CIRCUMSTANTIAL EVIDENCE

IN CRIMINAL CASES

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GENESIS ?

1. I do not know just when indirect evidence became known as circumstantial evidence, but the concept has been with us for a long time. In writing his *Introduction to the Indian Evidence Act* published in 1872[1] Sir James Stephen observed that:

> Facts relevant to the issue are facts from the existence of which inferences as to the existence of the facts in issue may be drawn.
>
> A fact is relevant to another fact when the existence of the one can be shown to be the cause or one of the causes, or the effect or one of the effects, of the existence of the other, or when the existence of the one, either alone or together with other facts, renders the existence of the other highly probable, or improbable, according to the common course of events.

2. In *Peacock v The King*[2] in 1911 Griffiths CJ relied upon the 1842 edition of *Starkie on Evidence* as authority explanatory of circumstantial evidence. In 1928 in *Taylor Weaver and Donovan*[3] Hewart LCJ observed that:

> It has been said that the evidence against the applicants is circumstantial: so it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undesigned coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.

3. I do not recall many cases where circumstantial evidence proved a proposition with the accuracy of mathematics, in spite of the urgings of prosecutors and judges, but the case points to the big issue of just how circumstantial evidence is to be treated, which I will come to.

4. Professor Wigmore [4]said "the term "circumstantial" is unfortunately but inevitably fixed upon us… this class embraces all offered evidentiary facts not being assertions from which the truth of the matter asserted is desired to be inferred". And he went on at considerable length to consider circumstantial evidence as requiring a grouping according to whether the facts constituting evidence of the act to be proved came before the act (prospectant) at the time of the act (concomitant) or after the act (retrospectant)[5].

In the end, circumstantial evidence in criminal cases permits of a simple definition, that is, evidence of a fact or facts from which a jury is asked to infer a fact in issue. But it is at that point the debate usually starts.

SIMILAR FACTS, TENDENCY AND COINCIDENCE

5. Before the *Evidence Act* there was a long line of authority to the effect that circumstantial evidence demonstrating a mere propensity to commit crime, or crime of a similar kind, was inadmissible unless the evidence was relevant in some other way. The evidence of similar facts had to have a strong degree of probative force. It would usually be of acts bearing a striking similarity to the act charged, such that it would be unreasonable to suppose they occurred merely by coincidence. Such evidence might have been relevant if it bore upon the question whether the acts alleged were designed or accidental, or to rebut a defence otherwise open to the accused.

6. In 1892 and earlier Mr and Mrs Makin accepted the care of infants in Sydney for a fee. To them, it was sound economics to keep the fees and dispense with the infants. When charged with the murder of one baby, whose body was found buried, they found it difficult to explain the presence of twelve other buried babies in premises owned by the Makins[6]. The Privy Council held that the discovery of the other bodies could throw light upon the cause of death of the infant with whose murder the Makins were charged. They were hanged.

7. George Smith, tried in England in 1915, had the misfortune to lose three lovers (each of whom he bigamously married) all by drowning in a bath, all in the same bizarre circumstances[7]. He joined the Makins. Noor Mohamed the goldsmith had better luck, having lost two mistresses to cyanide poisoning. Evidence of the first death was rejected as showing no more than a propensity to commit murder[8]. In *Boardman*[9] Lord Cross used the term "striking similarity" as a test for admission, and in *Markby*[10] Gibbs CJ at 117 said the admission of similar fact evidence was the exception rather than the rule, and observed (citing *Boardman*) that it may not be going too far to say that it will be admissible only if it is "so very relevant that to exclude it would be an affront to common sense". The cases were reviewed times over by the High Court of Australia in cases such as *Perry*[11], *Hoch*[12], *Harriman*[13] and *Pfennig*[14]. The list is by no means exhaustive but the common thread was that evidence of similar facts was a particular sort of circumstantial evidence which, to be admitted, had to possess a particular probative value or cogency by reason that it revealed a pattern of activity such that, if accepted, bore no reasonable explanation other than the inculpation of the accused person in the offence charged: for example, *Hoch* at 294.

