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Indirect or Circumstantial Evidence In Criminal Trials

By: Michael Fantin – Barrister

Abstract: What is indirect or circumstantial evidence? Why is indirect or circumstantial evidence important in our criminal justice system? Why is it important to review and identify issues that concern indirect or circumstantial evidence in our criminal justice system? These are just some of the questions this paper will explore including: why it is important to be critical of the rules of evidence in respect of indirect or circumstantial evidence; why this area of law needs changing and what practitioners can do to identify fallacies and illogical inferences that have resulted in miss-carriage of justice. Ultimately, this paper is concerned about criminal trials that have miscarried as a result of poor attention to the issues and dangers of indirect or circumstantial evidence.

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1. Introduction

My client was charged with supply indictable quantity of methyl amphetamines. No drugs were found in my client's home. But police recorded conversations of offer to supply over a 2 month period and then raided his home. Police found material that they say amounted to evidence of supply, but no drugs seized. My client pleaded not guilty.

The prosecution case is circumstantial and despite the lack of corroborating or direct evidence, the prosecution is very bullish about scoring a conviction. This is half the problem. The attitude of my opponent. Ignoring any common sense and despite the fact that crown prosecutors are bound by 'fairness' embodied in the Prosecution Guidelines ("PG") and the International Standards of prosecutors duties (Appendix A of the PG); I am troubled by the submissions of the Crown and the way the jury are being led *astray*. It is like watching those Evangelical shows. The uninitiated aren't questioning the hype, carried along by the herd mentality and drunk on the euphoria, accepting every word of the minister.

Here, the Crown prosecutor cannot lose this case. Probably been told the case is a sure bet and it would be highly embarrassing if he returned to his workplace having lost the unlosable case. Such is the pressure. And such is the need to win. And even with Prosecution Guidelines, the need to win at all costs is so strong people are willing to turn a blind eye to those principals when it suits their agenda.

Clause 2 of the PG states:

> *A prosecutor is a "minister of justice". The prosecutor's principal role is to assist the court to arrive at the truth and to do justice between the community and the accused according to law and the dictates of fairness.*
>
> *Nevertheless, there will be occasions when the prosecutor will be entitled firmly and vigorously to urge the prosecution's view about a particular issue and to test, and if necessary to attack, that advanced on behalf of an accused person or evidence adduced by the defence. Adversarial tactics may need to be employed in one trial that may be out of place in another. A criminal trial is an accusatorial, adversarial procedure and the prosecutor will seek by all proper means provided by that process to secure the conviction of the perpetrator of the crime charged.*

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The second paragraph "Nevertheless, there will be occasions when the prosecutor will be *entitled* to firmly and vigorously *urge* the prosecution…" creates the problem and often relied upon as Crown's excuse for overstepping the dictates of fairness. Note the words "entitled" and "urge". What impression does this leave on you? My opinion: Crown have a licence to stop at nothing.

The *Legal Profession Uniform Conduct (Barristers) Rules 2015* (Barristers Rules) provides further ethical duties in relation to dictates of fairness. Rules 83 – Rule 88, and Rule 93 of the Barristers Rules states:

> ***83 Prosecutor's duties***
> *A prosecutor must fairly assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court, and must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts.*
> ***84*** *A prosecutor must not press the prosecution's case for a conviction beyond a full and firm presentation of that case.*
> ***85*** *A prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.*
> ***86*** *A prosecutor must not argue any proposition of fact or law which the prosecutor does not believe on reasonable grounds to be capable of contributing to a finding of guilt and also to carry weight.*
> ***87*** *A prosecutor must disclose to the opponent as soon as practicable all material (including the names of and means of finding prospective witnesses in connection with such material) available to the prosecutor or of which the prosecutor becomes aware which could constitute evidence relevant to the guilt or innocence of the accused other than material subject to statutory immunity, unless the prosecutor believes on reasonable grounds that such disclosure, or full disclosure, would seriously threaten the integrity of the administration of justice in those proceedings or the safety of any person.*
> ***88*** *A prosecutor who has decided not to disclose material to the opponent under rule 87 must consider whether:*
> *(a) the charge against the accused to which the material is relevant should be withdrawn, and*
> *(b) the accused should be faced only with a lesser charge to which such material would not be so relevant.*
> ***93*** *A prosecutor must not inform the court or opponent that the prosecution has evidence supporting an aspect of its case unless the prosecutor believes on reasonable grounds that the evidence will be available from material already available to the prosecutor.*

Overzealous prosecution is a blurry and fuzzy line. Raising the issue may cause rebuke from the bench and jeopardise one's case, due in part to ego or personality clashes or hypersensitivity. The advocate's credibility is questioned and no matter how bright or intelligent the advocate, human nature is inherintently about judging others. It's part of our survival mechanism.

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Much of the ethical guidelines and rules extracted from above are directed at what the prosecution have available in their possession and what material will be presented to the court.

The *material* may be a business document, the murder weapon or a photo. It can be Closed Circuit TV (CCTV) or a Certificate from laboratory of the purity and quantity of drug seized. I've never seen actual drugs brought to court and shown to the jury.

The rules which govern how this material is put before the court and jury is the *Evidence Act 1995* (NSW) (**Evidence Act**) and the common law. Each jurisdiction in Australia including the Commonwealth operates similarly.

The Evidence Act covers the practice and procedure of adducing evidence and exclusions of evidence such as hearsay, expert or lay opinion, tendency evidence, credibility evidence, character evidence and identification evidence to name a few.

However, the Evidence Act is quiet on admissibility of circumstantial evidence. There is no heading or section dealing with the topic. Much of the admissibility is subject to relevance and the judge's discretion. Even then, if a piece of circumstantial evidence is admitted, the warning from the judge may be inadequate or fail to address what use to make of it or what weight to give it.

Part of the problem is that indirect or circumstantial evidence is so wide and ambiguous that it may at first seem lacking in relevance or unimportant or inconspicuous on its own. As Sherlock Holmes told Dr Watson in *The Boscombe Valley Mystery:*

> *Circumstantial evidence is a very tricky thing. It can seem to point very straight to one thing, but if you shift your own point of view a little, you may find it pointing in an equally uncompromising manner to something entirely different.*

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Circumstantial evidence is ambivalent – it can be looked at from many contradictory perspectives or angles. There is no way to limit or define it. It is easily abused, manipulated and dressed up when coupled with other evidence forming a 'tag line'.

Often referred to as *links in a chain, strands in a cable.* I give it a modern edge and call it a 'tag line'. Tag lines then feeds into the prosecution's hypotheses or case theory. There is no mechanism to back test 'tag lines'. If the 'tag lines' are fundamentally logically flawed, then you can only pray that the jury identify the problem and resolve the issue by ignoring it. Many times, the jury aren't aware of fallacies or illogical reasoning and those illogical 'tag lines' are accepted and the potential for miscarriage of justice becomes a real possibility.

I am highly critical of the way the prosecution makes use of and presents indirect or circumstantial evidence. Together with other unchecked issues such as overzealous prosecution, and illogical inferential reasoning, I believe this area is a major flaw in criminal trials.

To demonstrate the issues above, I have selected *Wood v R* [2012] NSWCCA 21, which is coming up to 10 years since the "spear throw" was put forward by the Crown as a plausible explanation for the murder of Caroline Byrne who died on the night of 7 June 1995 by Gordon Wood, who was convicted and sentenced. He was then acquitted by the Court of Criminal Appeal on 24 February 2012.

I made reference to *illogical inferential reasoning*. This is a danger area which will be explored later. One such fallacy is the prosecutor's higher authority fallacy and the dangers of blindly accepting what a higher authority says is true. For example, cigarette companies hired scientists who published opinions and reports that concluded there was no proof that cigarettes were harmful or caused cancer. People continued to smoke and despite evidence of the number of patients in hospital diagnosed with lung cancer due to smoking, these people rationalised that the scientist knew more than them, so they trusted cigarette companies. We tend to trust people in authority.

