable doubt", on the ground that the phrase is well understood in the community. This article respectfully disagrees with the High Court's position and argues that Victoria has taken the appropriate course in enacting ss 63–64 of the Jury Directions Act 2015 (Vic). However, it is contended that both ss 63 and 64 can be improved by removing the requirement that an explanation of the phrase "proof beyond reasonable doubt" may only occur in response to a direct or indirect jury question. The argument is developed in the context of a number of sexual assault cases where the guilty verdicts have been overturned on appeal.*

## I. Introduction

> I don't think the law exists to arrive at the truth. If it did, we wouldn't have exclusionary rules, we wouldn't have presumptions of innocence, we wouldn't have proof beyond reasonable doubt. There's an enormous difference between the role of truth in law and the role of truth in science. In law, truth is one among many goals.[1]

The genesis for this article was a recent publication entitled "Tipped Scales",[2] which posed the question as to why a number of sexual abuse convictions were being overturned on appeal. Solicitors for three of the successful appellants were quoted. John Tyrrell's solicitor, Peter Mihailidis, saw the conviction of his client, a former Christian Brother, in the context of outrage over the revelations of the Royal Commission into Institutional Responses to Child Sexual Abuse:[3]

> My view is that, in the current climate, defendants have a strong chance of being convicted in these cases whether they are guilty or not. It takes a brave prosecutor to say, "This doesn't add up". The prevailing attitude seems to be to prosecute and let the courts sort it out, but many juries are making decisions based on emotion and preconceptions, not evidence or facts.[4]

Similarly, Carol Younes, the solicitor for "IW", was reported as saying: "There is a genuine growing concern that defendants in sexual assault cases do not really enjoy the presumption of innocence."[5] This view was reinforced by Sydney solicitor Ron Malouf, whose 39-year-old client, "JN", successfully appealed his conviction for rape of a brother and sister who were once his childhood neighbours:

> [T]his blanket approach of assuming allegations are true, no matter how flawed or vexatious they may be, is creating a lot of unfairness for the accused. Juries, from my experience, seem to struggle with the fundamental concept of reasonable doubt.[6]

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[1] Alan Dershowitz, quoted in Katherine Schulz, "Alan Dershowitz on Being Wrong, Part II: Error in the Law", *Slate Magazine*, 12 May 2010 <https://slate.com/news-and-politics/2010/05/alan-dershowitz-on-being-wrong-part-ii-error-in-the-law.html>.

[2] Richard Guilliatt, "Tipped Scales", *Weekend Australian Magazine*, 18–19 July 2020, 12–17 <https://www.theaustralian.com.au/weekend-australian-magazine/reasonable-doubt-why-sex-abuse-convictions-are-being-overturned/news-story/7a5bd5c868ff829b9b2813ea67bbc70d>.

[3] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017).

[4] Guilliatt, n 2, 14.

[5] Guilliatt, n 2, 14.

[6] Guilliatt, n 2, 15.

While it is recognised that in each of the successful appeal cases examined in this article the respective Court of Appeal stressed different factors for its decision, the common theme is to ask: how did the jury arrive at a guilty verdict against the standard of beyond reasonable doubt when the Crown case was palpably weak?

For example, as discussed below, in *Xu v The Queen*[7] the defendant chose not to give evidence, defence counsel failed to adduce good character evidence, and the Crown was found to have run the case unfairly as regards suggesting the complainant had been drugged by the defendant while adducing no evidence to support this imputation.[8] Each of these factors provides an explanation as to why Mr Xu was convicted, aside from the jury's understanding of the meaning of the term "beyond reasonable doubt". Yet, at the same time, there were glaring holes in the Crown's case, such as the complainant voluntarily returning to the defendant's apartment a week after the alleged first assault, the exchange of friendly text messages between the dates of the two alleged assaults, and the complainant going to the police at the behest of his mother after she had discovered he was in a homosexual relationship.

Indeed, prima facie, it is surprising that Mr Xu was charged at all under the Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales.[9] The Guidelines identify three factors in determining whether or not the public interest requires that a person be prosecuted:

> (1) whether or not the admissible evidence available is capable of establishing each element of the offence;
> (2) whether or not it can be said that there is no reasonable prospect of conviction by a reasonable jury (or other tribunal of fact) properly instructed as to the law; and if not
> (3) whether or not discretionary factors nevertheless dictate that the matter should not proceed in the public interest.[10]

Arguably, none of these three factors applied in Mr Xu's case, which in turn can be gauged by the extremely high bar the appellant must clear in order to succeed on the unreasonableness ground. The test to be applied where the appellant contends that jury verdicts of guilty are unreasonable and cannot be supported having regard to the evidence, was set out by the High Court in *M v The Queen*.[11] The test has two components: (1) the Court is to make its own independent assessment of the sufficiency and quality of the evidence; and (2) whether, notwithstanding that there is evidence upon which a jury might convict, it would be dangerous in all the circumstances to let the verdict of guilty stand. The test was recently affirmed by the High Court in *Pell v The Queen*.[12]

The structure of this article is as follows. Part II reviews High Court authority on the dangers of explaining to the jury the meaning of "beyond reasonable doubt", and considers the appropriateness of ss 63–64 of the *Jury Directions Act 2015* (Vic). Part III discusses in detail the cases of relevance to ascertain whether a common theme of jury misunderstanding of the term "beyond reasonable doubt" can be discerned. Finally, Part IV draws a conclusion as to whether or not the common law as stated by the High Court should be followed, or whether the Victorian approach is to be preferred.

## II. The Meaning of "Beyond Reasonable Doubt": Common Law and Statute

> Scientists search for truth. Philosophers search for morality. A criminal trial searches for only one result: proof beyond a reasonable doubt.[13]

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[7] *Xu v The Queen* [2019] NSWCCA 178.

[8] Effectively, the Crown prosecutor was "Willing to Wound, Yet Afraid to Strike": Alexander Pope, *Epistle to Dr Arbuthnot* (1734).

[9] Office of the Director of Public Prosecutions, *Prosecution Guidelines* (NSW Government, 2007) <https://www.odpp.nsw.gov.au/sites/default/files/prosecution-guidelines.pdf>.

[10] Office of the Director of Public Prosecutions, n 9, 8.

[11] *M v The Queen* (1994) 181 CLR 487, 492–493.

[12] *Pell v The Queen* (2020) 94 ALJR 394; [2020] HCA 12.

[13] Alan Dershowitz, "Casey Anthony: The System Worked", *Wall Street Journal*, 7 July 2011.

## A. Common Law in Australia

For nearly 50 years, the High Court of Australia has consistently affirmed it is both unnecessary and unwise for a trial judge to seek to explain to the jury the meaning of "beyond reasonable doubt", on the ground that the phrase is well understood in the community.[14] The most recent confirmation of the High Court's position can be seen in *R v Dookheea*,[15] in which the High Court was of the view that "explanations of 'reasonable doubt' are more likely to exacerbate a jury's uncertainties than alleviate their concerns",[16] and where the impugned statement was a direction by the trial judge, Emerton J, to the jury "that the Crown did not have to satisfy the jury of the respondent's guilt 'beyond any doubt, but beyond reasonable doubt'".[17]

The High Court reviewed the trial judge's overall charge to the jury in considerable detail, noting that her Honour had observed "[b]eyond reasonable doubt is not something that is capable of expression on some sort of percentage basis", and had "contrasted the beyond reasonable doubt standard, which is the highest standard known to law, with the much lower civil standard … called the balance of probabilities, more likely than not".[18] The High Court further noted the trial judge had told the jury "[i]f any evidence causes you to have reservations about drawing such an inference [intention to kill or cause really serious injury], then the benefit of your doubt should go to Mr Dookheea", and that "the trial judge issued the jury with an aide memoire of each of the elements of the offence charged, in which it was stated in bold type that the jury had to be satisfied of guilt beyond reasonable doubt".[19]

The High Court then considered the position taken by the Victorian Court of Appeal (Maxwell P, Redlich JA and Croucher AJA) in finding that the trial judge had fallen into error, and concluded that because the standard of proof was fundamental to a fair trial the appeal must succeed.[20] In so doing, the Victorian Court of Appeal "based their decision on the approach adopted by the South Australian Court of Criminal Appeal in *R v Compton*".[21]

Under the heading "The distinction between reasonable doubt and any doubt", the High Court accepted the Crown submissions that "[w]hile it may be unnecessary and unwise for a trial judge [to contrast reasonable doubt with any doubt], it will not always result in a substantial miscarriage of justice and in this case it did not do so".[22] The High Court then set out the appropriate test, ironically citing previous Victorian authority that the Court of Appeal failed to follow:

> [A] reasonable doubt is a doubt which the jury as a reasonable jury considers to be reasonable (albeit, of course, that different jurors might have different reasons for their own reasonable doubt). Phillips JA accurately summarised the position in *R v Chatzidimitriou* [[2000] VSCA 91; (2000) 1 VR 493, 498 [11]]:

[14] *Green v The Queen* (1971) 126 CLR 28, 32–33; *La Fontaine v The Queen* (1976) 136 CLR 62, 71. This assumption is open to challenge. A survey of 1,225 jurors from 112 juries conducted by the New South Wales Bureau of Crime Statistics and Research found "more than half (55.4%) of the jurors surveyed believe that the phrase 'beyond reasonable doubt' means 'sure [that] the person is guilty'. A further 22.9 per cent believe that the phrase means 'almost sure [that] the person is guilty'. Therefore, almost four in five jurors (78.3%) understand the phrase to mean either 'sure' or 'almost sure' that the person is guilty": Lily Trimboli, "Juror Understanding of Judicial Instructions in Criminal Trials" (2008) 119 *Crime and Justice Bulletin* 1, 4. A former Chief Justice of the Supreme Court of the Northern Territory has described the results of this research as painting "a disturbing picture of the understanding of jurors of this 'popularly understood formula'": Chief Justice Brian Martin, "Beyond Reasonable Doubt" (2010) 1 *Northern Territory Law Journal* 225, 226.

[15] *R v Dookheea* (2017) 262 CLR 402 (Kiefel CJ, Bell, Gageler, Keane, Nettle and Edelman JJ); [2017] HCA 36.

[16] *R v Dookheea* (2017) 262 CLR 402, [23]; [2017] HCA 36.

[17] *R v Dookheea* (2017) 262 CLR 402, [1]; [2017] HCA 36.

[18] *R v Dookheea* (2017) 262 CLR 402, [13]; [2017] HCA 36.

[19] *R v Dookheea* (2017) 262 CLR 402, [17]–[18]; [2017] HCA 36.

