

INDIRECT AND CIRCUMSTANTIAL EVIDENCE IN CRIMINAL TRIALS

Presenter:

Michael Fantin – Barrister

Marbury Chambers



INTRODUCTION

- Introduction – what is circumstantial evidence?
- Probative Force/Inferential Reasoning - Chamberlain and Shepherd – Intermediate Facts – Indispensable Links - Links in the Chain or Strands in a Cable – Shepherd Direction (NSW) – Victorian situation
- Evidence Act – relevance, degree of proof
- Cases:
 - *Wood v R* [2012] NSWCCA 21
 - *The Queen v Bayden-Clay* [2016] 258 CLR 308
 - *George Pell v R* [2019] VSCA 186

WHAT IS CIRCUMSTANTIAL EVIDENCE

- **Circumstantial evidence** is evidence that relies on an inference to connect it to a conclusion of fact—such as a fingerprint at the scene of a crime. By contrast, direct evidence supports the truth of an assertion directly—i.e., without the need for any additional evidence or inference.
- The distinction between direct and circumstantial evidence does not relate to the *nature or content of the evidence given* but to the *way in which the evidence is to be used*. If it is necessary for the jury to infer a particular fact from the evidence, it will be circumstantial evidence of that fact.
- The same piece of evidence can therefore be both direct and circumstantial, depending on what it is being used to prove. For example, evidence given by a witness that s/he saw the accused holding a gun could be:
 - Direct evidence that the accused possessed a gun; and
 - Circumstantial evidence that the accused murdered the victim with that gun.

CIRCUMSTANTIAL EVIDENCE

- Probative Force/Inferential Force
- Logically connected – can it be logical but not true?
 - Links in a Chain: *R v Exall* (1866) 4 F & F 922
 - Strands in a Cord/Cable
- *Examples:*
 - *R v Zaiter* [2004] NSWCCA 35
 - *Morrison v Jenkins* (1949) 80 CLR 626
- HCA: Chamberlain & Shepherd
 - Intermediate Facts
 - Indispensable Links
- Shepherd Direction (NSW)
- Jury Directions Act 2015 (Vic) ss 61-62

EVIDENCE ACT

- Sections 55, 56 of the Evidence Act
 - Key provision regarding admissibility in Chapter 3 of the Evidence Act is s 56, whereby evidence that is “not relevant” is never admissible.
- Degree of Proof: s 141 of the EA: Beyond Reasonable Doubt

WOOD V R [2012] NSWCCA 21

- Facts
- Prosecution hypothesis – indirect evidence and intermediate facts
 - Means
 - Motive and
 - Opportunity
- Judgement: McClellan CJ at CL at [1]; Latham J at [810]; Rothman J at [820]

THE QUEEN V BAYDEN-CLAY [2016] 258 CLR 308

- Facts
- Prosecution hypothesis – indirect evidence and intermediate facts
- Judgement: FRENCH CJ, KIEFEL, BELL, KEANE AND GORDON JJ.
 - On appeal from [2015] QCA 265
 - QCA allowed appeal and ordered the verdict of guilty of murder be set aside and a verdict of manslaughter substituted.
 - THE HC addressed QCA findings but on the issue of whether the jury's verdict was unreasonable, HC doesn't address the evidence or lack of evidence but rather does not disturb the jury's conclusion based on motive, some inconsistencies and post-offence concealment.

GEORGE PELL V R [2019] VSCA 186

- Facts
- Prosecution hypothesis – indirect evidence and intermediate facts
- Judgement: FERGUSON CJ, MAXWELL P and WEINBERG JA
- Weinberg JA dissenting judgment at [353] deals with the M test (M v The Queen): [590]
- Defence relied on evidence of habit or custom (negative opportunity) and portrayed A's evidence as fanciful or improbable (the 13 obstacles to conviction: [664]).
- Defence case presented a largely circumstantial case in answer to the complainant's allegations: [940].
- The jury had to consider a large number of factual issues, each of which might be regarded as a strand in a cable. Most unusual for the defence, in a criminal trial, to rely upon inferential reasoning to meet the prosecution case: [950].