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Now, if asked this question: "who do you trust, the Crown or the defence lawyer?" Most people answer the Crown. Why? People associate defence lawyers as an extension of their clients. How can you defend someone who is guilty or committed those horrible crimes? TV crime shows feed this polarising image. So, members of the public already have a preconceived idea of who they trust when they walk into a court room.

During the course of a trial, the jury need to listen to lots of evidence and make sense of the story. Prosecutors do not have to call witnesses in the order of sequence of events. The story may start mid-way and conclude at the beginning. It is far from ideal in terms of appreciating the sequence of events. Further, members of the jury are not legally trained in legal logic. And so, the jury are in a difficult position. They take the evidence from authority. It's easier to pick the person who you trust, and the natural tendency is to trust the Crown.

The prosecutor's role is to draw the audience to a conclusion whether true or not and whether logically connected or unconnected.

In my drug case, the crown prosecutor went so far as to argue before the jury that a set of scales found in my client's kitchen cupboard, a number of plastic bags found in kitchen draw, a roll of aluminium foil found in the living room and shoe box of cash ($7620) found in the home office were indicia of supply.

The jury agreed.

2. What is Indirect or Circumstantial Evidence?

A fact that is in issue can be proved in two ways:

1. By providing evidence which *directly proves* that fact, without requiring the jury to draw any inferences ("direct evidence") (Cross on Evidence, 2013 [1110]); or

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2. Any fact or facts (sometimes called "evidentiary fact" or "fact relevant to the issue"), from which the jury (or judge) may *infer the existence* of a fact in issue (sometimes called "factum probandum").[1]

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.

In *Peacock v The King*,[2] Griffiths CJ cited the 1842 edition of Starkie on Evidence saying:

> *The rules as to circumstantial evidence are nowhere better stated than in a book, somewhat old it is true, but by an undoubted authority (Starkie on Evidence, 3rd ed., published in 1842). I quote from page 574. Speaking of circumstantial evidence, he says:- " Fourthly, it is essential that the circumstances should, to a moral certainty, actually exclude every hypothesis but the one proposed to be proved: hence results the rule in criminal cases that the coincidence of circumstances tending to indicate guilt, however strong and numerous they may be, avails nothing unless the corpus delicti, the fact that the crime has been actually perpetrated, be first established….*
>
> *The force of circumstantial evidence being exclusive in its nature, and the mere coincidence of the hypotheses with the circumstance being in the abstract insufficient, unless they exclude every other supposition, it is essential to inquire with the most scrupulous attention what other hypotheses there may be which may agree wholly or partially with the*
> *facts in evidence.*

[1] *Shepherd v The Queen* (1990) 170 CLR 573. See also *Doney v R* (1990) 171 CLR 207; *Festa v R* (2001) 208 CLR 593; *Myers v DPP* [1965] AC 1001; *R v Spina* [2005] VSCA 319).
[2] *Peacock v The King* (1911) 13 CLR 619 at 628.

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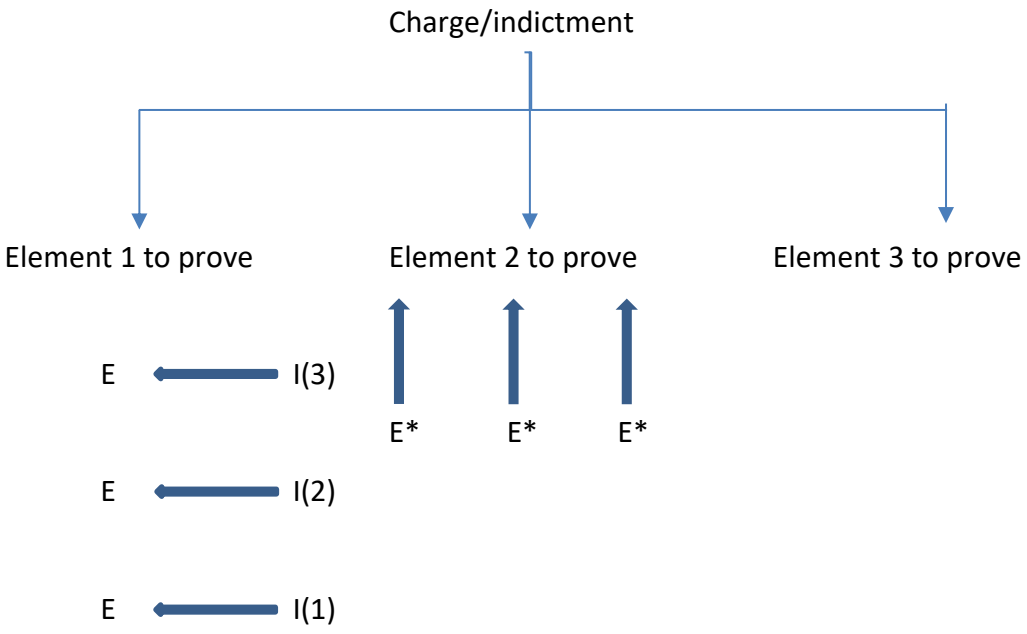
In *Martin v Osborne*,[3] Dixon J said:

> *If an issue is to be proved by circumstantial evidence, facts subsidiary to or connected with the main fact must be established from which the conclusion follows as a rational inference. In the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed.*

Another definition is offered by Anderson, Schum and Twining, *Analysis of Evidence* (2005). Anderson *et al* highlight that in law, direct evidence is evidence, which if believed, resolves a matter in issue. All other evidence is indirect or circumstantial because even if the circumstances depicted are accepted as true, additional reasoning is required to reach the desired conclusion. Figure 2.1 demonstrates the distinction.

Figure 2.1



Evidence E* is directly relevant to charge/indictment because it is linked directly by a chain of reasoning to the charge/indictment. E* is directly relevant evidence if the chain of reasoning

[3] *Martin v Osborne* (1936) 55 CLR 367 at 375.

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is defensible. E represents an event or intermediate fact. The other three items of evidence I(1), I(2) and I(3) are also relevant but only indirectly so. Although themselves not directly linked to the charge/indictment, they are nevertheless relevant because they each bear upon the strength or weakness of links in the chain of reasoning. These three items or inferences are indirectly relevant.

Links in the Chain – Inferential Reasoning

An example of inferential reasoning is captured in the text: *The Nine Mile Walk* by Harry Kemelman (1947). The short story starts with Nicholas Welt inviting Kemelman to a game of inferential reasoning. Part of the book is extracted below:

> …….
> *"They were perfectly logical inferences," I pleaded.*
> *"My dear boy," he purred, "although human intercourse is well-nigh impossible without inference, most inferences are usually wrong. The percentage of error is particularly high in the legal profession where the intention is not to discover what the speaker wishes to convey, but rather what he wishes to conceal."*
> *I picked up my check and eased out from behind the table.*
> *"I suppose you are referring to cross-examination of witnesses in court. Well, there's always an opposing counsel who will object if the inference is illogical."*
> *"Who said anything about logic?" he retorted. "An inference can be logical and still not be true."*
> *He followed me down the aisle to the cashier's booth. I paid my check and waited impatiently while he searched in an old-fashioned change purse, fishing out coins one by one and placing them on the counter beside his check, only to discover that the total was insufficient. He slid them back into his purse and with a tiny sigh extracted a bill from another compartment of the purse and handed it to the cashier.*
> *"Give me any sentence of ten or twelve words," he said, "and I'll build you a logical chain of inferences that you never dreamed of when you framed the sentence."*
> I said: "A nine mile walk is no joke, especially in the rain."

Through a series of inferences, *Nicky* unwittingly solves a murder that occurred the previous night. The story concludes with the following exchange:

> *"Oh, Nicky," I called, "what was it you set out to prove?"*
> *"That a chain of inferences could be logical and still not be true," he said.*

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Both laughed.

The term *link in the chain* first appeared in *R v Exall* (1866) 4 F & F 922, where Pollock CB said:

> *It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence is a link in the chain, but that is not so, for then, if any one link breaks, the chain would fall. It is more like the case of a rope comprised of several cords. One strand of cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus, it may be in circumstantial evidence - there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of.*[4]

To what degree must all the "cord" or intermediate facts be proved to find guilt beyond reasonable doubt?

