ORDER PROHIBITING PUBLICATION OF THIS JUDGMENT OR ANY PART OF THE PROCEEDINGS TO DATE (INCLUDING THE RESULTS) IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF THE RETRIAL ORDERED IN [2024] NZCA 97. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 43/2024
[2024] NZSC 80

BETWEEN	CUONG VAN DO Applicant
AND	THE KING Respondent

Court: Glazebrook, Kós and Miller JJ

Counsel: J C Harder for Applicant
J M Pridgeon for Respondent

Judgment: 26 July 2024

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B We make an order prohibiting publication of this judgment or any part of the proceedings to date (including the results) in news media or on the internet or other publicly available database until final disposition of the retrial ordered in [2024] NZCA 97. Publication in a law report or law digest is permitted.

REASONS

[1] The applicant was tried before a jury in the District Court at Manukau on a single charge of possessing 435 grams of cannabis for sale. In summing up, the Judge

departed slightly from the recommended *Wanhalla* direction on the standard of proof.[1] The applicant was convicted.[2] An appeal to the Court of Appeal failed, and he now seeks leave to appeal here.[3]

[2] We set out the relevant parts of the recommended and given directions below:

R v Wanhalla[4]

> 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 a 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.

R v Do[5]

> … the standard of proof in a criminal trial is *high*. That is the standard of proof that the Crown must reach before you find the defendant guilty on the charge. The standard of proof is proof beyond reasonable doubt. The Crown will have met that standard if you are sure at the end of the case that the defendant is guilty, so as [defence counsel] has said, probably guilty *or more likely than not he is guilty* is not good enough. On the other hand, proof beyond reasonable doubt does not mean proof to a 100 per cent scientific certainty because that would be an impossible standard for the Crown to meet when, in criminal trials, we are dealing with witnesses who are asked to come to court and reconstruct things that have happened months or even years after the event.
>
> The best definition I can give you of a reasonable doubt comes from our Court of Appeal and this is how they define it. 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 the accused is guilty, you must find him guilty. On the other hand, if you are not sure whether the accused is guilty, you must find him not guilty.

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1 *R v Wanhalla* [2007] 2 NZLR 573 (CA).
2 *R v Do* [2022] NZDC 11393 (Judge Ryan, the trial Judge having been Judge McNaughton).
3 *Do v R* [2024] NZCA 97 (Wylie, Edwards and Hinton JJ) [CA judgment].
4 *R v Wanhalla*, above n 1, at [49] (emphasis added).
5 *R v Do* DC Manukau CRI-2019-092-6351, 4 June 2021 (Judge McNaughton) at [10]–[11] (emphasis added).

[3] As will be seen, the key differences lie in describing the standard as "high" (rather than "very high") and advising that "more likely than not" guilty (rather than "very likely" guilty) is not enough.

[4] About this, the Court of Appeal said:[6]

> … we agree … that the use of the language "likely guilty" instead of "very likely" was insufficient. But we are not satisfied it led to a miscarriage of justice in this case. The case against Mr Do was much stronger, particularly given the jury clearly rejected Mr Nyuyen's evidence. There is also no indication of confusion on the part of the jury. We are not satisfied that the language used by the Judge created a real risk of the verdict being unsafe.

[5] The applicant submits the departure from the terms recommended in *Wanhalla* meant the trial was thereby unfair for the purposes of s 25(a) and (c) of the New Zealand Bill of Rights Act 1990, and that the Court of Appeal erred in applying "no miscarriage" proviso reasoning in the face of that failure.

Our assessment

[6] As the Court of Appeal made clear in *Wanhalla* itself, and subsequently in *Wilson v R*, slavish adherence to the form of the recommended direction is not required.[7] In *Wanhalla* the Court said:[8]

> … we are not to be taken as asserting that the formula just stated is mandatory. It is not. Further, we wish to discourage too close a focus on the precise nuances of judicial directions. It is sufficient to make it clear that the concept involves a high standard of proof which is discharged only if the jury is sure or feels sure of guilt.

In *Wilson* the Court said the three elements of a *Wanhalla* direction were "among the most important things that a judge must address a jury on in a criminal trial". But, both reprising and expanding on *Wanhalla,* it said:[9]

> Exact expression in the terms above is not obligatory. But due direction on the three elements most certainly is. Failure by a judge to do so is a fundamental error. It is an error likely to cause a miscarriage of justice, requiring the quashing of a conviction and direction of a new trial.

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6 CA judgment, above n 3, at [53]—the Court contrasting the course taken in another, separate trial which was also the subject of a conviction appeal by Mr Do heard at the same time.

7 *Wilson v R* [2019] NZCA 485.

8 *R v Wanhalla*, above n 1, at [52].

9 *Wilson v R*, above n 7, at [3] (footnote omitted).

[7] In this case the summing-up did not omit any of the three elements, as had been the case in *Wilson* and other cases discussed there. As was noted in *Wilson*, the trials there were "rendered unfair by the *degree* of misdirection that occurred".[10] It is not suggested by the applicant that s 232(4)(a) of the Criminal Procedure Act 2011—which relates to miscarriages of justice where there is "a real risk that the outcome of the trial was affected"—is engaged here.[11] The question posed instead is whether the degree of misdirection was so substantial as to amount to a fundamental error constituting an unfair trial for the purposes of s 232(4)(b).

[8] We do not consider it is reasonably arguable that the modest departure from the expression of the recommended direction that occurred here could constitute an unfair trial by itself. Nothing material could turn on the first departure, of itself—i.e., describing the standard of proof as "high" rather than "very high"—when both before and after that the direction makes clear the jury must be sure of guilt. Although departure in this way from the model direction in *Wanhalla* is not to be encouraged, there is no suggestion the second departure—saying "more likely than not" was insufficient, rather than "very likely"—could have misled. That is a negative, precautionary direction, and no-one in fact was suggesting it misled the jury. Critically, what *was* included, without dilution or adulteration, was the second paragraph of the recommended direction—i.e., that the jurors must be sure of guilt. That was what really mattered, and ensured the inherent fairness of the trial process.

[9] In these circumstances, the criteria for leave are not met. The proposed appeal turns on its own particular facts and there is no likelihood that a substantial miscarriage of justice will occur if it is not heard by this Court.[12] It is not therefore necessary in the interests of justice for this Court to hear and determine the appeal.

Result

[10] The application for leave to appeal is dismissed.

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10 At [28] (emphasis added).
11 See also Criminal Procedure Act 2011, ss 232(2)(c) and 240(2).
12 Senior Courts Act 2016, s 74(2)(a) and (b).

[11] We make an order prohibiting publication of this judgment or any part of the proceedings to date (including the results) in news media or on the internet or other publicly available database until final disposition of the retrial ordered by the Court of Appeal. Publication in a law report or law digest is permitted.

Solicitors:
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