EVIDENCE ACT

8. The issue of propensity evidence is now of course governed by ss.97 and 98 of the *Evidence Act*. Section 97 proscribes the admission of evidence of character, reputation, conduct or tendency to prove a person has or had a tendency to act in a particular way or to have a particular state of mind if the court thinks the evidence would not have

significant probative value. Section 98 precludes evidence of 2 or more related events to prove that because of the improbability of coincidence a person did a particular act or had a particular state of mind unless the evidence would have *significant probative value*.

9. It is unclear precisely what "significant" means in this context. The effect of the legislation seems to be to make easier the reception of propensity evidence, no longer requiring the sort of tests discussed in the common law cases, notwithstanding that the onus is on the party calling the evidence to justify its reception as having significant probative value.

10. Section 101 requires exclusion of evidence in criminal proceedings unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant. Section 137 makes such the same provision, but without requiring "substantial" prejudice and limiting prejudice to "unfair" prejudice. Section 137 is mandatory in its terms.

It seems to me that the legislation does not restore the strict common law prohibition against the reception of circumstantial similar fact evidence except in special circumstances.

11. *Fletcher*[15] is an example of the ways ss.97 and 98 have introduced a new concept, not necessarily a just one. The majority in the CCA held that evidence of an uncharged sexual act, different from the acts charged, on a different person, remote in time from the

offences charged, was properly admitted. It would be difficult to see the admissibility of the evidence at common law. The High Court refused special leave to appeal.

12. Propensity evidence is a large and diverse subject on its own; too wide for detailed attention here. In the context of this paper I simply observe that in my view the effect of the *Evidence Act* has been to undercut the common law to make easier the reception of propensity evidence.

RATIONAL CONCLUSION TO BE DRAWN

13. A principle once paramount to the admission of circumstantial evidence in a criminal case was that, in order to convict, the only rational conclusion to be drawn from the circumstances was the guilt of the accused.

14. The principle has been put in various ways. *Peacock*[16] was a medical practitioner convicted of the murder of a woman said to have died from the result of an abortion and whose body was never found. One of the issues before the High Court was whether evidence of facts led by the Crown to prove the cause of death was sufficient for a conviction. The appeal was allowed on a different ground, but in considering the strength of the circumstantial evidence 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.

And he said (at 630):

> The rules of evidence are the same in criminal as in civil law, and the rules of logic and common sense as to what inference may be drawn from acts are the same whether the case is civil or criminal. In civil cases where the evidence is nicely balanced, the recognized practice is to leave it to the jury to say which hypothesis they accept, where there are two equally, or nearly equally, probable hypothesis. But this is certainly not the practice in criminal cases. It is practice of Judges, whether they are

> bound to give such a direction or not to tell the jury that, if there is any reasonable hypothesis consistent with the innocence of the prisoner, it is their duty to acquit.

15. In 1936 in *Martin v Osborne*[17] 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.

16. In 1963 Hendrikis Plomp went swimming with his wife at Southport. Only Plomp came back, his wife having drowned. He was tried for her murder and convicted. The evidence was entirely circumstantial and included his statement that he had been happily married. That was, on Plomp's part, a grave error. The evidence assumed considerable significance when it was proved that he had for some time had a mistress to whom he proposed marriage, a few days after his wife's death. His application for special leave was refused[18]. Dixon CJ cited his judgment in *Martin & Osborne*. Menzies J put the requirement for the direction as to rational conclusions on a broader basis than before, saying (at 252):

> The customary direction where circumstantial evidence is relied upon to prove guilt, that to enable a jury to bring in a verdict of guilty it is necessary not only that it should be a rational inference but the only rational inference that the circumstances would enable them to draw, was given. It was argued, however, that the direction is something separate and distinct and must be kept separate and distinct from the direction that the prosecution must prove its case beyond reasonable doubt. Notwithstanding that the applicant's counsel did find some authority to support their contention- *Reg. v Ducsharm*- that contention is unsound for the giving of the particular direction stems from the more general requirement that the guilt must be established beyond reasonable doubt.