[20] *R v Dookheea* (2017) 262 CLR 402, [20]; [2017] HCA 36, citing *Dookheea v The Queen* [2016] VSCA 67, [87]–[91].

[21] *R v Dookheea* (2017) 262 CLR 402, [29]; [2017] HCA 36 (citations omitted).

[22] *R v Dookheea* (2017) 262 CLR 402, [28]–[29]; [2017] HCA 36.

> [T]he test remains one of reasonable doubt, not of any doubt at all; and … the jury's function includes determining what *is* reasonable doubt – or to put that in more concrete fashion, whether the doubt which is left (if any) is reasonable doubt or not.[23]

The High Court continued by observing that "in point of principle it is not wrong to notice the distinction" between reasonable doubt and any doubt, and any question of a false perception is "to be decided by taking the summing up as a whole and as a jury listening to it might understand it, not upon some subtle examination of its transcript record or by undue prominence being given to any of its parts".[24] In that regard, the High Court concluded on the basis of the repeated references to the criminal standard of beyond reasonable doubt by the trial judge, "the jury would clearly have understood that it was up to them to decide whether there was what they considered to be a reasonable doubt as to Dookheea's guilt and that, if there were, they were bound to acquit him".[25]

As a postscript, the High Court fired this broadside at the Victorian Court of Appeal: "If the Court of Appeal had followed their own earlier decisions on the subject, or this Court's decision in *La Fontaine*, the need for this appeal might have been avoided."[26]

For present purposes, the High Court did encourage the practice of "contrasting the standard of proof beyond reasonable doubt with the lower civil standard of proof on the balance of probabilities".[27] In addition, because the jury did not seek an explanation from the trial judge as to the meaning of the phrase "proof beyond reasonable doubt", ss 63–64 of the *Jury Directions Act* were not engaged. This raises the question as to whether such a restriction: (1) should be removed to allow the trial judge greater discretion to provide an explanation; or (2) should be replaced by a test for all cases that has the approval of the High Court. This question is developed in Part IIC below.

## B. Common Law in England and Wales, Canada, New Zealand and the United States

The High Court of Australia's position that it is both unnecessary and unwise for a trial judge to seek to explain to the jury the meaning of "beyond reasonable doubt", on the ground that the phrase is well understood in the community, is not shared in other countries with a common law tradition, such as England and Wales, Canada, New Zealand and the United States.

### *1. England and Wales*

The appropriate direction to the jury on the meaning of "beyond reasonable doubt" is set out in the *Crown Court Compendium*, citing the case of *R v JL*[28] in support:

(1) the jury was not required to be 100% certain (relevant only because the question had been specifically asked),
(2) sure and beyond reasonable doubt meant the same thing; and

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[23] *R v Dookheea* (2017) 262 CLR 402, [34]; [2017] HCA 36 (emphasis in original). It can be seen that the trial judge, Emerton J, had adapted the phrase "not of any doubt at all" cited in *R v Chatzidimitriou* (2000) 1 VR 493; [2000] VSCA 91 above in her Honour's charge to the jury in *R v Dookheea* (2017) 262 CLR 402; [2017] HCA 36.

[24] *R v Dookheea* (2017) 262 CLR 402, [37]; [2017] HCA 36.

[25] *R v Dookheea* (2017) 262 CLR 402, [39]; [2017] HCA 36.

[26] *R v Dookheea* (2017) 262 CLR 402, [40]; [2017] HCA 36. In this case, the Crown was represented by Mr GJC Silbert QC, who has subsequently written an article critical of the performance of the Victorian Court of Appeal under its President, the Hon Chris Maxwell: Gavin Silbert QC, "The First 24 Years of the Victorian Court of Appeal in Crime" (2020) 94 ALJ 455. The thrust of the article is that under the first President, the Hon John Winneke, between 1995 and 2005 the Victorian Court of Appeal was only reversed twice by the High Court, whereas under the Hon Chris Maxwell between 2006 and 2019 the Victorian Court of Appeal was reversed 16 times by the High Court.

[27] *R v Dookheea* (2017) 262 CLR 402, [41]; [2017] HCA 36. At fn 59 the High Court noted the practice was ordinarily followed in Victoria and New South Wales, citing the following authority: "Judicial College of Victoria" in *Victorian Criminal Charge Book* (2017) [1.7.2]. See also Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* (2017) [1.480], [1.490]; *R v Dat Quoc Ho* (2002) 130 A Crim R 545, 548 [15] (Bell J; Meagher JA and Hidden J agreeing at 562 [66], [67]); [2002] NSWCCA 147; *Ward v The Queen* [2013] NSWCCA 46, [54] (McClellan CJ; Latham and Adamson JJ agreeing at [246], [247]).

[28] *R v JL* [2018] 2 Crim LR 184.

> (3) a reasonable doubt was the sort of doubt that might affect the jurors' minds if they were making decisions in matters of importance in their own affairs, their own lives.
>
> It might be thought that it is best to avoid both "certain" and even "beyond a reasonable doubt" if faced with a question from the jury seeking further guidance on this topic – a reminder that the prosecution has to make the jury "sure" in order to prove guilt is probably the safest course to adopt.[29]

Thus, in England and Wales, what is required from the trial judge is a clear instruction to the jury that they have to be satisfied so that they are sure[30] before they can convict.[31] Other than telling the jury that "beyond reasonable doubt" means the same thing as being sure, it is unwise to elaborate on the standard of proof.[32] Given the limitations of such a sparse comparison, the direction to the jury in England and Wales is the closest to that of Australia compared with other common law jurisdictions. In that regard, it is not apparent why comparing the phrase "beyond reasonable doubt" with "being sure" adds to the comprehension of the jury of the criminal standard of proof without a more detailed prior explanation, as the Supreme Court of Canada has recognised.

### *2. Canada*

In Canada, the leading case on the expression "reasonable doubt" is *R v Lifchus*,[33] in which the Supreme Court of Canada, unlike the position in Australia and England and Wales, held that a jury must be provided with an explanation of the expression "reasonable doubt". The Supreme Court set out a model suggested charge to the jury:

> The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty.
>
> What does the expression "beyond a reasonable doubt" mean?
>
> The term "beyond a reasonable doubt" has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.
>
> 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.
>
> Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.
>
> On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.
>
> In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.[34]

It can be seen from the above model suggested charge to the jury that: (1) the Supreme Court is fixing the comparative standard of the phrase "beyond reasonable doubt" as being above "probably guilty or likely guilty" and below "absolute certainty"; and (2) the equivalence of "you are sure that the accused committed the offence" with "beyond reasonable doubt" is only identified at the end of the charge by way of summary.

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[29] Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (2020) 5-2 [7] <https://www.judiciary.uk/wp-content/uploads/2020/07/Crown-Court-Compendium-Part-I-July-2020-09.10.20.pdf>.

[30] A dictionary definition of "sure" has several alternative meanings, including "free from doubts" and "undoubtedly true": *The Concise Oxford Dictionary* (6th ed, 1976) "sure" (definitions 1, 4).

[31] Judicial College, n 29, 5-1 [2], citing *R v Miah (Muked)* [2018] Crim LR 652; [2018] EWCA Crim 563.

[32] Judicial College, n 29, 5-1 [3], citing *R v Ching (Yap Chuan)* (1976) 63 Cr App R 7, [11].

[33] *R v Lifchus* [1997] 3 SCR 320.

[34] *R v Lifchus* [1997] 3 SCR 320, [39].

Three years later, the Supreme Court further clarified the meaning of the phrase "beyond reasonable doubt" by comparing the civil standard proof with the criminal standard of proof in these terms: "an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities".[35] Essentially, the Supreme Court without actually quantifying a percentage was saying the reasonable doubt standard is way beyond the 51% civil standard of proof of the balance of probabilities and over 90% by fixing it "much closer" to the 100% standard of absolute certainty. The deduction from 100% involves the jury ignoring "an imaginary or frivolous doubt", discounting "sympathy or prejudice", and instead focusing on whether there is any reasonable explanation consistent with the accused's innocence all the while bearing in mind the accused is to be presumed innocent at the start of the proceedings.

### *3. New Zealand*

The New Zealand Court of Appeal followed the Supreme Court of Canada in favouring an explanation of the concept of proof beyond reasonable doubt, and in *R v Wanhalla* (*Wanhalla*) laid out a model set of jury directions clearly based on *R v Lifchus*:[36]

> The starting point is the presumption of innocence. You must treat the accused as innocent until the Crown has proved his or her guilt. The presumption of innocence means that the accused does not have to give or call any evidence and does not have to establish his or her innocence.
>
> The Crown must prove that the accused is guilty beyond reasonable doubt. Proof beyond reasonable doubt is a very high standard of proof which the Crown will have met only if, at the end of the case, you are sure that the accused is guilty. It is not enough for the Crown to persuade you that the accused is probably guilty or even that he or she is very likely guilty. On the other hand, it is virtually impossible to prove anything to an absolute certainty when dealing with the reconstruction of past events and the Crown does not have to do so.
>
> What then is reasonable doubt? A reasonable doubt is an honest and reasonable uncertainty left in your mind about the guilt of the accused after you have given careful and impartial consideration to all of the evidence. In summary, if, after careful and impartial consideration of the evidence, you are sure that the accused is guilty you must find him or her guilty. On the other hand, if you are not sure that the accused is guilty, you must find him or her not guilty.[37]

The New Zealand Court of Appeal in setting the bar of beyond reasonable doubt went a little higher than the Supreme Court of Canada by virtue of several points of additional emphasis, such as stating proof beyond reasonable doubt is a "very high standard of proof" and it is not enough for the Crown to persuade the jury the accused is "very likely guilty". Both model directions conclude with the England and Wales benchmark of being "sure" the accused is guilty. However, while the Supreme Court of Canada stressed reasonable doubt needed to be based on reason and common sense, the New Zealand Court of Appeal defined reasonable doubt as an honest and reasonable uncertainty, thereby associating being "sure" with being "certain".

### *4. United States*

In *Re Winship*, the United States Supreme Court held that "the Due Process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged".[38] Subsequently, the Federal Judicial Centre produced the following definition of reasonable doubt:

> [T]he government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute

[35] *R v Starr* [2000] 2 SCR 144, [242].

[36] *R v Lifchus* [1997] 3 SCR 320, [39].

[37] *R v Wanhalla* [2007] 2 NZLR 573, 588.

[38] *Re Winship*, 397 US 358, 364 (1970).

> certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.[39]

There is an interesting choice of words in the above definition, which in essence does not differ greatly from those of Canada or New Zealand. First, in comparison with the civil standard, the government's proof "must be more powerful … beyond a reasonable doubt". Secondly, the proof does not have to overcome "every possible doubt", leaving open proof below "absolute certainty". Thirdly, "more powerful" is calibrated with being "firmly convinced", which is simply another way of questioning whether you are sure or certain of the accused's guilt. Finally, "real possibility" appears to be stronger and more robust than "reasonable possibility", thereby widening the margin between the two measures of "absolute certainty" and "beyond reasonable doubt".

### *5. Summary*

A common theme across all four jurisdictions is the use of "sure" as an equivalent to "beyond reasonable doubt" (or "firmly convinced" in the case of the United States), albeit with the caveat in both Canada and New Zealand that a reference to "sure" is only to be made at the end of the charge to the jury by way of summary. Another common theme is fixing the standard of "beyond reasonable doubt" to be well above the civil standard of proof but below absolute certainty.

In terms of detailed instructions, both Canada and New Zealand provide the most extensive charge to the jury on the meaning of "beyond reasonable doubt". Both jurisdictions stress that "probably" guilty and "likely" guilty are insufficient to meet the criminal standard of proof. This highlights a critical point in cases where it is oath against oath, such as sexual assault cases, in that the standard of beyond reasonable doubt is not met by the jury making a choice between the veracity of the complainant and the accused.[40]

Understandably, in the interests of providing clarity, none of the suggested directions address the individual circumstances of a case, sensibly leaving additional directions to the trial judge. However, individual factors in a case may impact on the exact positioning of the bar of beyond reasonable doubt. For example, where the accused is able to put their good character forward in a case where many years have passed between the date of the alleged offences and the date of trial such that the accused faces a significant forensic disadvantage, then the bar of beyond reasonable doubt ought to move closer towards certainty.[41] Conversely, if the Crown is able to adduce similar fact evidence from multiple credible complainants, then the bar of beyond reasonable doubt ought to move further away from certainty.[42]

## C. Statute in Australia

The only jurisdiction in Australia to overrule the common law in relation to jury directions concerning the criminal standard of proof is Victoria, with the enactment of the *Jury Directions Act*.[43] The overall

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[39] Federal Judicial Center, *Pattern Criminal Jury Instructions* (US Government, 1987) 28 [21] <https://www.fjc.gov/sites/default/files/2012/CrimJury.pdf>.

[40] The issue of the jury not making a choice is further discussed in Part IIIB when considering the case of *IW v The Queen* [2019] NSWCCA 311.

[41] See, eg, the common law *Longman* direction or warning: *Longman v The Queen* (1989) 168 CLR 79. Section 165B(2) of the uniform evidence legislation reflects the *Longman* direction: "If the court, on application by the defendant, is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of that disadvantage and the need to take that disadvantage into account when considering the evidence."

[42] See, eg, the common law test for the admission of similar fact evidenced in *Pfennig v The Queen* (1993) 182 CLR 461, 483, of whether there is no "rational view of the evidence that is consistent with the innocence of the accused". The strictness of the *Pfennig* test effectively means the accused is guilty.

[43] By contrast, the Queensland Law Reform Commission recommended that "[t]here should be no attempt to define 'beyond reasonable doubt' in statute or in model directions such as those in the Queensland Supreme and District Court Benchbook": Queensland Law Reform Commission, *A Review of Jury Directions*, Report No 66 (2009) Vol 2, 549 [17.49] Recommendation 17.1.

thrust of the legislation was encapsulated by the Victorian Attorney-General in introducing the Bill into the Victorian Legislative Assembly:

> Jury directions are the directions a trial judge gives to a jury to help them to make this decision. Accordingly, it is vitally important that these directions be as helpful, relevant and fair as possible. In recent years, it became clear that the law of jury directions in Victoria required significant reform. This law was spread across both the common law and legislation.[44]

The origins of this legislation can be found in a Victorian Law Reform Commission Report, which reflected concerns that:

> [T]he law in this area is too complex, that it does not encourage judges to use modern means of communicating with juries, that juries are sometimes given very lengthy directions that are not particularly helpful, and that some appeals against conviction succeed because of highly technical errors in the directions which the trial judge gave to the jury.[45]

Justice Bell of the High Court, writing extra-judicially, has observed that "[t]here was a concern that the intended audience had become the appellate court and not the jury".[46] Justice Bell went on to note research from the New South Wales Law Reform Commission,[47] which found "while the empirical evidence suggests that jurors are generally conscientious in their efforts to follow the directions, which they are reported to find helpful, the evidence is less positive about the level of juror comprehension of directions".[48] The importance of juries understanding the trial judge's directions was stressed by McHugh J of the High Court: "Put bluntly, unless we act on the assumption that criminal juries act on the evidence and in accordance with the directions of the trial judge, there is no point in having criminal jury trials."[49]

Part 7 Div 1 of the *Jury Directions Act* deals with proof beyond reasonable doubt and encompasses ss 61–64. Section 61 covers what must be proved beyond reasonable doubt, and s 62 abolishes the common law obligation to give certain directions.[50] For present purposes, the focus is upon ss 63 and 64, as set out below:

> Section 63 When trial judge may explain "proof beyond reasonable doubt"
>
> (1) A trial judge may give the jury an explanation of the phrase "proof beyond reasonable doubt" if the jury asks the trial judge -
>  (a) a direct question about the meaning of the phrase; or
>  (b) a question that indirectly raises the meaning of the phrase.
>
> (2) Subsection (1) does not limit any other power of a trial judge to give the jury an explanation of the phrase "proof beyond reasonable doubt".
>
> Section 64 How explanation may be given in response to jury question
>
> (1) If the jury has asked a direct question about the meaning of the phrase, or a question that indirectly raises the meaning of the phrase, "proof beyond reasonable doubt", the trial judge may -
>  (a) refer to -
>  (i) the presumption of innocence; and
>  (ii) the prosecution's obligation to prove that the accused is guilty; or

[44] Victoria, *Parliamentary Debates*, Legislative Assembly, 18 March 2015, 678 (Martin Pakula, Attorney-General).

[45] Victorian Law Reform Commission, *Jury Directions*, Final Report No 17 (2009) 4.

[46] Justice Virginia Bell AC, "Jury Directions: The Struggle for Simplicity and Clarity" (Banco Court Lecture, Supreme Court of Queensland, 20 September 2018) <https://cdn.hcourt.gov.au/assets/publications/speeches/current-justices/bellj/bellj20Sep2017.pdf>.

[47] New South Wales Law Reform Commission, *Jury Directions*, Report No 136 (2012) 28 [1.83].

[48] Bell, n 46, 3.

[49] *Gilbert v The Queen* (2000) 201 CLR 414, 425 [31]; [2000] HCA 15.

[50] Effectively, in combination ss 61 and 62 of the *Jury Directions Act 2015* (Vic) provide that the only matters the trial judge may direct the jury must be proved beyond reasonable doubt are (1) the elements of the offence charged or an alternative offence and (2) the absence of any relevant defence, by abolishing the common law obligation to give certain directions, such as the rule attributed to *Shepherd v The Queen* (1990) 170 CLR 573. The purpose is to give juries simpler directions.

(b) indicate that it is not enough for the prosecution to persuade the jury that the accused is probably guilty or very likely to be guilty; or
(c) indicate that -
(i) it is almost impossible to prove anything with absolute certainty when reconstructing past events; and
(ii) the prosecution does not have to do so; or
(d) indicate that the jury cannot be satisfied that the accused is guilty if the jury has a reasonable doubt about whether the accused is guilty; or
(e) indicate that a reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility.

(2) The trial judge may adapt his or her explanation of the phrase "proof beyond reasonable doubt" in order to respond to the particular question asked by the jury.[51]

Section 64(1) is in part derived from directions set down in cases in New Zealand and Canada, discussed in Part IIB above. The New Zealand Court of Appeal in *Wanhalla* established a formulation to explain the concept of "proof beyond reasonable doubt", the relevant passage of which is given below:

> It is not enough for the Crown to persuade you that the accused is probably guilty or even that he or she is very likely guilty. On the other hand, it is virtually impossible to prove anything to an absolute certainty when dealing with the reconstruction of past events and the Crown does not have to do so.[52]

The genesis of the *Wanhalla* direction can be found in the Canadian case of *R v Lifchus*, where the Supreme Court of Canada held that a jury must be provided with an explanation of the expression "reasonable doubt".[53]

The first point to note is that both s 63 and s 64 are predicated on the jury asking either a direct or indirect question as to the meaning of the phrase "proof beyond reasonable doubt". The implication being that an explanation is only required if it is requested. This seems a dubious approach to such an important issue at trial. For example, in *R v Dookheea*,[54] if the trial judge had been able to rely on s 64 because there was no requirement that a direct or indirect question had been asked by the jury, then arguably the appeal may not have proceeded. This follows because instead of the trial judge using the impugned phrase "beyond any doubt", Emerton J could have relied on s 64(1)(e) and contrasted beyond reasonable doubt with "an imaginary or fanciful doubt or an unrealistic possibility". Alternatively, her Honour could have indicated under s 64(1)(c)(i) that "it is almost impossible to prove anything with absolute certainty when reconstructing past events".

The second point of interest is that while s 64(1)(b) allows the trial judge to indicate that it is "not enough for the prosecution to persuade the jury that the accused is probably guilty or very likely to be guilty", there is no reference in the list of alternatives in s 64(1) to the High Court's encouragement of the practice[55] of "contrasting the standard of proof beyond reasonable doubt with the lower civil standard of proof on the balance of probabilities".[56]

Thirdly, s 64 does not include previous Victorian authority[57] as to the appropriate test when explaining reasonable doubt to the jury. In *R v Neilan*, the Court stated that "[h]ad the jury asked his Honour what

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[51] Section 64(1)(c)(i) is taken from the judgment of Cox J in *R v Pahuja* (1988) 49 SASR 191, 204. Similarly, Martin CJ in *Ladd v The Queen* (2009) 27 NTLR 1, [212]; [2009] NTCCA 6 observed: "The adjective 'reasonable' has a role to play in qualifying the noun 'doubt'."

[52] *R v Wanhalla* [2007] 2 NZLR 573, 588. See Criminal Law Review, *Jury Directions: A Jury-centric Approach* (Victorian Department of Justice and Regulation, 2015) 126 [15.2.5] <https://www.justice.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2020/06/1a/019f4a60e/jury-directions-a-jury-centric-approach.pdf>.

[53] *R v Lifchus* [1997] 3 SCR 320, [39]. See Criminal Law Review, n 52, 126–127 [15.2.5].

[54] *R v Dookheea* (2017) 262 CLR 402; [2017] HCA 36.