In *Chamberlain v R*,[5] Brennan J said:

> *The prosecution case rested on circumstantial evidence. Circumstantial evidence can, and often does, clearly prove the commission of a criminal offence, but two conditions must be met. First, the primary facts from which the inference of guilt is to be drawn must be proved beyond reasonable doubt. No greater cogency can be attributed to an inference based upon particular facts than the cogency that can be attributed to each of those facts. Secondly, the inference of guilt must be the only inference which is reasonably open on all the primary facts which the jury finds. The drawing of the inference is not a matter of evidence: it is solely a function of the jury's critical judgment of men and affairs, their experience and their reason. An inference of guilt can safely be drawn if it is based upon primary facts which are found beyond reasonable doubt and if it is the only inference which is reasonably open upon the whole body of primary facts.*

After the decision in *Chamberlain v R,*[6] the law required a judge to give a direction to the jury that they cannot use a fact as a basis for inferring guilt unless that fact was proved beyond reasonable doubt (called "Chamberlain Direction"). The joint judgment of Mason J and Gibbs CJ gave rise to some misconception that, accordingly, played a part in the course of reasoning

[4] Cross on Evidence 2013, [1110], foot note 88, pg 15.
[5] *Chamberlain v R* (1983) 153 CLR 512 at 599.
[6] *Chamberlain v R* (1983) 153 CLR 512.

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by which courts of criminal appeal have come to the conclusion that the Chamberlain Direction should always be given.

Shepherd v R[7] resolved the issue. Dawson J said:

> *4. Circumstantial evidence is evidence of a basic fact or facts from which the jury is asked to infer a further fact or facts. It is traditionally contrasted with direct or testimonial evidence, which is the evidence of a person who witnessed the event sought to be proved. The inference which the jury may actually be asked to make in a case turning upon circumstantial evidence may simply be that of the guilt of the accused. However, in most, if not all, cases, that ultimate inference must be drawn from some intermediate factual conclusion, whether identified expressly or not. Proof of an intermediate fact will depend upon the evidence, usually a body of individual items of evidence, and it may itself be a matter of inference. More than one intermediate fact may be identifiable; indeed the number will depend to some extent upon how minutely the elements of the crime in question are dissected, bearing in mind that the ultimate burden which lies upon the prosecution is the proof of those elements. For example, with most crimes it is a necessary fact that the accused was present when the crime was committed. But it may be possible for a jury to conclude that the accused was guilty as a matter of inference beyond reasonable doubt from evidence of opportunity, capacity and motive without expressly identifying the intermediate fact that the accused was present when the crime was committed.*
>
> *5. On the other hand, it may sometimes be necessary or desirable to identify those intermediate facts which constitute indispensable links in a chain of reasoning towards an inference of guilt. Not every possible intermediate conclusion of fact will be of that character. If it is appropriate to identify an intermediate fact as indispensable it may well be appropriate to tell the jury that that fact must be found beyond reasonable doubt before the ultimate inference can be drawn. But where - to use the metaphor referred to by Wigmore on Evidence, vol.9 (Chadbourn rev. 1981), par.2497, pp 412-414 - the evidence consists of strands in a cable rather than links in a chain, it will not be appropriate to give such a warning. It should not be given in any event where it would be unnecessary or confusing to do so. It will generally be sufficient to tell the jury that the guilt of the accused must be established beyond reasonable doubt and, where it is helpful to do so, to tell them that they must entertain such a doubt where any other inference consistent with innocence is reasonably open on the evidence.*
>
> *6. As I have said, the prosecution bears the burden of proving all the elements of the crime beyond reasonable doubt. That means that the essential ingredients of each element must be so proved. It does not mean that every fact - every piece of evidence - relied upon to prove an element by inference must itself be proved beyond reasonable doubt. Intent, for example, is, save for statutory exceptions, an*

[7] *Shepherd v R* (1990) 170 CLR 573.

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> *element of every crime. It is something which, apart from admissions, must be proved by inference. But the jury may quite properly draw the necessary inference having regard to the whole of the evidence, whether or not each individual piece of evidence relied upon is proved beyond reasonable doubt, provided they reach their conclusion upon the criminal standard of proof. Indeed, the probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately.*

In summary, what Dawson J said was that intermediate facts which constitute indispensable links in a chain of reasoning towards an inference of guilt, some will be subject to proof beyond reasonable doubt and others not. *Shepherd v R*[8] continues to be applied today.

This variability in application of the standard of proof to intermediate facts creates problems. Circumstantial evidence cannot be solely thought of as a *strands of cord* or *strands in a cable*. Circumstantial evidence cannot be viewed in isolation.

There is a great deal of things happening in a court room during a trial. The concern is how the jury receives evidence and rationalise about it. The court room settings (the layout), the actors (judge, Crown, Defence etc), the theatre played out (actors interacting), the evidence itself – the probative force of direct and indirect evidence, the objectivity of the evidence, veracity, observational sensitivity, biases, the dialogue (submissions, directions, the inferential reasoning (a human activity)), and the rules of the game (the standard of proof, opening, closing statements, calling witnesses etc) creates complexity and with complexity comes danger of confusion and with confusion the opportunity for ilogical conclusions or errors.

The judgement of Dixon J and McTiernan J in *Morrison v Jenkins* (1949) 80 CLR 626, are apposite on how two highly intelligent justices employ inferential reasoning and arrive at two different conclusions.

[8] *Shepherd v R* (1990) 170 CLR 573.

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The High Court had to deal with the parentage issue of Nola Jenkins and Johanne Lee. The Morrison's claimed Nola was switched at birth by the hospital and since birth lived with the Jenkin's. The Morrison's took procceedings against the Jenkin's by way of *Habeas Corpus,* claiming custody of Nola.

Dixon J said:

> *The inference that Nola is the child of the Morrison's rests of course wholly on circumstantial evidence. Notwithstanding the wealth of detail gone into, particularly as to the circumstances of the birth of the two children, the whole case depends upon a chain consisting of a very few evidentiary facts or circumstances and some steps in reasoning which together are relied upon as warranting the inference. The first of these facts or steps is the conclusion deposed to by scientific witnesses that Johanne Lee belongs to a blood group that is inconsistent with her being the child of Mr Morrison. This conclusion the Jenkins are powerless to deny. The second step is the inference that she is therefore not the child of Mrs Morrison. The third is the fact that from the time that Mrs. Morrison left the hospital with a girl child and until the scientists took the blood tests there has been no change in the identity of that child and she is Johanne Lee and was the child submitted to the blood tests. The fourth step is proof that at the hospital where both women were confined there was a real chance of confusion between the female child which Mrs. Morrison bore and some other female child. The fifth step is the elimination of the possibility that any other child but Mrs. Jenkins' could have been attributed to Mrs. Morrison. The sixth step is the inference that correspondingly Mrs. Jenkins must have received Mrs. Morrison's child. By this chain of reasoning the result that Nola is Mrs. Morrison's child is said to be established. To make good the last three steps a great deal of evidence was adduced at the hearing.*
>
> *….*
>
> *In my opinion this issue was properly decided in the negative by the Full Court of the Supreme Court. With any chain of circumstantial evidence the chances of error in the conclusion arise first from the chances of error in each fact or consideration forming the steps and second from the chance of error in reasoning to the conclusion from the whole of those facts and considerations. It is therefore wrong to take each fact or consideration separately, to assess the possibilities of error in finding it is established and then if you think it should be found afterwards to treat it as a certainty and pass to the next fact or consideration and so on to the conclusion. The possibilities of error at all points must be combined and assessed together.*
>
> *In the present case I think that when all the possibilities are taken into account there is too much uncertainty in the inference that Nola is the child of Mr. and Mrs. Morrison to warrant an order taking her from Mr. and Mrs. Jenkins and placing her in the custody of Mr. and Mrs. Morrison.*

McTiernan J said:

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In my opinion the appeal should be allowed.