17. Dawson J effectively abandoned the strict rule articulated by Griffiths CJ in *Peacock* and re-stated the generality of the requirement for the direction in *Shepherd*[19], saying:

> The learned trial judge gave the customary direction that, where the jury relied upon circumstantial evidence, guilt should not only be a rational inference but should be the only rational inference that could be drawn from the circumstances: see *Hodge's Case*; *Peacock v The King*; *Plomp v The Queen*. Whilst a direction of that kind is customarily given in cases turning upon circumstantial evidence, it is no more than an amplification of the rule that the prosecution must prove its case beyond reasonable doubt. In many, if not most, cases involving substantial circumstantial evidence, it will be a helpful direction. In other cases, particularly where the amount of circumstantial evidence involved is slight, a direction in

> those terms may be confusing rather than helpful. Sometimes such a direction may be necessary to enable the jury to go about their task properly. But there is no invariable rule of practice, let alone rule of law, that the direction should be given in every case involving circumstantial evidence. It will be for the trial judge in the first instance to determine whether it should be given.

And it was confirmed in *Knight*[20] where the majority said:

> In his charge, the trial judge instructed the jury to the effect that they should only find by inference an element of the crime charged if there were no other inference or inferences which were favourable to the appellant reasonably open upon the facts. A direction in those terms is often called for where the prosecution relies upon circumstantial evidence…. However it is a direction which is no more than an amplification of the rule that the prosecution must prove its case beyond reasonable doubt….

18. There are many other cases which touch upon the necessity for a direction about competing inferences. Although the direction may be no more than an amplification of the rule that conviction requires proof beyond reasonable doubt, it is nonetheless usually given in trials involving circumstantial evidence and is a special rule in such cases. But contrary to earlier authority it now does not have to be given in every case involving circumstantial evidence.

LINKS IN A CHAIN, STRANDS IN A CABLE (OR STRAWS IN THE WIND?)

19. If you mix these metaphors with the argument about the extent to which juries should be instructed to find some circumstantial facts beyond reasonable doubt or merely on the balance of probabilities you are confronted with a judicial stew which, if not inedible, tends to be indigestible.

Pollock CB seems to have started it all in 1866, in *Exall*[21] where he 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 fail. 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.

20. But there are cases where the chain metaphor is more apt, that is, where the evidence is in truth almost entirely relied upon by the prosecution and there are cases where it is unclear which metaphor is apt. Yet juries may still be told if they look at the whole of the evidence the case will not fail merely because of the uncertainty of some evidence or

other, so the evidence can be looked at as a fraying rope rather than a breaking chain and they are told they must look at all the evidence. Out of all this has emerged the notion of *intermediate facts* which constitute *indispensable links* in a chain of reasoning towards an inference of guilt, and that some facts need proof beyond reasonable doubt and some not.

21. The issue became a little confused in 1983 when the High Court delivered the judgment in *Chamberlain*[22]. Gibbs CJ and Mason J said (at 536):

> It follows from what we have said that the jury should decide whether they accept the evidence of a particular fact, not by considering the evidence directly relating to that fact in isolation, but in the light of the whole evidence, and that they can draw an inference of guilt from a combination of facts, none of which viewed alone would support that inference. Nevertheless the jury cannot view a fact as a basis for an inference of guilt unless at the end of the day they are satisfied of the existence of that fact beyond reasonable doubt. When the evidence is circumstantial, the jury, whether in a civil or in a criminal case, are required to draw an inference from the circumstances of the case; in a civil case the circumstances must raise a more probable inference in favour of what is alleged, and in a criminal case the circumstances must exclude any reasonable hypothesis consistent with innocence….
>
> It seems to us an inescapable consequence that in a criminal case the circumstances from which the inference should be drawn must be

> established beyond reasonable doubt. We agree with the statement in *Reg. v. Van Beelen* that it is "an obvious proposition in logic, that you cannot be satisfied beyond reasonable doubt of the truth of an inference drawn from facts about the existence of which you are in doubt".