[55] The Queensland Supreme and District Court Benchbook specifically incorporated the comparison between the civil and criminal standard of proof following the decision in *R v Dookheea* (2017) 262 CLR 402; [2017] HCA 36: Queensland Supreme and District Court Benchbook, *Reasonable Doubt*, No 60.1 (March 2019 Amendments) <https://www.courts.qld.gov.au/__data/assets/pdf_file/0020/86060/sd-bb-60-Reasonable-Doubt.pdf>.

[56] *R v Dookheea* (2017) 262 CLR 402, [41]; [2017] HCA 36.

[57] *R v Neilan* [1992] 1 VR 57, 71; *R v Chatzidimitriou* (2000) 1 VR 493, 498 [11]; [2000] VSCA 91.

'reasonable' meant, it would have been correct to reply that a reasonable doubt was a doubt which the jury considered reasonable".[58] As mentioned above, in *R v Chatzidimitriou*, it was held that "the jury's function includes determining what *is* reasonable doubt … whether the doubt which is left (if any) is reasonable doubt or not".[59] This means that proof of guilt beyond reasonable doubt cannot be expressed as a percentage of certainty,[60] as held by Vincent JA in *R v Cavkic*:

> It is inherent in the expression of the standard by reference to a percentage chance of guilt or by some assessment of the odds as in a wager, that some doubt must exist that is to be disregarded once the arbitrarily fixed percentage or rate is reached. The law has never proceeded on that basis … which, in effect, enables them to avoid grappling with their own genuine doubts.[61]

Similarly, the Victorian Court of Appeal held that the expression "beyond reasonable doubt" is not equivalent to being "sure" or "certain"[62] in following High Court authority that it is a mistake to depart from the time-honoured formula.[63]

Accordingly, in light of the above three observations, a revised s 64 is proposed below, which is predicated on the trial judge being able to give an explanation about the meaning of the phrase "proof beyond reasonable doubt" irrespective of whether the jury has asked a direct or indirect question:[64]

> Section 64 How explanation may be given irrespective of whether a jury question has been asked:
>
> (1) Irrespective of whether the jury has asked a direct question about the meaning of the phrase, or a question that indirectly raises the meaning of the phrase, "proof beyond reasonable doubt", the trial judge may –
>
> (a) refer to –
>
> (i) the presumption of innocence; and
>
> (ii) the prosecution's obligation to prove that the accused is guilty; or
>
> (b) indicate that –
>
> (i) it is not enough for the prosecution to persuade the jury that the accused is probably guilty or very likely to be guilty; and
>
> (ii) the phrase "proof beyond reasonable doubt" is not equivalent to being sure or certain, and cannot be referenced to a percentage chance of guilt; or
>
> (c) indicate that –
>
> (i) it is almost impossible to prove anything with absolute certainty when reconstructing past events; and
>
> (ii) the prosecution does not have to do so; or
>
> (d) indicate that –
>
> (i) the jury cannot be satisfied that the accused is guilty if the jury has a reasonable doubt about whether the accused is guilty;
>
> (ii) a reasonable doubt is a doubt which the jury considers reasonable; and
>
> (iii) the jury's function includes determining what *is* reasonable doubt, which means whether the doubt which is left (if any) is reasonable doubt or not; or
>
> (e) indicate that –

[58] *R v Neilan* [1992] 1 VR 57, 71 (Young CJ, Brooking and Marks JJ).

[59] *R v Chatzidimitriou* (2000) 1 VR 493, 498 [11] (Phillips JA); [2000] VSCA 91.

[60] A New Zealand study in 1999 found jurors viewed "beyond reasonable doubt" in percentage terms: "[M]any jurors said that they, and the jury as a whole, were uncertain what 'beyond reasonable doubt' meant. They generally thought in terms of percentages, and debated and disagreed with each other about the percentage certainty required for 'beyond reasonable doubt', variously interpreting it as 100 per cent, 95 per cent, 75 per cent, and even 50 per cent. Occasionally this produced profound misunderstandings about the standard of proof" (Warren Young, Neil Cameron and Yvette Tinsley, "Juries in Criminal Trials Part 2" (Preliminary Paper No 37, Vol 2, Law Commission of New Zealand, 1999) 54 [7.16]).

[61] *R v Cavkic* (2005) 12 VR 136, [227]; [2005] VSCA 182.

[62] *R v Cavkic (No 2)* (2009) 28 VR 341, [54]–[55] (Vincent, Nettle JJA and Vickery AJA); [2009] VSCA 43; *Benbrika v The Queen* (2010) 29 VR 593, [138]–[141] (Maxwell P, Nettle and Weinberg JJA); [2010] VSCA 281.

[63] *Dawson v The Queen* (1961) 106 CLR 1, 18 (Dixon CJ).

[64] Section 63 would also have to be amended to account for the judge's explanation of the phrase "proof beyond reasonable doubt" being permitted irrespective of whether the jury has asked a direct or indirect question about the meaning of the phrase.

(i) a reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility; and
(ii) the standard of proof beyond reasonable doubt can be contrasted with the lower civil standard of proof on the balance of probabilities; or

(f) indicate that –

(i) even if the jury prefers the evidence for the prosecution, the jury should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence; and
(ii) even if the jury does not positively believe the evidence for the defence, the jury cannot find the accused guilty if the evidence gives rise to a reasonable doubt

(2) The trial judge may adapt his or her explanation of the phrase 'proof beyond reasonable doubt' in order to respond to the particular question asked by the jury, or even if a particular question has not been asked by the jury the trial judge may adapt his or her explanation to the circumstances of the case.

Thus, it can be seen that: (1) the test in *R v Chatzidimitriou*[65] has been incorporated in the proposed s 64(1)(d)(iii); (2) the High Court's encouragement of the practice of contrasting the standard of proof beyond reasonable doubt with the lower civil standard of proof on the balance of probabilities has been added as a new s 64(1)(e)(ii); (3) the statement "a reasonable doubt is a doubt which the jury considers reasonable" has been inserted under the proposed s 64(1)(d)(ii); and (4) the phrase "proof beyond reasonable doubt" not being equivalent to being sure or certain, and not being able to be referenced to a percentage chance of guilt, has been incorporated in the proposed s 64(1)(b)(ii).

The next step in the analysis is to consider the cases of *Tyrrell v The Queen*,[66] *IW v The Queen*,[67] *JN v The Queen*,[68] *Xu v The Queen*[69] and *Pell v The Queen*,[70] where the guilty verdicts were overturned on appeal, in order to ascertain whether a common theme of jury misunderstanding of the term "beyond reasonable doubt" can be discerned. In other words, would a trial judge's ability, unfettered by either the common law or the requirement in ss 63 and 64 of the *Jury Directions Act* that the jury ask a question, to explain the phrase "proof beyond reasonable doubt" to the jury have made a difference to the jury's verdict?

## III. Successful Appeal Cases on Unreasonableness Grounds

> But in the absence of eye-witness there's always a doubt, sometimes only the shadow of a doubt. The law says "reasonable doubt", but I think a defendant's entitled to the shadow of doubt. There's always the possibility, no matter how improbable, that he's innocent.[71]

As mentioned above, the common theme across the cases examined in this part is to ask: how did the jury arrive at a guilty verdict against the standard of beyond reasonable doubt when the Crown case was palpably weak? For example, in *Wood v The Queen*,[72] the Crown case was that the appellant had murdered his partner, Ms Byrne, by throwing her from a cliff onto rocks below. The jury found Mr Wood guilty. However, five of the nine grounds of appeal were successful, including Ground 1 ("The verdict is unreasonable and cannot be supported by the evidence") and Ground 6 ("The trial miscarried by reason of the prejudice occasioned by the Crown Prosecutor").

As regards Ground 1, in applying the approach set out by the High Court in *M v Queen*[73] – namely, whether the Court of Appeal thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty – McClellan CJ at CL (with whom Latham

[65] *R v Chatzidimitriou* (2000) 1 VR 493, 498 [11] (Phillips JA); [2000] VSCA 91.

[66] *Tyrrell v The Queen* [2019] VSCA 52 (Kaye, Niall and Weinberg JJA).

[67] *IW v The Queen* [2019] NSWCCA 311.

[68] *JN v The Queen* [2019] NSWCCA 287.

[69] *Xu v The Queen* [2019] NSWCCA 178.

[70] *Pell v The Queen* (2020) 94 ALJR 394; [2020] HCA 12.

[71] Harper Lee, *To Kill a Mocking Bird* (Arrow Books, 2017) 242.

[72] *Wood v The Queen* (2012) 84 NSWLR 581; [2012] NSWCCA 21.

[73] *M v The Queen* (1994) 181 CLR 487, 493 (Mason CJ, Deane, Dawson and Toohey JJ).

and Rothman JJ agreed) reviewed the entirety of the evidence at the trial and "concluded that the verdict of the jury cannot be supported".[74]

McClellan CJ at CL upheld Ground 6 because the Crown prosecutor reversed the onus of proof,[75] observing that "when determining whether the jury's verdict was unreasonable it is important to give careful consideration to the way in which the prosecutor put the Crown case to the jury".[76]

Thus, as *Wood* demonstrates, the challenge, when a Court of Appeal is taking a holistic approach to the evidence, is to identify those factors that pertain to the jury's understanding of beyond reasonable doubt in the successful appeals on unreasonableness grounds in the sexual assault cases to be considered in this part. This is particularly pertinent in sexual assault cases where similar fact evidence, multiple charges, and the length of time that has elapsed between the alleged offences and the date of the trial are common features of such cases.

## A. Tyrrell v The Queen

In *Tyrrell v The Queen*,[77] the applicant appealed his multiple convictions of buggery and indecent assault upon a male. The charges on the indictment were alleged to have occurred in 1965 and 1966, and the applicant's trial took place 53 years later in 2018. This very considerable span of time in itself raises the first red flag of doubt given the forensic disadvantage to the applicant.[78] In Victoria, the common law *Longman v The Queen* direction has been abolished by s 40 of the *Jury Directions Act*:

> Abolition of common law rules.
>
> Any rule of common law under which a trial judge is required or permitted to direct the jury on a disadvantage to the accused in challenging, adducing or giving evidence or conducting his or her case because of delay is abolished.
>
> Notes
>
> 1 This provision abolishes the rule attributed to *Longman v R* [1989] HCA 60; (1989) 168 CLR 79, followed in *Crampton v R* [2000] HCA 60; (2000) 206 CLR 161 and applied in relation to the corroborated evidence of a complainant in *Doggett v R* [2001] HCA 46; (2001) 208 CLR 343.
> 2 Section 4 applies generally to override any rule of law or practice to the contrary of this Act.