…

The evidence proves that the child born to Mrs. Morrison on 22nd June 1945 in the labour ward of the Kyneton District Hospital was begotten by her husband. This fact is an irresistible inference from the evidence, given by Mrs. Morrison, that she never had sexual intercourse with any man other than her husband. Barry J believed this evidence. There is no ground upon which an appeal court could properly decide that his Honour erred in believing this evidence or why the Court itself should disbelieve it or suspect that the child born to Mrs. Morrison was not begotten by her husband. The scientific evidence of the blood tests, the validity and the reliability of which are established by the evidence, proves that Johanne Lee, a child under the custody of the appellants, could be the child of Mrs. Morrison but not of her and her husband. The evidence further proves that Johanne Lee is the baby who was given to Mrs. Morrison after she had given birth to a child at the above-mentioned time and place, upon the supposition that it was the child to which she had given birth ; she was the child whom Mrs. Morrison took with her from the hospital when she returned to her home.

These facts establish beyond any reasonable doubt that Mrs. Morrison was given a baby to which she did not give birth and the baby is Johanne Lee.

…

The short facts proved by the evidence are that Mrs. Morrison did not get her own baby ; necessarily some other mother got her baby, and Mrs. Morrison got that other woman's baby.

The only rational conclusion is that the other mother is Mrs. Jenkins, and that she got Mrs. Morrison's baby and Mrs. Morrison got her baby.

In P v Burdet[9] *Best J said :*

> *"We are not to presume without proof. We are not to imagine guilt, where there is no evidence to raise the presumption. But when one or more things are proved, from which our experience enables us to ascertain that another, not proved, must have happened, we presume that it did happen, as well in criminal as in civil cases. Nor is it necessary that the fact not proved should be established by irrefragable inference. It is enough, if its existence be highly probable, particularly if the opposite party has it in his power to rebut it by evidence, and yet offers none; for then we have something like an admission that the presumption is just, it has been solemnly decided, that there is no difference between the rules of evidence in civil and criminal cases. If the rules of evidence prescribe the best course to get at truth, they must be and are the same in all cases, and in all civilized countries. There is scarcely a criminal case, from the highest down to the lowest, in which courts of justice do not act upon this principle. Lord Mansfield, in The Douglas Case gives the reason for this. 'As it seldom happens that absolute certainty can be*

[9] *P v Burdet* (1820) 4 B & Ald 95 at pg 121.

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> *obtained in human affairs, therefore reason and public utility require that Judges and all mankind, in forming their opinions of the truth of facts, should be regulated by the superior number of probabilities on one side and on the other.' "*

Dixon J approached the issue quite clinical but mindful of the consequences for the families. His Honour said:

> *What is to happen to her if the Court were to transfer the custody of Nola to the Morrisons does not appear. The Jenkins of course repudiate her as their child and could not be required to receive her into their family. It would militate against Nola's future happiness and welfare if the transfer were made notwithstanding the continued existence of reasonable cause for doubt as to the child's parentage and it would be little short of disastrous if afterwards further information made it appear more hkely that after all the Jenkins were her parents.*

McTiernan J was far more resolute and convinced. His Honour identified one fact above all that convinced him that Nola was the Morrison's child. That Johanne Lee did not share the same blood group as Mr Morrison, despite having the same blood group as Mrs Morrison.

This example illustrates the point of this paper – logical reasoning differs between people. Shift your point of view and the evidence shifts with you. It may be due to one's biases, objectivity, upbringing, education, or confusion about the evidence. I suspect McTiernan J was coloured by his own personal beliefs, probably a Christain with strong religious views whereas Dixon J was perhaps influenced by his relationships with his own children.

3. How does indirect or circumstantial evidence become admitted?

The starting place for admitting circumstantial evidence is Part 3.1 of the Evidence Act – whether a fact or piece of evidence is relevant: ss 55 and 56 of the Evidence Act; or provisionally relevant: s 57 of the Evidence Act.

If it is, it will then be subject to the other exceptions, namely hearsay, opinion, tendency, credibility, or discretionary/mandatory exclusions.

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Section 55 of the Evidence Act states:

> **55 Relevant evidence**
>
> *(1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.*
>
> *(2) In particular, evidence is not taken to be irrelevant only because it relates only to—*
>
> *(a) the credibility of a witness, or*
>
> *(b) the admissibility of other evidence, or*
>
> *(c) a failure to adduce evidence.*

Section 56 of the Evidence Act states:

> ***56 Relevant evidence to be admissible***
>
> *(1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.*
>
> *(2) Evidence that is not relevant in the proceeding is not admissible.*

Section 57 of the Evidence Act states:

> ***57 Provisional relevance***
>
> *(1) If the determination of the question whether evidence adduced by a party is relevant depends on the court making another finding (including a finding that the evidence is what the party claims it to be), the court may find that the evidence is relevant—*
>
> *(a) if it is reasonably open to make that finding, or*
>
> *(b) subject to further evidence being admitted at a later stage of the proceeding that will make it reasonably open to make that finding.*

Steven Odgers (Uniform Evidence Law, 15th edn, 2020) highlighted that the key provision regarding admissibility in Chapter 3 of the Evidence Act is s 56, whereby evidence that is "not relevant" is never admissible.

Focus then is upon evidence that may be relevant or is relevant, which Odgers concedes is given a broad interpretation.[10] Odgers highlights the following for consideration:

[10] S Odgers, Uniform Evidence Law, 15th Edn, (2020), [EA.55.60], pg 324.

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1. The reference to "if it were accepted", requires that relevance be determined on the assumption that the jury accepts the evidence;
2. The use of the word "could" rather than "would", a recognition of an indirect connection with the fact in issue.
3. I will also add here that s 55 of the Evidence Act contains "rationally affect (direct or indirect)". I've highlighted in this paper issues around poor rational thinking in links in the chain due to our own biases or objectivity (or lack of). As Odgers points out, the Evidence Act does not differentiate between logical relevance and legal relevance.[11]

Odger's has no doubt that circumstantial evidence can be relevant evidence. But Odgers says on the probative force of circumstantial evidence:

> *Further, since relevance only requires that the evidence "could rationally affect" that probability, there is equally no doubt that circumstantial evidence need not have any particular degree of probative force to be relevant.*[12]

It is difficult to accept Odger's proposition that evidence need not have any particular degree of probative force to be relevant.

Terence Anderson *et al* adoption of "trifles" taken from Sherlock Holmes in *Buscombe Valley Mystery*– referring to single datum of evidence is used to demonstrate that any trifle, no matter how unimportant becomes logically connected to other trifles if it is relevant, credible and has probative force or weight in combination.[13]

Probative Force

Another way to view Terence Anderson *et al* argument is to revisit *Shepherd v R*.[14] The High Court distinguished "strands in a cord" and "links in the chain". The first link in the chain

[11] S Odgers, Uniform Evidence Law, 15th Edn, (2020), [EA.55.60], pg 329.
[12] S Odgers, Uniform Evidence Law, 15th Edn, (2020), [EA.55.330], pg 355.
[13] Anderson, Schum and Twining, *Analysis of Evidence* (2005), pg 59-60.
[14] *Shepherd v R* (1990) 170 CLR 573.

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must always be credible. The remaining links are those necessary to demonstrate the relevance of an item or trifle to the ultimate conclusion (what you are setting out to prove i.e D murdered V). The probative force of an item or trifle depends on the strength of each link in the chain: "link in the chain". When there is a mass of evidence to consider: "strands in a cord", there will be many chains of reasoning to consider. Assessing the probative force of a mass of evidence requires that the probative force of every chain be assessed and that the individual assessments combined to determine the net probative value of the mass with respect to the ultimate conclusion.

