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1 ADDUCING EVIDENCE – WITNESSES AND REAL EVIDENCE

→ **Role of *voir dire***: When evidence is challenged, there is a trial within a trial. The mini-trial has its own burdens and standards of proof. Challenging evidence – balance of probabilities, not BRD – with a few special rules relating to confession. But a lot of evidence is challenged and resolved **prior** to the trial.

- s 139(3)(g) *Criminal Procedure Act 1986*: The Court can 'give a ruling on any question of law that might arise at the trial' – a party can make an application, or a court can raise the issue of its own motion.

→ **Opening the case**: Whoever bears the burden of proof starts. Ordinarily, in criminal cases, the P starts and, in their opening statement, there is a **duty of fairness**. They must give a brief outline of the facts, the case theory (i.e. what they think might have happened, their theory of the case), and they may list (or refer generally) to the witnesses to be called and any likely areas of conflict. The P should not refer in their opening to any witness evidence whose admissibility is in doubt: *R v Tran* (2000) FCA 1888.

→ **Orality and the role of witnesses**:

- **Demeanour**: e.g. the 'burqa' or 'niqab' cases – *Anwar Saeed* (2010), WA; *R v D*(R) (2013), UK; *R v NS* (2012)

1.1 Calling a witness

s 11 – General powers of a court

(1) The power of a court to control the conduct of a proceeding is not affected by this Act, except so far as this Act provides otherwise expressly or by necessary intendment.

(2) In particular, the powers of a court with respect to abuse of process in a proceeding re not affected.

s 26 – Court's control over questioning of witnesses

The court may make such orders as it considers just in relation to:

(a) the way in which witnesses are to be questioned; and

(b) the production and use of documents and things in connection with the questioning of witnesses; and

(c) the order in which parties may question a witness.

Role of Advocates: Responsibility of the parties to call witnesses (not mentioned by s 26).

→ **Civil Cases**: The Court does not call witnesses, without the consent of the parties.

→ **Criminal Cases**: The Court calls witnesses only in exceptional cases 'in the interests of justice'.

Cases:

Clark Equipment Credit of Australia Ltd v Como Factors Pty Ltd (1988) 14 NSWLR 552: **Authority** for the position that **a judge in a civil case may not call a witness**. Different from a **criminal** trial where judges **can** call witnesses in the '**most exceptional circumstances**': *R v Apostilides* (1984) 154 CLR 563 at 576.

R v Apostilides (1984) 154 CLR 563 at 575: general propositions applicable to the conduct of criminal trials in Australia:

(1) The **Crown Prosecutor alone** bears the responsibility of deciding **whether a person will be called as a witness for the Crown**.

(2) The trial judge **may but is not obliged to question** the prosecutor in order to discover the reasons which led the prosecutor to decline to call a particular person. He is **not called upon to adjudicate the sufficiency of those reasons**.

(3) Whilst at the close of the Crown case the trial **judge may properly invite the prosecutor to reconsider** such a decision and to have regard to the implications as then appear to the judge at that stage of the proceedings, **he cannot direct the prosecutor to call a particular witness**.

(4) **When charging the jury, the trial judge may then make such comment as he then thinks to be appropriate with respect to the effect which the failure of the prosecutor to call a particular person as a witness would appear to have had on the course of the trial**. No doubt, the comment, if any, would be affected by such information as to the prosecutor's reasons for the decision as the prosecutor thinks it proper to divulge.

(5) Save in the evidence of the ***most exceptional circumstances***, **the trial judge should not himself call a person to give evidence**.

(6) A decision of the prosecutor not to call a particular person as a witness would **only constitute a ground for setting aside a conviction if**, when viewed against the conduct of the trial taken as a whole, it is seen to give rise to a **miscarriage of justice**.

→ At 577-8: 'miscarriage of justice' was defined as focussing on the '**consequences, objectively perceived, that the failure to call the witness has had on the course of the trial and its outcome**.' It is not a question about whether the decision 'constitutes misconduct' but whether '**in all the circumstances the verdict is unsafe or unsatisfactory**.'

R v Kneebone (1999) 47NSWLR 450: Quoted the **six propositions** from *Apostilides* on the prosecutor's **obligation to call witnesses**. This case makes it clear that it is necessary for the prosecutor to point to identifiable factors which justify a decision **not** to call a material witness on the grounds of unreliability.

→ **Facts**: The victim's mother was a witness to alleged assault and sexual assault. The Crown referred to the mother as a potential witness in their opening, but subsequently told the defence that she was unreliable and would not be called.

→ Greg James J (Spigelman CJ concurring): Quotes *Apostilides* propositions at [39]; DPP Prosecution Guideline 26 at [43] and NSW Bar Rules at [44]. Concluding at [57]: 'In summary, it is the **duty of a prosecutor to determine what witnesses will be called**. He has the responsibility for ensuring that the Crown case is **properly presented**. He also has the responsibility of ensuring that the Crown case is presented with **fairness to the accused and to the court**. He **does not perform that duty by seeking to avoid having placed before the court evidence which he is not entitled to regard as unreliable and yet which ill accords with a theory of the accused's guilt**.

- '...no basis is put forward in evidence which would have entitled the Crown Prosecutor on the basis of unreliability to have formed the view that the witness should not properly be called in the Crown case. There was, for example, **no evidence that the witness was unwilling to speak to the police**; there was no **attempt to conduct a conference with the witness** and the witness' **statements** to the police concerning the physical assault may have been **explicable on a basis other than being in the accused's "camp"**.'
  - '...by reason of the failure to call the witness, occasioned, as it appears to be, by a failure to adopt an appropriate course to enable proper consideration of any question of unreliability, **a miscarriage has occurred**.'

→ Smart AJ (Spigelman CJ concurring) [105], in conclusion: '...**there will probably be a miscarriage of justice if the Crown does not call the mother**. In practical terms the appellant cannot call her. In fairness she should be called despite the reservations about the evidence. The offence charged is particularly serious and the appellant received a long term of penal servitude (nine years; six year minimum). **Apart from the appellant and the complainant, she was the only other person in the house at the critical time.** It was the complainant who said that the mother observed the rape and made the comment mentioned. Thus, **the complainant rendered the mother's evidence in denial of importance to the appellant**.'

→ At [107]: 'In *Apostilides*, the HCA pointed out that the **absence of testimony from a witness may lead to a miscarriage of justice without any error having occurred**. Despite the problems with some of her evidence and the reservations about it, this appears to be such a case. Pre-eminently, this is a case where the jury should assess the complainant, the appellant and the mother. **Without the mother, the jury may be left with unanswered questions of consequence. <u>The prosecutor will have to address not only the question of whether the mother's evidence would be unreliable but the further question of whether there would, in the special circumstances, be a miscarriage of justice if she were not called</u>**.'

→ **Result**: Kneebone's appeal was allowed – the conviction was quashed – and a new trial ordered.