The *Longman* direction has been replaced by the more stringent test of significant forensic disadvantage under s 39(2) of the *Jury Directions Act*, which states that the trial judge may direct the jury on forensic disadvantage experienced by the accused only if the trial judge is satisfied that the accused has experienced a significant forensic disadvantage. Such a direction must not include phrases in the *Longman* direction considered to be problematic, such as "it would be dangerous or unsafe to convict the accused" or "the victim's evidence should be scrutinised with great care".[79]

Further, as the Court of Appeal pointed out: "At the trial, the prosecution case relied, wholly, on the evidence of the complainant."[80] In other words, there was no corroborative evidence against the applicant who did not have any convictions either before or after the alleged offending.[81]

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[74] *Wood v The Queen* (2012) 84 NSWLR 581, [387]; [2012] NSWCCA 21.

[75] *Wood v The Queen* (2012) 84 NSWLR 581, [605]; [2012] NSWCCA 21.

[76] *Wood v The Queen* (2012) 84 NSWLR 581, [281]; [2012] NSWCCA 21.

[77] *Tyrrell v The Queen* [2019] VSCA 52 (Kaye, Niall and Weinberg JJA).

[78] *Longman v The Queen* (1989) 168 CLR 79; *Jury Directions Act 2015* (Vic) ss 39(2), 40.

[79] *Jury Directions Act 2015* (Vic) s 39(3)(b)(i), (ii); Victoria, *Parliamentary Debates*, Legislative Assembly, 18 March 2015, 680 <https://www.parliament.vic.gov.au/images/stories/daily-hansard/Assembly_2015/Assembly_Daily_Extract_Wednesday_18_March_2015_from_Book_4.pdf>.

[80] *Tyrrell v The Queen* [2019] VSCA 52, [90].

[81] *Tyrrell v The Queen* [2019] VSCA 52, [54].

The Court of Appeal, in following the requirements of s 276(1)(a) of the *Criminal Procedure Act 2009* (Vic),[82] examined the evidence under three headings: (1) "Inconsistencies in complainant's evidence"; (2) "Improbabilities in complainant's evidence"; (3) "Effect of delay: Missing evidence".

Under heading (1), the Court of Appeal drew the following telling conclusion in discussing the complainant's original statement to the police that the applicant's abuse had continued until the end of 1968 when in fact the applicant had left the school in 1966:

> The complainant said that during the two years of 1965 and 1966, there were 142 occasions on which the applicant sexually abused him. If the complainant's evidence were true, during that period, he was subjected to sheer torment on a regular and relentless basis. In those circumstances, when the applicant left the school at the end of 1966, the complainant must have felt enormous relief. The departure of the applicant from the school would have been an unforgettable landmark in his young life, a watershed in his school years. The fact that the complainant did not recall that event, but, rather, recalled that the abuse continued in the ensuing two years, was a most significant discrepancy in his evidence. In our view, it could not reasonably be accepted that the explanation given by the complainant – that he thought that the abuse went on longer than it actually did – could account for that discrepancy.[83]

The Court of Appeal went on to draw another unfavourable conclusion as to the credibility and reliability of the complainant's account in discussing the evidence of Brother McCabe who, on the complainant's testimony, had entered the room when the last incident in which the applicant sexually abused him is said to have occurred:[84]

> The fact that the complainant nominated McCabe as a witness to the incident that was the subject of charge 14, knowing or believing that McCabe was then deceased, was a further matter that ought to have given the jury, at the very least, reason to pause in reflecting on the credibility and reliability of the complainant's account.[85]

Under heading (2), the Court of Appeal found that "the fact that the abuse was so frequent, and so brazen, but went undetected, added to the improbabilities that were inherent in the account given by the complainant in his evidence".[86] The Court of Appeal went even further when discussing the evidence of Dr Keck, which was to the effect that if the complainant's account was truthful as to the applicant putting his hand up the complainant's anus, then long-lasting damage would have ensued to a young boy:

> [C]ounsel for the applicant was correct to point out that the evidence given by Dr Keck made it most improbable – if not impossible – that the offences that were alleged to have been committed, and which comprised charges 11, 12 and 13, could have involved anal penetration by the hand of the applicant without the complainant sustaining significant injury, which he did not.[87]

In addition, there were two other factors going to the improbability of the complainant's account. First, the complainant had been convicted of two serious offences,[88] and in neither case, in the course of plea for mitigation in sentencing, did the complainant inform his lawyers of the alleged abuse at the hands of the applicant. Secondly, the applicant had enjoyed a long and successful teaching career, with no criminal convictions. The Court of Appeal pointed out that the alleged offending had the hallmarks of "a practised and incorrigible pedophile", going on to state "it is improbable that, after the applicant had abused the

[82] Section 276(1)(a) states: "the Court of Appeal must allow the appeal against conviction if the appellant satisfies the court that – (a) the verdict of the jury is unreasonable or cannot be supported having regard to the evidence".

[83] *Tyrrell v The Queen* [2019] VSCA 52, [108].

[84] McCabe gave evidence for the prosecution. The trial judge gave the prosecution permission to cross-examine McCabe under s 38 (unfavourable witnesses) of the *Evidence Act 2008* (Vic). McCabe remained consistent in his account to the police that the incident alleged by the complainant did not happen.

[85] *Tyrrell v The Queen* [2019] VSCA 52, [120].

[86] *Tyrrell v The Queen* [2019] VSCA 52, [124].

[87] *Tyrrell v The Queen* [2019] VSCA 52, [126].

[88] In 1976, the complainant pleaded guilty to manslaughter and robbery. In 1995, the complainant pleaded guilty to intentionally causing serious injury.

complainant in the manner described by the complainant, he underwent a dramatic transformation, and desisted from any further conduct of the kind described by the complainant".[89]

Under heading (3), the Court of Appeal observed that the trial judge gave a thorough and detailed forensic disadvantage warning to the jury, which included:

(1) the impact the delay had on the applicant's ability to defend himself;
(2) the applicant's lost opportunity to make inquiries close to or at the time of the incidents;
(3) the applicant lost the means of testing the complainant's allegations;
(4) the applicant could not call other potential witnesses who might have been able to shed light on the surrounding circumstances;
(5) the delay had the effect that the complainant could not identify the timing of the offences with accuracy, meaning the applicant was unable to raise a defence that he had been doing something else on the day of an alleged offence; and
(6) if the complaint had been made closer to the time of the alleged offending, the complainant could have been medically examined so as to provide any evidence contradicting his allegations.[90]

This list of six disadvantages was followed by the trial judge directing "the jury that it must take those disadvantages into consideration when determining whether the prosecution had proven its case against the applicant beyond reasonable doubt".[91] As the Court of Appeal recognised, "the law proceeds on the assumption that juries do take into account, and adhere to, directions, such as those given by the judge to the jury in this case".[92]

This article is challenging that assumption insofar as whether the overall directions to the jury were sufficient to link the forensic disadvantages faced by the applicant to the criminal standard of proof of beyond reasonable doubt. It begs this question: if the directions on forensic disadvantage were thorough, taken into account and adhered to by the jury, then why did the Court of Appeal find that it was not open to the jury to be satisfied beyond reasonable doubt that the applicant was guilty of the offences on which he was convicted?

The Court of Appeal went on to note that the unavailability of the complainant's mother and brother (going to the complainant's state on returning from school and the alleged extra tuition), and Brother Carey (applicant denied staying after school to assist a student in his studies and circumstances in which the complainant was expelled from school in 1969) meant that the forensic disadvantage to the applicant was considerable:

> Where the defence was able to identify relevant objective facts – such as the correct date of death of the complainant's grandfather, and the fact that the applicant ceased to teach at the college at the end of 1966 – those facts significantly contradicted or undermined the evidence of the complainant in important respects. Thus, the forensic disadvantage to the defence, arising from the delay, was by no means theoretical.[93]

Consequently, the Court of Appeal held that the appeal on the unreasonableness ground succeeded:

> Each of the matters, that we have discussed in respect of ground 1, are matters of moment. Taken together, in our view, it is inevitable that they raise a reasonable doubt about the evidence of the complainant. In combination, the matters which we have discussed have a greater force than the sum of the individual issues standing alone. The concatenation of those matters, working together, raise a serious doubt in the minds of each member of this Court as to the proof of the guilt of the applicant beyond reasonable doubt.[94]

Thus, for present purposes, the key question is: how – given the powerful almost compelling evidence casting doubt as to credibility and reliability of the complainant's account, and the trial judge's thorough and detailed forensic disadvantage warning to the jury – did the jury convict the applicant? Would a

[89] *Tyrrell v The Queen* [2019] VSCA 52, [141]–[142].

[90] *Tyrrell v The Queen* [2019] VSCA 52, [146]–[147].

[91] *Tyrrell v The Queen* [2019] VSCA 52, [147].

[92] *Tyrrell v The Queen* [2019] VSCA 52, [148].

[93] *Tyrrell v The Queen* [2019] VSCA 52, [152].

[94] *Tyrrell v The Queen* [2019] VSCA 52, [153].

specific direction from the trial judge as to the meaning of the criminal standard of "beyond reasonable doubt" have made any difference? Was it simply, in the current climate, the jury responding to historical sexual assault allegations against church figures? This latter question is further considered in regards to the case of *Pell v The Queen*.[95]

## B. IW v The Queen

In *IW v The Queen*,[96] the appellant had been convicted of two counts of sexually assaulting a child in his care.[97] The New South Wales Court of Criminal Appeal in quashing the two convictions upheld six grounds of appeal.[98] For present purposes, the focus is on Ground 5 – the verdicts were unreasonable and cannot be supported having regard to the evidence. The leading judgment was given by Bellew J (with whom Bathurst CJ and Fullerton J agreed), who set out the relevant matters in support of the appellant under six headings:

(1) The evidence of complaint – which Bellew J found "was lacking in both consistency and cogency".[99]
(2) The Facebook messages – where Bellew J noted the complainant had lied to police over her having "absolutely no contact" with the appellant and his wife (LW) since leaving their care.[100] Bellew J also accepted "that it was ER [the complainant's aunt's partner] who, in the absence of any allegation of the complainant, was suggesting that the appellant was a paedophile".[101]
(3) The complainant's expressed desire to remain in the appellant's care – where Bellew J found there was "objective evidence which is capable of supporting a conclusion that the complainant was happy whilst living with the appellant and LW, and had expressed a desire to stay".[102]
(4) The timing of the alleged offending – where Bellew J accepted "the substance in the submission advanced by senior counsel for the appellant as to the unreliability of the complainant's account of the timing of the relevant events".[103]
(5) Statements attributed by the complainant to the appellant – where Bellew J found the evidence supported "a conclusion that in making these assertions, the complainant effectively acted upon the suggestions of ER in their exchanges of messages".[104]
(6) The evidence of the appellant's prior good character – where Bellew J found there was "a plethora of evidence to support the fact that the appellant was a person of prior good character".[105]

In the context of jury's understanding of the meaning of "proof beyond reasonable doubt" and the fact that the appellant's prior good character played such a significant part in the trial, it is instructive to set out further observations by Bellew J under heading (6) above:

> That evidence included the fact that he had been accredited as a foster carer in 2007, an accreditation which was, as might be expected, awarded after an exhaustive assessment process. The evidence also supported a conclusion that, consistent with his prior good character, the appellant had discharged his responsibilities as a foster carer not only without complaint, but in a manner which had earned the unequivocal and

[95] *Pell v The Queen* (2020) 94 ALJR 394; [2020] HCA 12.