A good example of the jury's erroneous rationalising the "link in the chain" is *R v Zaiter* [2004] NSWCCA 35, where Ipp JA said:

> *6 The Crown relied on inference to prove the factual elements relating to the purposes with which the appellant entered into the lease. The appellant did not give evidence.*
> *7 There are a number of primary facts which the Crown contended were capable together of giving rise to the inference that the appellant entered into the lease for purposes of allowing Pedavoli to supply drugs there.*
> *However, the essential link in the chain of inferences to be drawn for purposes of proving the guilt of the appellant on the two charges has to be that at the time the lease was entered into, the appellant knew that it was to be used as a supply base by Pedavoli.*
> *8 If one removes this element from the list of facts on which the Crown relies to prove its case, one is left with an empty shell. Without proof that the appellant entered the lease for purposes of allowing Pedavoli to use the flat to store drugs for supply, the remainder of the factual material, in my opinion, is incapable of proving beyond reasonable doubt the appellant knowingly took part in the supply of a commercial quantity of ecstasy in*
> *August 1999, that being the relevant time according to the trial judge's directions to the jury.*
> *9 The other material to which I have referred, particularly the fact that the appellant was the lessee of the flat, and thereby had power to permit entry to it; the fact that before the lease was entered into he knew that Pedavoli was a supplier of drugs; the fact that, from the telephone conversations, he seemed, even at a later date – that is some time in August – to know that Pedavoli was a supplier of drugs, and seemed to be ready to supply drugs himself to Pedavoli, give rise to a very serious suspicion that the appellant was guilty of the offences charged. But suspicion is not enough.*
> *10 The Crown must prove its case beyond reasonable doubt. Beyond reasonable doubt is not constituted by establishing serious suspicion. I therefore conclude that the allegation relating to the purpose for which the appellant entered into the lease on 19 April 1999, was an intermediate fact that was an*

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> *indispensable basis for an inference of guilt: Chamberlain v The Queen (No 2) (1984) 153 CLR 521; Shepherd v The Queen (1990) 170 CLR 573 at 576 and 579; Gipp v The Queen (1998) 194 CLR 106 at 133.*
> *11 In Gipp, Justice McHugh and Justice Hayne, said, at 133: "Sometimes, a fact may be so indispensable to a finding of guilt that it is necessary to direct the jury that that finding be proved beyond reasonable doubt even though that fact is not one of the ultimate facts that constitute the offence."*
> *12 As I have explained, in the present case I consider that the facts relating to the purpose for which the appellant entered into the lease is a fact so indispensable to the finding of guilt that it was necessary for the trial judge to direct the jury that that fact be proved beyond reasonable doubt.*
> *13 The trial judge did not give such a direction. In my view, by failing to give that direction, the appellant was deprived of a reasonable opportunity of persuading the jury he should be found not guilty.*
> *14 In my view, therefore, on this ground, the verdict of the jury should be set aside.*[15]

Twelve members of the jury did not think the "indispensable link" i.e. entry into the lease was that important. Nor did they accept, that the evidence could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding. We had to wait for a professional logican on appeal, to spot the obvious error and His Honour Ipp JA overturned the rational thinking of twelve members of the public.

Consider also the difference between adversarialism and inquisitorialism. When an inquisitorial court retires to consider whether guilt is proved to the standard of *intime conviction* – roughly translated as 'deeply and thoroughly convicted'[16] – it must provide not only a one or two word verdict, i.e. guilty/not guilty, but reasons for its conclusions.[17] Wheras the scantity of our system with the jury's verdict renders its criminal offence to ask for or disclose details of a jury's deliberations, leaving the Court of Appeal to speculate as to what a jury *might* have been thinking.

The caveat Odgers proposed is that a fact in issue to be proved is rationally open and the mere existence of other possible inferences or alternatives will not mean that the evidence

[15] *R v Zaiter* [2004] NSWCCA 35, [6] – [14].
[16] R L Lerner, The Intersection of Two Systems: An Amercian on trial for an American Murder in the French Court d'Assisses (2001) 19, *University of Illinois Law Review* 791 at 796.
[17] J Doak, C McGourlay and M Thomas, *Evidence in Context*, 3rd edn (2012), pp 34 – 42.

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ceases to be relevant, since a rational fact-finder "could" find the evidence affects the probability of the existence of that fact in issue.[18] The example Odgers offers is DNA evidence that created a link between the defendant and the crime.

This approach is no different to probability theory i.e. rolling a dice.

As a matter of stark comparison, consider these three statements:

1. *The probability that this nurse's shifts would coincide with so many deaths and resuscitations by chance is 1 in 342 million, so she must be guilty.*
2. *Given your positive test result, the chance of you dying within 10 years is 99.9%.*
3. *He mustn't love me anymore, as it's been 3 days and he hasn't returned my call*.

The three statements above have one thing in common – they are all examples of *The Prosecutor's Fallacy.* This is a logical error involving conditional probabilities – a measure of the chance, likelihood, or probability of X when Y has happened, Y being something that modifies the chance. The Prosecutor's Fallacy can be avoided by making sure the probability answers the right question, by focusing on how the evidence applies to the 'defendant' and not on the 'evidence' alone in the absence of other relevant factors.

It is by no means clear or precise as Odgers highlights and contrasts in *Edwards v The Queen* (1993) 178 CLR 193 and *Martinez v WA* (2007) 172 A Crim R 389 on the issue of consciousness of guilt from post-offence conduct.[19]

However, relevance and probative force cannot be looked at in isolation in circumstantials cases as the Victorian Court of Appeal emphasised in *R v Cavkic (No 2)* [2009] VSCA 43.

There is an undercurrent or paradox, that the law of evidence is subscribed to the notion that the public is made up of rational beings, trained in logic, unbiased and objective, which is far

[18] S Odgers, Uniform Evidence Law, 15th Edn, 2020, [EA.55.330], pg 355.
[19] S Odgers, Uniform Evidence Law, 15th Edn, 2020, [EA.55.330], pg 356.

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from reality. In The Secret Barrister – Stories of the Law and How Its Broken, the "Secret Barrister" explains this paradox as: "It is not for those twelve to decide whether evidence is reliable or whether it is fair to take it into account. We fear the jury's human weaknesses, while simultaneously lauding its innate and unimpeachable sense of fairness. Is this tenable? Or does this all add up to a picture of incomplete information being put before an admittedly irrational tribunal?"

The jury's risk for irrational thinking and illogical conclusions is a byproduct of adversarialsim, which is far from a comprehensive fact gathering exercise and an impartial look at all of the evidence but rather a "game" of tactical manoevers by the Crown and Defence to limit the jury's access to information, some being relevant information; and the often unchallenged trial judge's failure to give appropriate warnings and directions which torpedos the entire process.

4. Proof and Evidence

The logic of proof and law of evidence are closely related and interdependent.

The standard of proof in criminal proceedings is set out in s 141 of the Evidence Act and states:

> ***141 Criminal proceedings: standard of proof***
>
> *(1) In a criminal proceeding, the court is not to find the case of the prosecution proved unless it is satisfied that it has been proved beyond reasonable doubt.*
>
> *(2) In a criminal proceeding, the court is to find the case of a defendant proved if it is satisfied that the case has been proved on the balance of probabilities.*

In a circumstantial case, it may be necessary to direct the jury that, where they rely on circumstantial evidence, guilt should not only be the rational conclusion but also the *only* rational (or reasonable) conclusion that can be drawn from the circumstances.[20]

[20] *Peacock v The King* (1911) 13 CLR 619; *Shepherd v The Queen* (1990) 170 CLR 573; *Imnetu v The Queen* [2006] NSWCCA 203.

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It is useful to note that Victoria[21] has abrogated the common law where the prosecution relies on circumstantial evidence and an intermediate conclusion of fact in the inferential process constitutes an "indispensable link in a chain of reasoning towards an inference of guilt"[22], such fact must itself be proved beyond reasonable doubt.

A jury direction to this effect may be necessary but need not be given if its obvious tha the intermediate fact must itself be proved beyond reasonable doubt or if the direction would be confusing to the jury.[23]

In *Hannes v Director Of Public Prosecutions (Cth) (No. 2)*,[24] Barr and Hall JJ observed at [665]:

> *There were, no doubt, a number of reasons why Dawson J was careful to express himself in guarded terms. Such a direction may be "unnecessary or confusing", depending on what else the jury has been told and depending on the circumstances of the case. Further, however the Crown may have presented its case, one cannot be sure what process of reasoning a jury will necessarily follow and it may be difficult to determine whether the jury will treat a particular fact as "indispensable".*

Some examples in a circumstantial case not requiring a "Shepherd" direction includes:

- Relationship evidence.[25]
- When lies are used as evidencing a consciousness of guilt.[26]
- Motive, if the jury are not being invited to infer guilt from motive alone.[27]

However, cases involving tendency reasoning will require a direction because such evidence is so significant to the jury that they may well regard it as *indispensable* to prove guilt, even if it is not, as a matter of strict logic, essential to prove guilt: *HML v The Queen* (2008) 235 CLR 334.