And they went on to say (at 538):

> However, in our opinion, it must follow from the reasoning in *Reg v Van Beelen* that the jury can draw inferences only from facts which are proved beyond reasonable doubt.

And at 599 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

22. Sir William Deane would have allowed the appeal. On the subject of proof of all facts beyond reasonable doubt he did not agree with the majority, holding that it was not the law that a jury was in all circumstances precluded from drawing an inference from a primary fact unless the fact is proved beyond reasonable doubt.

He said (at 626-627):

> If a primary fact constitutes an essential element of the crime charged, a juror must be persuaded that that fact has been proved beyond reasonable doubt before he or she can properly join in a verdict of guilty. Whether or not a juror must be satisfied that a particular fact has been proved beyond reasonable doubt will, however, otherwise depend not only on the nature of the fact but on the process by which an individual juryman sees fit to reach his conclusion on the ultimate question of guilt or innocence. If, for example, the case against an accused is contingent upon each of four matters being proved against him, it is obvious that each of those matters must be proved beyond reasonable doubt. Indeed, it would be appropriate for the presiding judge to emphasize to the jury in such a case that even a minimal doubt about the existence of each of those matters would be greatly magnified in the combination of all. On the other hand, if the guilt of an accused would be established by, or a particular inference against an accused could be drawn from, the existence of any one of two hundred

> different matters, each of which had been proved on the balance of probabilities, it would be absurd to require that a jury should disregard each of them unless satisfied, either in isolation or in the context of all of the facts, that any particular one of those matters had been proved beyond reasonable doubt.

His judgment is sometimes overlooked in the debate about whether some circumstantial evidence is an indispensable link in the chain of reasoning. I will return to it.

23. If the majority in *Chamberlain* intended their words to be read literally, the law they declared was that inferences drawn beyond reasonable doubt must derive from facts proved beyond reasonable doubt. Such appeared to be the law on 22 February 1984.

24. But challenge loomed.

Between 1976 and 1979 James William Shepherd conspired to import into Australia a lot of heroin. In 1988 he was tried, convicted and sentenced to 20 years. An appeal to the CCA was dismissed but the court reserved a ground of appeal that the trial judge failed to direct the jury in accordance with *Chamberlain*[23].

25. The reserved ground was argued before the same bench[24]. The trial judge's directions are recorded at pp.468-469. He gave the customary direction that the circumstantial evidence must be such that no other reasonable inference could be drawn, but he did not

direct that to draw an inference beyond reasonable doubt the jury would have to be satisfied beyond reasonable doubt as to the facts from which the inference was drawn.

26. In his judgment Street CJ (at 471) said:

> Chamberlain's case was, in my view, an enunciation by the High Court made for the purpose of resolving the philosophical disputes that exist in relation to this topic. The law as laid down by the High Court is clear and specific. In the view that I hold, in a circumstantial case there should ordinarily be given a *Chamberlain* direction, drawing such direction from the terms of the judgments in that case and phrasing it as may be appropriate for the particular case in hand.