[96] *IW v The Queen* [2019] NSWCCA 311.

[97] The appellant and his wife (LW) were registered foster carers.

[98] Of the six grounds of appeal that were made out: three grounds dealt with the admission of evidence in rebuttal of good character and credibility, and the lack of adequate directions; one dealt with directions to the jury about complaint; one dealt with the verdicts being unreasonable and unsupported by the evidence; and one dealt with the evidence of the complainant being replayed to the jury without any reminder as to her cross-examination, any reminder of the evidence of the appellant, or any warning as to misuse.

[99] *IW v The Queen* [2019] NSWCCA 311, [237].

[100] *IW v The Queen* [2019] NSWCCA 311, [239].

[101] *IW v The Queen* [2019] NSWCCA 311, [240].

[102] *IW v The Queen* [2019] NSWCCA 311, [248].

[103] *IW v The Queen* [2019] NSWCCA 311, [255].

[104] *IW v The Queen* [2019] NSWCCA 311, [264].

[105] *IW v The Queen* [2019] NSWCCA 311, [265].

> unsolicited praise of Ms Taylor [Programs Manager of the Wesley Mission Out of Home Care], in the context of a regime of continuous monitoring and reporting.[106]

In coming to a conclusion as to whether the verdicts were unreasonable and cannot be supported having regard to the evidence, Bellew J noted that: "Proof of a matter beyond reasonable doubt involves a rejection of all reasonable hypotheses, or any reasonable possibility inconsistent with the Crown case."[107]

Bellew J then accepted that there were three real possibilities[108] that were open on the evidence and the Crown had failed to exclude:

> (i) the complainant was making up her evidence; or
> (ii) the complainant was giving evidence that was not her genuine memory; or
> (iii) the complainant's evidence was simply wrong, and that the alleged acts did not occur.[109]

So, again, the question to be asked is: would a specific direction from the trial judge as to the meaning of the criminal standard of "beyond reasonable doubt" have made any difference to the verdicts of guilty? In this case, the task was made more difficult by virtue of the numerous errors made by the trial judge, Bright DCJ, which were the subject of the other five successful grounds of appeal.

With regard to a specific direction as to the meaning of the criminal standard of "beyond reasonable doubt", one of the unsuccessful grounds of appeal was that the trial judge should have directed the jury that, even if the evidence led by the Crown was preferred, the appellant could not be found guilty unless the jury was satisfied beyond reasonable doubt of the truth of that evidence, citing *Liberato v The Queen* in support:

> When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question: who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issues which it bears the onus of proving. The jury must be told that, even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue.[110]

In considering this ground of appeal, Bellew J highlighted the recent authority of *R v Roos*[111] as to the circumstances in which a *Liberato*-type direction may be unnecessary:

> In *Roos v The Queen*, Gleeson JA (with whom Harrison and Davies JJ agreed) concluded that it would be wrong for a trial judge to indicate to a jury that guilt or innocence turned upon a "choice" between two inconsistent versions, but that a *Liberato*-type direction may be unnecessary where the jury is given clear directions regarding the onus and standard of proof.[112]

As to the onus of proof, the trial judge's directions had included the following:

> [I]t is not a question of saying for instance, "I'm not sure where the truth lies, but I prefer the evidence of the complainant to the accused". Before you can convict the accused of any count, you need to accept the evidence of the complainant as a witness of truth and reliability in relation to that count and that involves rejecting the denials by the accused.[113]

Bellew J then set out the trial judge's directions over and above the directions as to the onus and standard of proof:

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[106] *IW v The Queen* [2019] NSWCCA 311, [265].

[107] *IW v The Queen* [2019] NSWCCA 311, [268], citing *Moore v The Queen* [2016] NSWCCA 185, [43], [99].

[108] As opposed to being fanciful or speculative: *Moore v The Queen* [2016] NSWCCA 185, [37].

[109] *IW v The Queen* [2019] NSWCCA 311, [270].

[110] *IW v The Queen* [2019] NSWCCA 311, [276] (Bellew J), citing *Liberato v The Queen* (1985) 159 CLR 507, 515 (Brennan J).

[111] *R v Roos* [2019] NSWCCA 67, [89] (commencing).

[112] *IW v The Queen* [2019] NSWCCA 311, [281].

[113] *IW v The Queen* [2019] NSWCCA 311, [274].

> In the present case, over and above the directions as to the onus and standard of proof, the trial judge directed the jury that:
>
> (i) if the evidence led in the defence case was accepted, the appellant must be found not guilty;
> (ii) if the denials of the appellant in his record of interview and his sworn evidence were accepted, the appellant must be found not guilty;
> (iii) even if the evidence of the appellant and those called as witnesses in the defence case was possibly not accepted, but nevertheless left a reasonable doubt, the appellant must be found not guilty;
> (iv) it was not the case that the jury was required to believe that the appellant was telling the truth before he was entitled to be found not guilty; and
> (v) if, at the end of deliberations, the jury found that the Crown had failed to eliminate, as a reasonable possibility, that the version presented by the defence was true, then the Crown had failed in its obligation to persuade the jury of the appellant's guilt beyond reasonable doubt and the appellant should be found not guilty.[114]

Consequently, Bellew J held that because the trial judge did not suggest to the jury that they were required to choose between the Crown witnesses and the appellant as to who was to be believed, the jury could not have been left with the impression that it was only if they believed the appellant's evidence was true that they could have a reasonable doubt as to his guilt. Therefore, leave to argue this ground was refused.[115]

However, it does leave open the question as to whether a model direction on the onus and standard of proof should include a reference to a *Liberato*-type direction at the discretion of the trial judge.

## C. JN v The Queen

In *JN v The Queen*,[116] the appellant had been convicted of nine counts of sexual assault of a child. The complainants were a brother and sister, who alleged that the appellant had sexually assaulted each of them between 1994 and 2002. Indicative of the trial judge's doubts, immediately after the verdicts were given O'Rourke SC DCJ granted the appellant bail:

> Shortly after the verdicts were given and in disposing of a detention application made by the Crown, the trial judge made the following remarks:
>
> This Court is, of course, bound by and respects the verdicts of the jury. To my mind, however, there are real concerns in this particular case. As I sat and listened and watched the evidence that fell and the manner in which it did that there would be legitimate concerns as to whether or not the evidence in this trial justifies the verdicts of the jury.[117]

These remarks carry weight as the trial judge, who had lengthy and substantial experience of criminal trials, enjoyed the same advantages as the jury in seeing and hearing the evidence.

The main ground of appeal was that the verdicts of guilty were unreasonable, or could not be supported, having regard to the evidence, which required the Court to ask itself whether it thought that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. The leading judgment was given by Payne JA (with whom Button and Lonergan JJ agreed).

In order to understand the case, it is necessary to set out the relevant relationships and family compositions (the names used are pseudonyms). The complainants, Simon and Yvonne, are siblings and lived with their father, mother (Mary) and their elder brother (Victor). The appellant lived with his mother, father, younger brother (Michael) and three sisters. The appellant's home was small and busy, and there was always someone home. The latter is significant as the alleged offences were said to have taken place immediately after school in the appellant's bedroom, which he shared with Michael.

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[114] *IW v The Queen* [2019] NSWCCA 311, [282].

[115] *IW v The Queen* [2019] NSWCCA 311, [284]–[285].

[116] *JN v The Queen* [2019] NSWCCA 287.

[117] *JN v The Queen* [2019] NSWCCA 287, [23] (Payne JA).

The ages of the children are also important. Victor is one year older than the appellant. The appellant is eight years older than Simon and 12 years older than Yvonne. Michael was four years younger than Simon and a month younger than Yvonne.[118]

Payne JA first addressed the counts relating to Yvonne:

> I harbour considerable doubts about Yvonne's evidence. My doubts about Yvonne's credibility and reliability as a witness commence from a consideration of the quality of Yvonne's recollection, which was fragmentary and consisted of "flashbacks" of "snippets" of memory. She commenced her evidence with a statement that "I don't really have much of a recollection of my childhood". Whilst I do not doubt that childhood trauma may lead a victim to repress memories of abuse, a remarkable feature of the evidence in this case is that Simon's recollection of abuse was similarly fragmentary and also consisted of "flashbacks" which, on Yvonne's account, were experienced by the siblings after many years at much the same time and without there being any prior discussion between them.[119]

Even though there were two complainants and the jury was entitled to use tendency evidence, the "remarkable feature of the evidence" should surely have raised a doubt in the jury's mind as to the possibility of collusion between brother and sister, a fortiori given other evidence pointing to the invention of the allegations against the appellant.

For example, Payne JA then went on to discuss the alleged scale of the offending against Yvonne, which his Honour described as "staggering":[120]

> Yvonne agreed in cross-examination that she had made statements to the police that she went to the appellant's house five days a week in the time she was in years 3 to 6 at primary school and was sexually assaulted 2-3 times a week during that period by the appellant. This, she agreed, amounted to many hundreds of sexual assaults, including the repeated penetration of her anus by JN [the appellant].[121]

All this is said to have occurred in a small house occupied by seven people, in a bedroom with no lock that the appellant shared with his younger brother and was never detected. Yvonne admitted in her evidence that the appellant's "'parents were rarely, if ever, not home' and that JN [the appellant] had three sisters of school age and a brother, who were 'often' but 'not always' at home".[122]

Further, the credibility of Yvonne's evidence is stretched to the limit with her explanation for her repeated attendance at the appellant's home, in the face of the alleged regularity of the sexual assaults, being to play video games with Michael because she was not allowed to do so at home. This evidence was contradicted by her older brother Victor, who "gave evidence that their parents let them play video games at home without restriction".[123]

However, the coup de grace was delivered by Yvonne's mother, Mary, who testified that she collected Yvonne and Simon from after-care at the school between 5.00 pm and 5.30 pm.[124] As Payne JA observed: "This evidence raises a significant doubt about Yvonne's evidence that the assaults she described took place between 3.30 and 4.30 pm after school during her primary school years."[125] With respect, "significant doubt" appears to be an understatement, when the children's own mother gave unchallenged evidence that they could not have been at the appellant's home when the alleged offences took place.

