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SUPREME COURT OF NEW SOUTH WALES — COURT OF CRIMINAL APPEAL

R v STEWART

McClemens CJ, Nagle and Taylor JJ

9 November 1973

PROCEDURE – EVIDENCE – MEANING OF "REASONABLE DOUBT" – WHETHER THE JURY SHOULD HAVE DISCHARGED THE ACCUSED ON THE BASIS THAT SOME DOUBT COULD BE FOUND WHICH COULD MORALLY JUSTIFY THAT DECISION.

Appeal against conviction for murder on ground that trial judge had erred in his explanation to the jury of reasonable doubt. He defined this as doubt which upon the whole of the material could reasonably be held, and which emerged from the material presented – that it excluded fanciful doubts, doubts arising from more fanciful supposition, whimsical attitudes to questions of fact, and refusal to face up to decisions required.

[Reference was made to *Green v R* [1971] HCA 55; (1971) 126 CLR 28; [1972] ALR 524; 46 ALJR 545;
Dawson v R [1961] HCA 74; (1961) 106 CLR 1; [1962] ALR 365; 35 ALJR 360;
Brown v R [1913] HCA 70; (1913) 17 CLR 570;
Thomas v R [1960] HCA 2; (1960) 102 CLR 584; [1960] ALR 233; 33 ALJR 413.]

HELD: Appeal dismissed.
It was to be observed that the trial judge steadfastly adhered in his directions to telling the jury that the doubt with which they were concerned was a doubt they considered to be reasonably held by them and that it was for them to assess the material and decide whether it was a reasonable doubt in their minds.

McCLEMENS CJ: In his report the trial Judge referred to the prominence which counsel for the accused gave in his address to the question of proof beyond a reasonable doubt and the suggestions that were made in that address as to why the jury should be diffident about finding any fault in the accused and that they must find every single matter which might be raised in the evidence of the Crown conclusively proved in favour of the Crown's submissions as appearing from the evidence before they should return any verdict but one of innocence. He also referred to counsel for the accused's explanation of the meaning of beyond reasonable doubt and the fact that he suggested three states of feeling in which the jury might regard the case and which should lead them to an acquittal.

These 'states of feeling' amounted to an invitation to the jury to acquit because they would find it, and should find it, a dismal and virtually repugnant thing to convict the accused. There was a strong appeal to the jury's emotions. His Honour in his report took the view that the jury was being clearly invited to acquit the appellant on an approach to their task which did not amount to a determination, by an unemotional and objective assessment of the evidence, of the question whether the Crown had proved the essential allegations of the charge beyond doubt which they should regard as reasonably held by them.

Rather were they invited to discharge the appellant on the basis that some sort of doubt could be found as to some aspect of the evidence which could in some way morally justify them in discharging the appellant under a pretence of observing the law, as to do otherwise would be hard-hearted and lacking in sympathy for a man who had himself suffered serious injury.

It is to be observed that the learned trial judge steadfastly adhered in his directions to telling the jury that the doubt with which they were concerned was a doubt they considered to be reasonably held by them and that it was for them to assess the material and decide whether it was a reasonable doubt in their minds.

For these reasons we think the appeal fails, and it is dismissed.