27. The Chief Justice went on to say it was not appropriate to put a gloss on the basic principle enunciated by the High Court in *Chamberlain*, which was that circumstantial facts were to be adjudged in accordance with the approach of the High Court in *Chamberlain*. He was supported by Campbell J, whilst Lee J dissented. But there remained the proviso. A differently constituted court held that notwithstanding the previous court's ruling as to the necessity for a *Chamberlain* direction, there was no substantial miscarriage of justice, and they applied the proviso to s.6(1) of the *Criminal Appeal Act* and dismissed the appeal[25]. At the same time, the judges were hostile to the finding of Street CJ and Campbell J that a *Chamberlain* direction should have been given. At p.275 Roden J, in a Roden-like way, concluded a lengthy discourse on the topic in these words:

> Paying homage to the words required of them by appellate courts, yet making sense to a jury, is the almost impossible task imposed on trial judges these days. When *Viro* (1978) 141 CLR 88 was put to rest by *Zecevic* (1987) 162 CLR 645; 25 A Crim R 163, a giant step forward was taken. I would hate to see *Chamberlain* used to reverse the process. Nor do I believe that the majority in *Chamberlain* intended to lay down a requirement that any particular form of words be used by trial judges in explaining to juries how the requirement that guilt be proved beyond reasonable doubt impacts on circumstantial cases. Their Honours were simply describing their own thought processes as they considered the circumstantial evidence in the case then before them, for the purpose of deciding the "unsafe and unsatisfactory" ground.
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> Esoteric debate among lawyers who delight in it, like grand masters around a chess board, and perform well at it, may have its place. But let us keep it there. What might be appropriate for multi-million dollar law suits between commercial barons who play with numbers as lawyers play with words, is not necessarily appropriate in the administration of criminal justice under our system, in which fact-finding is for juries.

28. The case went to yet another CCA where further grounds of appeal were argued and rejected[26]. They are not relevant here. Shepherd was granted limited special leave, and appealed on the ground the CCA had erred in applying the proviso[27]. The DPP, no doubt emboldened by the opinions of Roden J and the other judges in the second CCA, filed a

notice of contention asserting that the trial judge had not erred in failing to give the *Chamberlain* direction.

29. Then, quite suddenly, the law changed or perhaps, as Dawson J and Mason CJ explained, it was merely clarified. At 576 the Chief Justice said of his ruling in *Chamberlain* that it really should have referred to not just a fact but "an intermediate fact as an indispensable basis for an inference of guilt" and should be understood in the sense stated by Dawson J. Dawson J sought to rescue the Chief Justice and the former Chief Justice by asserting (at 581) that:

> It is, I think, quite plain that in saying that a "fact as a basis for an inference of guilt" must be proved beyond reasonable doubt, their Honours are referring to an *intermediate fact* which is a necessary basis for the ultimate inference.

30. McHugh J was a little more direct, saying (at p.593):

> Although I think the majority in *Chamberlain* intended to assert that an inference of guilt can never be drawn unless each circumstance relied on to found that inference is proved beyond reasonable doubt, it does not follow that *Chamberlain* is an authority for the proposition that a jury must be directed to that effect.

His reasoning was that the case was concerned with whether the verdict of the jury was unsafe or unsatisfactory. It was not concerned with the direction which a jury should receive on the standard of proof to be applied.

Whether or not that reasoning is correct, it is I suppose relevant to point out that the issue which caused so much trouble was not raised at all at the trial of the Chamberlains. No such direction was asked for.

31. In *Shepherd* McHugh J said (at p.593):

> In *a particular case* an inference of guilt beyond reasonable doubt may not be able to be drawn unless each fact relied on to found the inference is established beyond reasonable doubt. This is likely to be the case where the incriminating facts relied on to establish the inference are few in number. But the more facts relied on to found the inference of guilt, the less likely it is that each or any fact will have to be proved beyond reasonable doubt to establish guilt beyond reasonable doubt.

He seems to be talking about individual facts, not intermediate facts as indispensable links.

32. This is consistent with what was said by Deane J in *Chamberlain* at pp.626-627. Although the words in the judgment of Deane J appear under the title "Proof of Intermediate Facts" they appear to relate to individual facts as well. He seems to use

"primary facts" as interchangeable with "intermediate facts", and his reference to proof of four matters as against proof of two hundred matters is a reference to individual facts not intermediate indispensable facts.