As to the evidence of Simon, Payne JA found a "good deal of Simon's evidence was simply fantastic in the literal sense".[126] In reviewing the credibility and reliability of Simon's evidence, Payne JA observed "Simon's departures from his original versions of when the offending ceased is remarkable", followed

[118] *JN v The Queen* [2019] NSWCCA 287, [46]–[47] (Payne JA).

[119] *JN v The Queen* [2019] NSWCCA 287, [79].

[120] *JN v The Queen* [2019] NSWCCA 287, [82].

[121] *JN v The Queen* [2019] NSWCCA 287, [83].

[122] *JN v The Queen* [2019] NSWCCA 287, [87].

[123] *JN v The Queen* [2019] NSWCCA 287, [92].

[124] *JN v The Queen* [2019] NSWCCA 287, [85].

[125] *JN v The Queen* [2019] NSWCCA 287, [86].

[126] *JN v The Queen* [2019] NSWCCA 287, [98].

by "Simon also gave irreconcilable accounts of the key milestone events by which he sought to give context to the offending".[127]

Finally, Payne JA dealt with the appellant complaining to police about Simon and Yvonne harassing him, which was actually part of police instigated pretext calls: "The appellant's actions are consistent with the conduct of an innocent man. At the very least the conduct contributes to raising reasonable doubt."[128] In light of the whole of the evidence, Payne JA concluded that "it was not open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offences on which he was convicted".[129]

In searching for a reason as to why the jury convicted the appellant in the face of so many inconsistencies in the complainants' evidence, the most obvious explanation is that there were two complainants and the jury used tendency reasoning. Indeed, Button J observed that "one can infer that the jury took into account as tendency evidence its satisfaction beyond reasonable doubt of the guilt of the appellant of the counts pertaining to Yvonne in support of its verdicts with regard to the counts pertaining to Simon, when it should not have been so satisfied of the former".[130] Nevertheless, the sheer unlikelihood of the alleged offending occurring undetected for so long in the appellant's "busy" home, especially in light of the evidence of the complainants' mother, Mary, that they were in after-school care at the alleged time of the offending, does give pause as to whether or not the jury understood the high bar of proof faced by the Crown.

## D. Xu v The Queen

The essential features of *Xu v The Queen*[131] were outlined above. Mr Xu was charged with a total of seven counts of indecent assault and sexual assault; he was convicted of two counts based on evidence of events of 12 August 2017 and was acquitted of five counts based on evidence of events of 19 August 2017.[132] As shown below, the different verdicts for each date are significant. The leading judgment was given by Harrison J (with whom Bathurst CJ and N Adams J (in part) agreed). There were four grounds of appeal, three of which were upheld.[133] For present purposes, the focus is on Ground 2: the guilty verdicts on counts 1 and 2 were unreasonable, unsafe and unsatisfactory, and could not be supported having regard to the evidence and the acquittals on counts 3, 4, 5, 6 and 7.

The fundamental reason why Harrison J upheld the appeal on Ground 2 is encapsulated in the following passage, which addresses the inconsistency in the jury's verdicts between the two dates of 12 and 19 August:

> In my view, the jury must in all of these very circumstances have entertained a reasonable doubt about what is said to have occurred on 12 August 2017. If the complainant was genuinely criminally assaulted on that day, it defies common sense, which juries are universally exhorted to apply to their deliberations, that the complainant would have disregarded or ignored what had occurred and nevertheless had returned to become involved in similar activity with Mr Xu to which the jury concluded, either, he must have consented or that Mr Xu reasonably believed he consented to.[134]

Harrison J was fortified in his view when examining the Facebook messages exchanged between the complainant and Mr Xu between 12 and 19 August:

> Notwithstanding what the complainant says occurred, and despite his evidence that the sexual interaction with Mr Xu was non-consensual, the complainant and Mr Xu continued between that day [12 August] and

[127] *JN v The Queen* [2019] NSWCCA 287, [114]–[115].

[128] *JN v The Queen* [2019] NSWCCA 287, [147].

[129] *JN v The Queen* [2019] NSWCCA 287, [158].

[130] *JN v The Queen* [2019] NSWCCA 287, [208].

[131] *Xu v The Queen* [2019] NSWCCA 178.

[132] *Xu v The Queen* [2019] NSWCCA 178, [6].

[133] Ground 1 was upheld, which concerned the failure of defence counsel to adduce evidence of Mr Xu's prior good character. Ground 2, that the guilty verdicts were unreasonable, was upheld. Ground 3, which dealt with the admission of evidence relating to the effects allegedly suffered by the complainant on 12 August 2017 concerning persistent and severe headaches, and an erection of a highly abnormal duration, was also upheld.

[134] *Xu v The Queen* [2019] NSWCCA 178, [55].

> 19 August to exchange messages on Facebook. They had lunch together on 15 August. They corresponded about an online game they were playing.[135]

This led Harrison J to conclude that "the jury verdicts on counts 1 and 2 were unreasonable".[136] As with the other cases examined above, the difficulty is in separating out the different successful grounds of appeal in terms of the jury's understanding of the meaning of "proof beyond reasonable doubt". Here, as with *IW v The Queen*,[137] the treatment of good character evidence may have played a role in the jury's guilty verdicts.

Another aspect of this case that was highlighted by N Adams J concerned the inconsistency between the acquittals on five counts and the guilty verdicts on two counts. Her Honour cited a passage from *MFA v The Queen*, an extract from which is cited below:

> A juror [in the context of multiple sexual assault counts] might consider it more probable than not that a complainant is telling the truth but require something additional before reaching a conclusion beyond reasonable doubt. *The criminal trial procedure is designed to reinforce, in jurors, a sense of the seriousness of their task, and of the heavy burden of proof undertaken by the prosecution. A verdict of not guilty does not necessarily imply that a complainant has been disbelieved, or a want of confidence in the complainant. It may simply reflect a cautious approach to the discharge of a heavy responsibility* … it may appear to a jury, that, although a number of offences have been alleged, justice is met by convicting an accused of some only.[138]

Although the jury will ordinarily be directed to give separate consideration to each count, it is an open question as to how a jury undertakes this task in the face of multiple counts on the indictment, and whether there is cumulative reinforcement towards a guilty verdict on some counts where the evidence is stronger based on the jury considering it more probable than not that the complainant is telling the truth. Thus, any concerns on the part of the jury as to the discharge of the heavy responsibility of finding the accused guilty beyond reasonable doubt are allayed by the sheer number of counts on the indictment. These concerns may be further diluted where there are multiple complainants and tendency evidence is admitted, as in *JN v The Queen*[139] above. As such, the question being posed in this article is whether or not the current criminal trial procedure in Australia, in the absence of clear directions to the jury on the meaning of beyond reasonable doubt (excepting Victoria), is robust enough to ensure that a person is innocent until proven guilty on a standard of proof beyond "very likely".

## E. Pell v The Queen

*Pell v The Queen*[140] has strong similarities with *Tyrrell v The Queen*,[141] in that both cases involved religious figures who were alleged to have committed sexual offences against children many years prior.[142] However, *Pell v the Queen* differs from the previous four cases considered in this part because the case was decided by the High Court following the Victorian Court of Appeal's decision to dismiss the appeal by a 2-1 majority.[143] The High Court, in unanimously (7-0) allowing the appeal, agreed with the analysis of the dissenting judge, Weinberg JA.

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[135] *Xu v The Queen* [2019] NSWCCA 178, [62].

[136] *Xu v The Queen* [2019] NSWCCA 178, [63].

[137] *IW v The Queen* [2019] NSWCCA 311.

[138] *Xu v The Queen* [2019] NSWCCA 178, [83], citing *MFA v The Queen* (2002) 213 CLR 606, [34]; [2002] HCA 53 (emphasis added).

[139] *JN v The Queen* [2019] NSWCCA 287.

[140] *Pell v The Queen* (2020) 94 ALJR 394; [2020] HCA 12.

[141] *Tyrrell v The Queen* [2019] VSCA 52.

[142] In *Tyrrell v The Queen* [2019] VSCA 52, the time period was 53 years; while in *Pell v The Queen* (2020) 94 ALJR 394; [2020] HCA 12, the time period was 22 years.

[143] Ferguson CJ and Maxwell P constituted the majority, with Weinberg JA in dissent.

The applicant had been convicted of one charge of sexual penetration of a child under 16 years and four charges of committing an act of indecency with or in the presence of a child under the age of 16 years:

> All the offences were alleged to have been committed in St Patrick's Cathedral, East Melbourne following the celebration of Sunday solemn Mass and within months of the applicant's installation as Archbishop of Melbourne. The victims of the alleged offending were two Cathedral choirboys, "A" and "B".[144]

The Crown case depended on the truth and reliability of A's evidence, as B had died before A made his complaint in 2015. Significantly, in 2001, in response to a question from his mother, B had said he had not been "interfered with or touched up" while in the cathedral choir.[145]

Essentially, the split in the Victorian Court of Appeal centred on the weight to be given to A's evidence in light of the evidence of the "opportunity witnesses".[146] The High Court summed up the differences between the majority and the minority views as follows:

> The members of the Court of Appeal viewed the recording of A's evidence, and that of a number of other prosecution witnesses. The majority, Ferguson CJ and Maxwell P, assessed A as a compellingly credible witness. There was evidence, adduced in the prosecution case from witnesses described as "the opportunity witnesses", with respect to the applicant's and others' movements following the conclusion of Sunday solemn Mass, which was inconsistent with acceptance of A's account. Their Honours concluded that no witness could say with certainty that the routines and practices described by the opportunity witnesses were never departed from (*Pell v The Queen* [2019] VSCA 186 at [166]). Their Honours reviewed a number of "solid obstacles" to conviction and in each case concluded that the jury had not been compelled to entertain a doubt as to the applicant's guilt.
>
> Weinberg JA, in dissent, considered that, in light of the unchallenged evidence of the opportunity witnesses, "the odds against [A's] account of how the abuse had occurred, would have to be substantial" (*Pell v The Queen* [2019] VSCA 186 at [1064]). His Honour concluded that the jury, acting reasonably on the whole of the evidence, ought to have had a reasonable doubt as to the applicant's guilt.[147]

In this regard, the High Court observed: "The division in the Court of Appeal in the assessment of A's credibility may be thought to underscore the highly subjective nature of demeanour-based judgments."[148] With respect, it also suggests that the majority fell into error by preferring the evidence of the complainant, which suggests the standard of proof of beyond reasonable doubt is not met by the jury making a choice between the veracity of the complainant and the accused, as set out in the suggested revised s 64(1)(f) in Part IIC above.