[21] *Jury Directions Act 2015* (Vic), s 61 - 62.
[22] *Shepherd v The Queen* (1990) 170 CLR 573.
[23] *Shepherd v The Queen* (1990) 170 CLR 573.
[24] *Hannes v Director Of Public Prosecutions (Cth) (No. 2)* [2006] NSWCCA 373.
[25] *Cornwell v The Queen* [2010] NSWCCA 59 at [95]-[96].
[26] *R v Fowler* (2003) 151 A Crim R 166.
[27] *R v Plevac* [1999] NSWCCA 351 at [28].

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The precise meaning of *indispensable link* is not entirely certain. Recall *The Nine Mile Walk* problem - can a chain of inferences be logical and still not be true?

In the "links in the chain" case, if the link is missing because the fact is not established, the remainder of the prosecution case is not capable of proving guilt beyond reasonable doubt. In the "strands in a cable" case, a number of individually doubtful factual inferences may in combination produce a finding beyond reasonable doubt. None is indispensable because none is, or reasonably capable of being regarded as, a logically necessary link in a chain of sequential reasoning towards proof beyond reasonable doubt. However, there are statements in a number of High Court decisions which suggest that a fact may be regarded as "indispensable" even if the strictly logical test is not satisfied.[28]

Ultimately, whether a direction is provided or not – comes down to the judges subjective view – how an indispensable fact is classified and interpreted is relative to the particular context and problem. An item of evidence judged to be relevant may not be so judged by another. Similarly, the credibility of evidence and its sources are context-dependent.

There is no test on whether the chain of inferences is logical. There is no quality control or check *per se*. I am impliedly acknowledging the limitations in our criminal justice system.

There are currently no statistics on unsafe convictions but David Hamer[29] sumises that on a basis of 3% gathered from the findings of the United Kingdom's Criminal Cases Review Commission (CCRC) and the US's Inocence Project, the average unsafe convictions in Australia is in the order of 350 cases nationally and about 90 in NSW per year.

[28] *Gibb v The Queen* (1998) 194 CLR 106; *Penney v The Queen* [1998] HCA 51.
[29] Hamer, David --- "Wrongful Convictions, Appeals, and the Finality Principle: The Need for a Criminal Cases Review Commission" [2014] *UNSWLawJl* 12; (2014) 37(1) *UNSW Law Journal* 270.

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Malcolm Knox[30] (Secrets of the Jury Room, Inside the Black Box of Criminal Justice in Australia, 2005) makes refernce to a survey conducted in NSW showing judges and at least once barrister agreed with 95% of juries. Still leaves 5%. Knox further points to a 1950's survey that of 3,576 criminal trials, 500 judges returned agreement with the jury on 78% of the time.

A quarter of the time, it appears juries get it wrong. It must be noted, that there is no information on how many of those 3,576 cases relied on circumstantial evidence for a conviction. But should judges be the yardstick of correctness? This is issue I point to in *R v Zaiter* where Ipp JA disagreed with the juries findings. Hamer proposed a similar CCRC here in NSW to have unsafe convictions referred to the Court of Criminal Appeal. I am not convinced this is the role of the Court of Appeal. A better option is to circumvent cases to a similar CCRC panel for review prior to convictions being recorded where Crown rely on circumstantial evidence to convict.

So many institutions, corporations, professional bodies, government bodies, contain checks and balances in place. Organisations are equipped with a raft of measures for ensuring rigidity in the processes (repeatability), accountability and transparency. Unless the jury are to provide reasons, then the system needs an additional layer of protection during the trial to detect potentially unsafe convictions.

Given a soapbox, I would require juries to give reasons for their verdicts ; to set out clearly their findings and how they approached the problem of rationalising the facts (inferential reasoning); assigning what weight to which facts (probative force) and how how they dealt with any ambiguity or uncertainty (credibility).

I also make this point. In civil hearings i.e. Supreme Court, the Judge is both fact-finder and adjudicator. The Judge provides reasons and sets out the facts – both direct and indirect,

[30] Malcolm Knox, *Secrets of the Jury Room, Inside the Black Box of the Criminal Justice in Australia*, Random House Australia 2005, pg 66.

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findings on credibility of witnesses and any other observations. People don't go to prison. Why then in the criminal justice system, were peoples lives and their freedoms are at their highest stake do we not ask for greater visibility and transaparency on the decisions of the jury to aid in identifying or recogising potential unsafe verdicts and having them dealt with immediately?

5. *Wood v R* [2012] NSWCCA 21

In *Wood v R* [2012] NSWCCA 21, the Criminal Court of Appeal had to determine issues of: circumstantial evidence; reasonableness of identification evidence; "displacement effect"; expert evidence and weight to be given to expert evidence; "spear throw" evidence; whether a conclusion of fact was an indispensable intermediate fact; need for a Shepherd direction; whether trial miscarried because of prejudice occasioned by the Crown prosecutor; prosecutor's duty of fairness; whether prosecutor breached trial judge's ruling; whether prosecutor invited jury to invert the onus of proof; whether prosecutor impermissibly gave personal opinions; whether prosecutor misrepresented evidence; whether prosecutor failed to adhere to case theory; the lack of evidence to support motive; dangers of inviting speculation as to motive; whether unfair prejudice occasioned; and new and fresh evidence not disclosed by prosecution at time of trial.

Wood v R is apt case to analyse and discuss issues identified in this paper being:

- Inferential reasoning having regard to issues that may block or hinder rational thinking such as background, education, bias, objectivity, fallacies and illogical conclusions;
- Indispensable intermediate facts and the pobative force of the evidence;
- Standard of proof and
- Appropriateness of directions; and
- Overzealous prosecution.

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5.1 Background facts

Ms Caroline Byrne died on the night of 7 June 1995. Her body was recovered from the rocks at the Gap at Watsons Bay. Cause of death was suicide. A coronial inquest was held in November 1997. The coroner returned an open finding in February 1998. Speculation and controversy mounted about Ms Byrne's cause of death and the media and newspapers claimed that Ms Byrne was murdered and it was someone she associated with. The obvious candiate was her boyfriend Gordon Wood ("Wood"), who was employed by Rene Rivkin at the relevant time. On 03 May 2006, some 11 years after the death of Ms Byrne, Wood was charged with her murder.

For a number of years the police were unable to establish with any confidence how Ms Byrne left the cliff top and got lodged in the rocks below.

The location from which the body was retrieved was identified by Sgt Mark Powderly, who was the first person to locate her. There is controversy as to whether the location which Sgt Powderly originally identified in 1996, "hole B" was the correct position or whether it was only in 2004 that the correct spot, "hole A" was identified.[31]

The location of the body became a critical issue for the Crown and they relied on expert evidence of Associate Professor Cross, an engineer, to establish that Ms Byrne was thrown rather than she jumped. The police *apparently* took no photographs of the scene at the time of Ms Byrne's death and the spot where her body was located was not the subject of any contemporaneous record.[32]

The Crown prosecutor accepted at the trial that unless the prosecution could exclude the reasonable possibility that Ms Byrne had committed suicide, a prosecution for murder or even manslaughter could not be sustained.[33]

[31] *Wood v R* [2012] NSWCCA 21, [9].
[32] *Wood v R* [2012] NSWCCA 21, [10].
[33] *Wood v R* [2012] NSWCCA 21, [8].