33. However. The opinions of the majority in *Shepherd* represent the present law, so let me try to summarise them as enunciated by Dawson J (with whom Toohey and Gaudron JJ agreed):

(1) In many, if not most, cases it will be helpful to tell the jury that, where the jury relies upon circumstantial evidence guilt should not only be a rational inference but the only rational inference that can be drawn from the circumstances. But this is not an invariable rule of practice or law.

(2) In most cases the jury's ultimate conclusion must be drawn from some intermediate factual conclusion whether identified expressly or not.

(3) Proof of an intermediate fact will depend on the evidence, usually a body of individual items of evidence and may itself be a matter of inference.

(4) More than one intermediate fact may be identifiable.

(5) It may sometimes be necessary to identify those intermediate facts which constitute indispensable links in a chain of reasoning towards an inference of guilt.

(6) If it is appropriate to identify an intermediate fact as indispensable it may well be appropriate to tell the jury that the fact must be found beyond reasonable doubt before the ultimate inference can be drawn, but where 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.

(7) 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 shown on the evidence.

(8) Not every fact – every piece of evidence – relied upon to prove an element by inference must itself be proved beyond reasonable doubt.

(9) 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. The probative force of a mass of

evidence may be cumulative, making it pointless to consider the degree of probability of each item separately.

34. In practice the following questions often arise:

(1) The identification of each individual fact which along with all other individual facts is said to constitute proof of the offence beyond reasonable doubt.

(2) The identification of each intermediate fact which may be an indispensable link in the chain of reasoning.

(3) The identification of each individual fact which, along with others, is said to constitute an essential intermediate fact.

(4) The identification of facts which require proof beyond reasonable doubt before an inference of guilt can be drawn from them.

35. The position was re-stated by Sully J in *Minniti*[28]:

> Ever since the decision of the High Court of Australia in Shepherd v The Queen, any case of the present kind has to be dealt with in the shadow of two contrasted forensic metaphors. The first is the "links in a chain" metaphor. The second is the "strands in a cable" metaphor

> It appears to be now settled law that a circumstantial Crown case which is properly to be treated as a "links in a chain" type of case will require jury directions about any so-called intermediate facts which are "indispensable links in [the jury's] chain of reasoning towards an inference of guilt", to borrow from the Court judgment (Wood CJ at CL, James and Adams JJ) in *P v Merritt* (1999] NSWCCA 29 at [70]. Such directions must identify facts having that potential significance; and the jury must be instructed that if the jury sees any such fact as constituting such an indispensable link, then the fact must be proved beyond reasonable doubt before it can be utilised as part of the chain of reasoning to an inference of guilt as charged.
>
> It appears to be equally settled law that a circumstantial Crown case which is properly to be treated as a "strands in a cable" type of case will not require any directions other than the conventional directions….

36. But Sully J identified the real problem (at 409) when he referred to the difficult concept, or principle, by which a trial judge can determine with a proper professional confidence whether he has on his hands a case calling for links in a chain direction, or strands in a cable direction.

37. The problem, I think, emerged in *Burrell*[29]. The focus of the Crown case was very largely on what was said to be the disappearance of Mrs Whelan at Parramatta in a Pajero vehicle at 9.38am. The defence called evidence of sightings of Mrs Whelan long after 9.38am and not in Mr Burrell's company. The trial judge refused to direct that the

evidence had to satisfy the jury beyond reasonable doubt that Mrs Whelan in fact entered the Pajero at about 9.38am driven by Burrell. She could, Barr J said, have been abducted at any time up to 4.00pm. The case is the subject of a special leave application.

38. In *Burrell* the CCA considered *Davidson*[30], *Velevski*[31], *Hillier*[32] and *Keenan*[33]. The cases emphasise the necessity for a jury to consider all the circumstances, collectively and not piecemeal. But I do not see that as eroding the need to attach to important circumstances the requirement of proof beyond reasonable doubt. In weighing a number of circumstances together it should not be confusing for a jury to be told some or other of them should not be acted upon unless proved beyond reasonable doubt.