The trial judge was satisfied that the accused had experienced a significant forensic disadvantage,[149] and informed the jury of the nature of the disadvantage experienced by the accused and the need to take the disadvantage into account when considering the evidence.[150] However, as noted when discussing *Tyrrell v The Queen*[151] in Part IIIA above, such a direction on forensic disadvantage is somewhat undermined by s 39(3)(b) of the *Jury Directions Act*, which prevents the trial judge from saying or suggesting that it would be dangerous or unsafe to convict the accused or the victim's evidence (here A's uncorroborated evidence) should be scrutinised with great care.

More broadly, the weight of authority in Australia supports the proposition that a judge who entertains strong doubts as to the strength of the Crown's case is neither permitted to advise the jury to return a

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[144] *Pell v The Queen* (2020) 94 ALJR 394, [1]; [2020] HCA 12.

[145] *Pell v The Queen* (2020) 94 ALJR 394, [2]; [2020] HCA 12.

[146] The term "opportunity witnesses" refers to witnesses in the cathedral at the time of the alleged offending, whose unchallenged evidence greatly restricted the span of time in which the alleged offending could possibly have occurred.

[147] *Pell v The Queen* (2020) 94 ALJR 394, [5]–[6]; [2020] HCA 12.

[148] *Pell v The Queen* (2020) 94 ALJR 394, [49]; [2020] HCA 12, citing *Fox v Percy* (2003) 214 CLR 118, 129 [31] (Gleeson CJ, Gummow and Kirby JJ); [2003] HCA 22.

[149] *Jury Directions Act 2015* (Vic) s 39(2).

[150] *Jury Directions Act 2015* (Vic) s 39(3)(a).

[151] *Tyrrell v The Queen* [2019] VSCA 52.

verdict of not guilty,[152] nor direct them to do so unless the evidence taken at its highest could not sustain a guilty verdict beyond reasonable doubt.[153]

This was the second trial of the charges against Cardinal Pell (the jury at the first trial having been unable to agree on its verdicts), which was presided over by Kidd CJ of the County Court of Victoria. Arguably, given the strength of Weinberg JA's dissent, which was endorsed 7-0 in the High Court, Kidd CJ should have directed the second jury to return a verdict of not guilty because the evidence taken at its highest could not sustain a guilty verdict beyond reasonable doubt as a result of the compounding improbability of events having occurred as A described them in light of the unchallenged evidence given by church witnesses. The standard of criminal proof is well beyond "probable", yet objectively A's evidence was improbable, not even passing a prima facie case for prosecution.

This argument follows from the High Court's demolition of the analysis undertaken by the majority in the Court of Appeal:

> Their Honours reasoned, with respect to largely unchallenged evidence that was inconsistent with those allegations [made by A] (the "solid obstacles" to conviction), that notwithstanding each obstacle it remained *possible* that A's account was correct. The analysis failed to engage with whether, against this body of evidence, it was reasonably possible that A's account was not correct, such that there was a reasonable doubt as to the applicant's guilt.[154]

The High Court then proceeded to examine the "solid obstacles" to conviction:

> The applicant adopted Weinberg JA's analysis of his submission below with respect to the "compounding improbabilities" (*Pell v The Queen* [2019] VSCA 186 at [840]–[843], [1060]–[1064]). His Honour distilled the applicant's case to ten claimed compounding improbabilities (*Pell v The Queen* [2019] VSCA 186 at [841]).
>
> In this Court, the respondent correctly noted that a number of the claimed improbabilities raise the same point. It remains that acceptance of A's account of the first incident requires finding that: (i) contrary to the applicant's practice, he did not stand on the steps of the Cathedral greeting congregants for ten minutes or longer; (ii) contrary to long-standing church practice, the applicant returned unaccompanied to the priests' sacristy in his ceremonial vestments; (iii) from the time A and B re-entered the Cathedral, to the conclusion of the assaults, an interval of some five to six minutes, no other person entered the priests' sacristy; and (iv) no persons observed, and took action to stop, two robed choristers leaving the procession and going back into the Cathedral.
>
> It suffices to refer to the evidence concerning (i), (ii) and (iii) to demonstrate that, notwithstanding that the jury found A to be a credible and reliable witness, the evidence as a whole was not capable of excluding a reasonable doubt as to the applicant's guilt.[155]

Essentially, the High Court adopted the applicant's submission that the majority had reversed the standard and burden of proof "by asking whether there existed the reasonable possibility that A's account was correct, rather than whether the prosecution had negatived the reasonable possibility that it was not".[156]

The sheer improbability that a newly installed Archbishop in full regalia, who was normally accompanied by another church official, would choose such a tiny window of time to sexually abuse two choirboys after mass in a cathedral on a Sunday morning with numerous other church officials and members of the congregation in attendance, sits uncomfortably with and is in stark contrast to the meaning of "proof

[152] *Director of Public Prosecutions Reference No 1 of 2017* (2019) 93 ALJR 424; [2019] HCA 9. The High Court overruled *R v Prasad* (1979) 23 SASR 161, 163 (King CJ), which was authority for the judge being able to direct a jury in a criminal trial that it is open at any time after the close of the prosecution case to acquit the accused if the jury considers the evidence is insufficient to support a conviction. The High Court unanimously held that "the exercise of the discretion to give a *Prasad* direction based upon the trial judge's estimate of the cogency of the evidence to support conviction is inconsistent with the division of functions between judge and jury and, when given over objection, with the essential features of an adversarial trial": [56].

[153] *Doney v The Queen* (1990) 171 CLR 207, 214–215 (Deane, Dawson, Toohey, Gaudron and McHugh JJ). For a fuller discussion on this point, see Andrew Hemming, "When Should a Judge Stop a Trial?" (2013) 15 *University of Notre Dame Australia Law Review* 56.

[154] *Pell v The Queen* (2020) 94 ALJR 394, [46]; [2020] HCA 12 (emphasis in original).

[155] *Pell v The Queen* (2020) 94 ALJR 394, [56]–[58]; [2020] HCA 12.

[156] *Pell v The Queen* (2020) 94 ALJR 394, [54]; [2020] HCA 12.

beyond reasonable doubt". The High Court was unanimous in finding the jury "must have had a doubt" (as opposed to "might") about the applicant's guilt.[157]

## IV. Conclusion

> Nine of us now seem to feel that the defendant is innocent, but we're just gambling on probabilities. We may be wrong. We may be trying to return a guilty man to the community. No one can really know. But we have a reasonable doubt, and this is a safeguard that has enormous value in our system. No jury can declare a man guilty unless it's sure. We nine can't understand how you three are still so sure. Maybe you can tell us.[158]

This article has sought to show that in the five cases of sexual assault examined in Part III, serious doubts as to the respective juries' collective understanding of the meaning of "proof beyond reasonable doubt" have been raised. While it is acknowledged that difficulties exist in separating out the criminal standard of proof from other issues in the respective trials, such as judicial warnings and the admission of evidence, it is contended that prima facie each case was so riddled with inconsistencies in the complainant's evidence as to be open to question the decision to prosecute in the first place.

Of particular concern is the fact that in four of the five cases the offences were alleged to have occurred many years before the trial. This in turn raises the efficacy of a judicial forensic disadvantage warning to the jury. Of potentially even greater concern is the recent insertion of s 97A into the *Evidence Act 1995* (NSW), which other jurisdictions in the uniform evidence regime are said to be set to follow.[159] For child sexual abuse prosecutions, s 97A introduces a rebuttable presumption that the tendency evidence identified in s 97A(2) has significant probative value for the purposes of ss 97(1)(b) and 101(2).[160]

More generally, this article has sought to show that in each of the five cases examined the jury would have been assisted by an extended definition of the term "proof beyond reasonable doubt". This argument has been buttressed by reviewing the situation in other countries with a common law tradition such as England and Wales, Canada, New Zealand and the United States, all of which have embraced some form of definition of the term "proof beyond reasonable doubt" to be explained to the jury. Further support for the need for an extended definition has been garnered from the reasoning processes adopted by the appellate court in each of the five cases examined where the jury's verdict was overturned, especially in the application of the appeal ground that the jury's verdict was unreasonable with the associated demanding test of the jury "must have had a doubt".

Consequently, this article respectfully disagrees with the High Court's position, that it is both unnecessary and unwise for a trial judge to seek to explain to the jury the meaning of "proof beyond reasonable doubt", most recently affirmed in *R v Dookheea*,[161] and argues that Victoria has taken the appropriate course in enacting ss 63–64 of the *Jury Directions Act*. However, it is contended that both s 63 and s 64 can be improved by removing the requirement that an explanation of the phrase "proof beyond reasonable doubt" may only occur in response to a direct or indirect jury question. The suggested reforms are set out in Part IIC, especially as a counterweight to s 97A above. The time has come to acknowledge that the phrase "beyond reasonable doubt" is not so well understood in the community as to absolve the trial judge from giving an explanation to the jury. In this way, it is hoped that the possibility that an innocent person has been convicted will be reduced.

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[157] *Pell v The Queen* (2020) 94 ALJR 394, [119] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); [2020] HCA 12.

[158] Reginald Rose, *12 Angry Men* (Metro Goldwyn Mayer, 1957).

[159] Council of Attorneys-General (CAG) communiqué, 29 November 2019: "Model Bill to Amend Uniform Evidence Law Test for Admissibility of Tendency and Coincidence Evidence in Criminal Trials. Uniform Evidence Law CAG members: (1) Noted that the Australasian Parliamentary Counsel's Committee has prepared a Model Bill to implement the proposed reform of the Uniform Evidence Law test for admissibility of tendency and coincidence evidence in criminal proceedings agreed by CAG on 28 June 2019; (2) Agreed to implement the Model Bill." See <https://www.attorneygeneral.gov.au/media/media-releases/council-attorneys-general-communique-29-november-2019>.

[160] For a fuller discussion, see Andrew Hemming, "Is There Any Prospect of a Model Provision for Similar Fact/Propensity Evidence or the Coincidence/Tendency Rules in Australia?" (2020) 44 Crim LJ 207.

[161] *R v Dookheea* (2017) 262 CLR 402; [2017] HCA 36.