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5.2 The Means - Expert evidence – A/P Cross

A/Prof Cross became intensely interested in the problem of how Ms Byrne met her death. He set about determining whether she could have been thrown from the cliff. Following the identification of hole A in 2004 he accepted that hole A was the correct position of the body and conducted a series of not particularly sophisticated experiments to establish whether Ms Byrne could have jumped or been thrown to that location. The experiments involved strong men throwing women into swimming pools and throwing dead weights, as well as fit and able-bodied young women jumping and diving into pools. A/Prof Cross was satisfied that a strong, fit man could have thrown a woman of Ms Byrne's weight from near the bend in the safety fence on what has become known as the "northern ledge" to hole A. A/Prof Cross also produced calculations from which he concluded that a person of Ms Byrne's assumed athletic ability could not have jumped, even with a running start, from the "northern ledge" to hole A with a run up of 4 metres, which was the run-up distance which was assumed to be available. However, he calculated that with the available run up it was possible for a strong man, using a "spear throw" technique to have thrown Ms Byrne to hole A without also falling off the cliff top as he threw her.

5.3 The Motive

The prosecutor told the jury that Wood may have killed Ms Byrne because she had told Wood that she wanted to terminate their relationship. For this theory the Crown accepted that Wood was in love with Ms Byrne and did not want this to happen. However, it was also suggested by the Crown that Wood believed that Ms Byrne knew details about the "Offset Alpine Printing scandal" which she might disclose to an unnamed person and, if this happened, Rivkin would blame Wood and he would then lose his job. In effect, the prosecution hypothesised that although it meant killing the person he loved, Wood chose to do this rather than lose his job. There was no suggestion that Wood had involved himself in suspect dealings in the shares but it was in effect suggested that he chose to kill Ms Byrne to protect Rivkin. The prosecution called evidence to suggest that, on the afternoon Ms Byrne died, Rivkin was seen in an agitated exchange with Wood. The content of the conversation is

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not known but the suggestion by the prosecutor was that Rivkin wanted Ms Byrne neutralised in some manner.

5.4 The Opportunity

There wereno eyewitnesses to Ms Byrne's fall. There was some evidence that indicated Wood was at the Gap with Ms Byrne between 1pm – 3pm. There was also evidence from Mr Doherty, local resident that Wood, with another person was seen at the Gap in the evening.

5.5 Analysis of the Issues

5.5.1 Unsafe verdict, illogical reasoning

Wood's case was entirely circumstantial.[34] Leave of the CCA is required when it is submitted that the jury's verdict was unreasonable: *Rasic v R* [2009] NSWCCA 202 at [12]. In *SKA v The Queen* (2011) 243 CLR 400, the High Court said at [11]-[14]:

> *"It is agreed between the parties that the relevant function to be performed by the Court of Criminal Appeal in determining an appeal, such as that of the applicant, is as stated in M v R [(1994) 181 CLR 487 at 493] by Mason CJ, Deane, Dawson and Toohey JJ: "… the question which the court must ask itself is whether it 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."*
>
> …

The High Court does not provide any guidance as to how to assess the whole evidence. Instead the High Court says:

> *"In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving doubt experienced by a court of criminal appeal."*[35]

The words "ought also to have" begs the question why didn't the jury see such '*doubt*' if it is apparent to three justices of appeal? The other question it raises is whether the CCA is the appropriate forum for review and determination, which I have briefly touched on above and

[34] *Wood v R* [2012] NSWCCA 21, [50].
[35] *M v R* [(1994) 181 CLR 487, at pgs 492-493.

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is outside the scope of this paper. However, issues of 'doubt' require a separate test before any verdict is made official, especially in circumstantial cases.

Returning the Wood case, the question of assessing the whole evidence in a circumstantial case, it is left to our own commonsense. His Honour McClellan CJ at CL said at [56]:

> *"In the analysis that follows, I have resisted any temptation to consider the case against the accused in a piecemeal way. In my view, this is a case where doubts about each piece of circumstantial evidence are reinforced, rather than resolved, by the rest of the prosecution's case. I have also borne in mind the deference due by an appeal court to the combined experience and commonsense of a jury that convicts an accused person on the basis of circumstantial evidence alone: Burrell at [64]-[65] (Giles JA); Chahine v R [2006] NSWCCA 179 at [88] (Johnson J, McClellan CJ at CL and Hoeben J agreeing); R v Kaldor [2004] NSWCCA 425; (2004) 150 A Crim R 271 at [2] (Dunford J). However, my evaluation of the whole of the evidence satisfies me that the jury's verdict cannot be supported. I am not satisfied beyond reasonable doubt of the applicant's guilt. Although the jury heard from various witnesses the applicant did not give evidence. I do not believe the jury's verdict can be explained by any advantage which they had which was not available to this Court."*[36]

His Honour adopted a links in the chain approach of reasoning. If one link was failed then the Crown could not support its hypothesis. But without reasons, both His Honour and we are left to fill in the gaps and re-construct the case from the evidence.

It is this reconstruction of the evidence the CCA provides us with the "reasons" of whether a jury could be satisfied beyond reasonable 'doubt'. The remainder of His Honours reasons from paragraphs [57] to [377] sets out his views of the evidence that favoured reasonable doubt including any findings about the credibility of witnesses and how the prosecution ran its case during the trial.

Does this now stand as proposition that in any circumstantial case, all convicted persons should appeal to ascertain the *reasons*? And the *reasons* of professional logicians.

[36] *Wood v R* [2012] NSWCCA 21, [56].

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5.5.2 Lack of Directions by trial judge

Defence counsel asked the trial judge for directions to be given in accordance with the decision in *Shepherd* in relation to four matters. Firstly he submitted that the jury must be satisfied that Ms Byrne was conscious when she was thrown, secondly that the method of throwing was the "spear throw," thirdly that Ms Byrne was spear thrown into hole A, and fourthly that the applicant was not at home at the time of death. Finally, in the context of discussions about joint criminal enterprise, defence counsel submitted that joint criminal enterprise should not be left to the jury and the jury should be directed that they had to be satisfied that it was the accused that did the act causing death.[37]

The Crown prosecutor opposed the directions.[38]

There was a debate at the trial as to whether, before they could convict Wood, the jury had to be satisfied, beyond reasonable doubt, that Wood's used a "spear throw" and that Ms Byrne lodged on the rocks at hole A. It was submitted that without being satisfied of those facts suicide could not be excluded.

The trial judge declined to give a Shepherd direction.

With respect to the first matter, whether Ms Byrne was conscious or unconscious, the trial judge ruled that he did not understand senior counsel for the applicant to have identified a fact that had to be proved beyond reasonable doubt and he did not hear the Crown on this point. With respect to the other matters, His Honour concluded that there was no intermediate fact requiring proof beyond reasonable doubt. He said: "all the Crown's case was [was] that the deceased had landed in hole A, it had not undertaken to prove that conclusion to the exclusion of hole B. The only purpose of the evidence about hole B was to provide for the possibility that that was where the deceased had landed."[39]

[37] *Wood v R* [2012] NSWCCA 21, [555].
[38] *Wood v R* [2012] NSWCCA 21, [556].
[39] *Wood v R* [2012] NSWCCA 21, [557].

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With respect to the "spear throw" method His Honour ruled that because of the evidence of A/Prof Cross, that method was the only one available: "if the jury found that the accused or any person for whose act he was responsible did the act causing death, it would follow that the method used was the 'spear throw'."[40] His Honour determined that since the commission of an act causing death itself had to be proved beyond reasonable doubt, it was unnecessary to direct the jury that they must find beyond reasonable doubt that the only available method was used.

His Honour also gave the jury directions in relation to suicide. His Honour said at paragraph [565]:

> *"One of the things you will be asking yourself during the course of your deliberations is whether the deceased could have got herself, under her own power, into hole A or hole B. And that is allied to this question of suicide of course, because if you conclude that she could not - and since there is no evidence upon which you could find that the body finished in any other place, the only evidence goes to hole A or hole B; there is no third choice - if she could not, under her own steam, have got to either of those places, then she must have got there by some means other than her own power and will. So that is relevant to this question of suicide. It is not necessarily the first question you have to answer but it is relevant."*[41]

That was despite evidence of tides and swell provided by Dr Duflou, that it was possible for the body to have moved and been wedged at hole B.[42]

Other direction issues that arose during trial was indentification of Woods and the deceased from the testimony of Doherty. There was also issues of the displacement effect. His Honour said: "The law is replete with warnings about the fallibility of evidence of this type."[43] Doherty was found lacking in credibility. His Honour remarked: "There is every chance that Doherty's memory has been influenced by the images he saw of the applicant well after 1995."[44]

[40] *Wood v R* [2012] NSWCCA 21, [558].
[41] *Wood v R* [2012] NSWCCA 21, [565].
[42] *Wood v R* [2012] NSWCCA 21, [535] – [554].
[43] *Wood v R* [2012] NSWCCA 21, [410].
[44] *Wood v R* [2012] NSWCCA 21, [165].