39. True it is that we will rarely know from what point in the evidence a juror will commence his or her deliberations, but when the Crown prosecutor invites a starting point as being the most important part of the case, the evidence thereby adduced should surely require a direction that if it is to be acted upon as the Crown suggests, it should be accepted only if proved beyond reasonable doubt.

40. In *Merritt* there were but two intermediate facts. The Court said where there are one or more facts which might be so regarded, it would usually be essential for the trial judge to identify those facts and instruct the jury that if they considered such facts were indispensable they would need to be satisfied of them beyond reasonable doubt. But that principle seems to be on the way out; at least, Spigelman CJ in *Davidson* sees it as a spent force.

41. *Serratore*[34] is an interesting if rare example of a judge giving a "links in a chain" direction in respect of what he saw as four essential circumstances. The jury convicted anyway. The majority in the CCA found the trial judge (Newman J) was wrong in giving the directions, but the trial miscarried because the jury could not have been satisfied beyond reasonable doubt about two of the circumstances. Even though wrongly given, the directions should have been observed. A new trial was ordered (after which Serratore was again convicted). The irony is that if the jury at the first trial had obeyed the directions they would have acquitted.

42. It seems to me the issue has been unnecessarily confused by chains and cables and indispensable intermediate facts and primary facts. Accepting it is impracticable to prove every fragment of evidence beyond reasonable doubt, what is wrong with the view of Deane J in *Chamberlain*? If the circumstantial facts relied on by the prosecution are numerically small, they require proof beyond reasonable doubt. If they are numerous, they are to be considered collectively and the individual facts do not require proof beyond reasonable doubt. And I would add, whether small or large in number, any fact substantially more significant to the Crown case than others should require proof beyond reasonable doubt. And it would surely be consistent with earlier authority to require judges to direct juries that before accepting any part of any circumstantial evidence they must be satisfied that the evidence bears no reasonable hypothesis consistent with innocence.

43. I am afraid that judges are becoming increasingly reluctant to direct juries to treat significant circumstantial facts as requiring proof beyond reasonable doubt before taking them into account, in support of a Crown case. But as with other aspects of the administration of justice the tide continues to run against the person on trial.

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1 Reproduced in 1909 in the NSW edition of Stephen's *Digest of the Law of Evidence* by Shaw, Macmillan 1909 (introduction p.xiv)

2 13 CLR 619 at 628

3 21 Cr App R 20 at 21

4 3rd Ed Vol.1 par.25 at p.400

5 Vol.1 pars.43, 51-119, 130-149

6 (1894) AC 57. See also SC judgment 9 WN(NSW) 129

7 (1916) 11 Cr App 229

8 1949) AC 182

9 (1975) AC at 421

10 (1978) 140 CLR 108

11 (1982) 150 CLR 580

12 (1988) 165 CLR 292

13 (1989) 167 CLR 590

14 (1994-95) 182 CLR 461

15 (2005) 156 A Crim R 308

16 (1911) 13 CLR 619 at 628-630

17 (1936) 55 CLR 367 at 375

18 (1963) 110 CLR 234

19 (1990) 170 CLR 573 at 578

20 (1992) 66 ALJR 860 at 863

21 (1866) 176 ER 850

22 (1983) 153 CLR 521 at 536

23 (1988) 37 A Crim R 303

24 (1988) 37 A Crim R 466

25 (1988) 39 A Crim R 266

26 (1989) 41 A Crim R 420

27 (1990) 170 CLR 573

28 (2006) 159 A Crim R 394 at 408

[29] (2009) NSW CCA 163

[30] (2009) NSWCCA 150

[31] (2002) 187 ALR 233

[32] (2007) 228 CLR 618

[33] (2009) 83 ALJR 243

[34] (1999) 48 NSWLR 101