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The jury were directed that Doherty's evidence did not purport to identify the applicant or the victim. They were also directed that they could not conclude on the evidence that Redding, an acquaintance of the applicant, was the second man. They were directed that "at best the evidence is of people, including two persons whose appearance was consistent with their being the accused and the deceased."[45]

The direction from the judge was in effect saying that the two persons, a fact in issue, **were** the accused and the deceased. It reversed the caution or warning provided.

His Honour said at [416]:

> *"The evidence having been admitted at the trial, strong directions were necessary and required by law: Domican v The Queen [1992] HCA 13; (1992) 173 CLR 555 at 561-2; Festa v The Queen [2001] HCA 72; (2001) 208 CLR 593 (Gleeson CJ at [26], McHugh J at [68]-[82], Kirby J at [172]-[180], and Hayne J at [216]-[219]); ss 116, 165 of the Evidence Act. An obligation also rested on the prosecutor, who had argued that appropriate safeguards could be ensured through directions and who had resorted to dock identification, to assist the judge with appropriate directions."*

5.5.3 Prosectors conduct - Overzealous, breach of fairness duty,

The final issue to address is the Crown's prejudicial conduct. As raised earlier in the introduction section, a danager in circumstantial case is the prejudice ocassioned by overzealous prosecution, invitation to drawing incorrect inferences or impermissible path of reasoning and the appeal to higher authority fallacy.

The appeal proceeded on two issues: 1) the second man,[46] and 2) the Crown Prosecutor's invitation to the jury to consider a list of fifty questions which the prosecutor told the jury were "the salient questions in order to decide the outcome of the case."[47] The second issue raises issues of reversing the onus of proof. Asking "rhetorical" questions falls into this category: *R v Rugari* [2001] NSWCCA 64.

[45] *Wood v R* [2012] NSWCCA 21, [167].
[46] *Wood v R* [2012] NSWCCA 21, [572].
[47] *Wood v R* [2012] NSWCCA 21, [574].

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The first issue was rejected by the CCA.

On the second issue, the CCA found the Crown prosecutor engaged in speculation without basis, offered his own opinion such as "[p]eople that commit suicide generally don't argue for an hour beforehand.",[48] and belittled defence expert to rebut A/P Cross.

The CCA agreed with the submission that "[a]part from the 50 questions the applicant submitted that the prosecution made further "unfair submissions in an attempt to persuade the jury that the deceased had not committed suicide." were made and justified.[49]

The CCA concluded that the Crown prosecutor failed to comply with the required standards of fairness and the trial miscarried.[50]

Over-all, the CCA was highly critical of the Crown's theory of the case and the presentation of the evidence.

The principal judgement was given by McClellan CJ at CL. However, the judgments of Rothman J and Latham J succinctly address the issues of drawing incorrerct inferences and the lack of proof. Rothman J said at paragraphs [821] – [827]:

> *[821] The case presented by the Crown is, as has been pointed out, a circumstantial case. A large number of prosecutions are in that category. In this case, there was no direct evidence linking the accused to the death of Ms Byrne.*
> *[822]. The received method of testing the sufficiency of evidence to establish the conclusion that a coincidence of events and circumstances warrants a belief in the causal connection between the facts that are capable of direct proof and the guilt of an accused is the examination of hypotheses logically consistent with the proved facts: Morgan v Babcock & Wilcox Ltd (1929) 43 CLR 163 at 173, per Knox CJ and Dixon J. The joint judgment went on to comment:*
>
> > *"In the end, however, the reasonableness or the probability of the occurrence of such hypotheses determines their admissibility, and when the coincidence of fact and concurrence of*

[48] *Wood v R* [2012] NSWCCA 21, [631].
[49] *Wood v R* [2012] NSWCCA 21, [624].
[50] *Wood v R* [2012] NSWCCA 21, [634].

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> *time are relied upon, the sufficiency of the circumstances must inevitably be judged by considering whether general human experience would be contradicted, if the proved facts were unaccompanied by the fact sought to be proved."*

[824]. In order to prove guilt the facts proved and accepted were required to be such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person: Peacock , supra, at 634 per Griffith CJ. It summarised the principle as being sometimes stated, "that the circumstances must be such as to be inconsistent with any reasonable hypothesis other than the guilt of the accused." The Chief Justice went on to say:

> *"In the present case we know what the cause of death was, if we know anything about the case at all. It was the result of a miscarriage. The next question is: How may that have been brought about? We all know that it may be the result of accident or of purpose. If of accident, there is no guilt anywhere. If of purpose, it may be the act of the woman herself, or of some other person."*

[826]. Beyond that conclusion all other conclusions on the elements to prove murder are conjecture. As made clear in the other reasons for judgment herein, the foundation to conclude that the death was by an act of violence perpetrated by another does not meet the requisite test. Further, the "proof" of the connection of the accused with the death of Ms Byrne fails to meet the required test to an even greater extent.

[827]. In order to find the appellant guilty of the charge preferred it was not sufficient to determine that which was more probable. Suspicion and conjecture, even grave suspicion, is not a proper basis for the finding of guilt.

Latham J said at paragraphs [812] – [816]:

[812]. There was a potentially fatal lacuna in the Crown case, namely, the absence of any evidence at all that Wood was with Ms Byrne when she left the cliff edge. The Crown relied on an inference that Wood was in her company, possibly with another man, continuously from the alleged sighting by Mr Doherty up until the scream was heard by the men who were fishing nearby. Having regard to the significant shortcomings in Mr Doherty's evidence, that was an inference that could not be reliably drawn.

[813]. It could not have escaped the Crown's attention that, without evidence of motive, its circumstantial case against Wood depended substantially upon the combination of the expert evidence (which was already compromised by the conflict in the evidence surrounding the nomination of the place from which Ms Byrne's body was recovered) and the weak "identification" evidence.

[814]. At the heart of Wood's alleged motive to kill the woman he loved, rather than risk the loss of his employment and all the financial advantages it entailed, was the assertion by the Crown that Ms Byrne

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communicated to Wood that she wanted to finish the relationship. The Crown's submission to the jury recognised the paucity of evidence underpinning this thesis. The submission was :

> *We would submit to you that she must have intimated to him that she wanted out, and it must have been obvious to him that this time it was going to be forever. (italics not in transcript)*

[815]. It is difficult to regard this submission as anything other than an invitation to speculate. Moreover, it fell short of asserting that Ms Byrne in fact directly conveyed to Wood that she "wanted out". Yet, it is clear that a very substantial portion of the Crown case was devoted to the topic of motive and that it, together with the expert evidence, occupied a position of primacy in the Crown's hypothesis. [816]. It is convenient to return at this point to one of the principal judgments of the High Court on the subject of a circumstantial case, namely, Plomp v R [1963] HCA 44; 110 CLR 234. In the course of a discussion on motive and its role in a circumstantial case, Dixon CJ (Kitto, Taylor, Windeyer JJ agreeing) said at [5] :-

> *All the circumstances of the case must be weighed in judging whether there is evidence upon which a jury may reasonably be satisfied beyond reasonable doubt of the commission of the crime charged. There may be many cases where it is extremely dangerous to rely heavily on the existence of a motive, where an unexplained death or disappearance of a person is not otherwise proved to be attributable to the accused; but all such considerations must be dealt with on the facts of the particular case. (italics not in original)*

Summary/Conclusion

Yours sincerely

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Bibliography

Odgers, Stephen. *Uniform Evidence Law*. Thomson Reuters, 15th edn, 2020.

Terence Anderson, David Schum and William Twining. *Analysis of Evidence*. Cambridge University Press, 2005.