

# JURD7251: Court Process, Evidence & Process

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# 1. Introduction

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## WHAT IS THE TRIAL?

- It is the administering of due process.
  - For the accused.
  - The state – burden of proof is a high standard: BARD.
  - Accountability.
- Public process for public confidence in the administration of justice.
- An accurate decision-making that may not be right but, the process was accurate.
- A fair trial.
- A trial is to get to the bottom of things:
  - Determining guilt / innocence.
  - Find the truth.
- A trial is a way of finding facts.
- Is the trial the appropriate and effective mechanism for some type of evidence and not for others?

## ON TRIAL

- Lost 11 months of his life, even before trial. When he was still deemed to be innocent.
- Judge intervenes and controls and regulates the witness examination process when the examination comes to an impasse or when the questioning leads to nowhere. The witness has to answer if the question is in accordance with the context of the case.
- The defence's job is to pull the loose thread in the facts / prosecution's case to introduce doubt in the prosecution's narrative of what happened.
- Just find one thread.
- Arguments about the admissibility of evidence happens throughout the trial.
- The prosecution creates a story that is comprehensible for the people, ie, the jury. The defence breaks down the credibility of that story.
- Contradicting evidence by the 2 witnesses—one says the accused said, "I don't know how to use this", the other said "I am going to shoot you". So, which is it? Which evidence is the prosecution relying on? And should it even be relied on?
- In witness examination, the defence's job is to find that doubt in t
- he witness' evidence, lead the witness through the doubts created, into a hole, and then shut the door on the witness.
- The rules that govern evidence and a trial are "the rules of the game", which is essentially the rules of what can or cannot be put forward (adduce) in support of your case.
- The fundamental principle in criminal law is that there is no onus on the defendant to give his version of the story—the burden is wholly on the prosecution to prove that the accused is guilty beyond a reasonable doubt.
- The judge as the guardian, not the dictator, of the process. The guardian of the rules of a trial. Making sure that the accused is not prejudiced by the Crown.
- The inconsistencies of witness between their statements and what they say in court.

## COMPULSORY EXAMINATION

| <u><a href="#">X7 v Australian Crimes Commission [2013] 248 CLR 92</a></u> |   |
|--|---|
| <b>Facts</b>   | <ul style="list-style-type: none"><li>• Accused was compelled to give information at examination.</li></ul>   |
| <b>Held</b>  | <ul style="list-style-type: none"><li>• ACCC legislation did not disclose a clear intention to restrict an accused person's right to silence. It did not authorise the compulsory examination of a person subject to pending criminal charges.</li><li>• Compulsion of information was repugnant to fundamental civil liberties and accusatorial justice.</li></ul> |

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|  | <ul style="list-style-type: none"> <li>○ Accused could no longer decide trial strategy, in answer to the charge, according <i>only</i> to the strength of the prosecution's case revealed by material provided by the prosecution before trial.</li> <li>○ Accused person would have to decide the course to be followed in light of that material and any self-incriminatory answers which they were compelled to give at an examination conducted after the charge was laid.</li> <li>○ Accused would have to decide the plea to enter, what evidence to challenge and/give according to answers given at examination.</li> </ul> |
|--|---|

[Lee v NSW Crime Commission \[2013\] 251 CLR 196 \(Lee \(No1\)\)](#)

|              |   |
|--------------|---|
| <b>Facts</b> | <ul style="list-style-type: none"> <li>• Provisions of the <i>Criminal Assets Recovery Act 1990</i> (NSW) were premised on proceedings taking place concurrently with criminal proceedings and any unfairness could be addressed through the Supreme Court, with its inherent powers to protect the fairness of its processes.</li> <li>• Issue: Whether the <i>Criminal Assets Recovery Act 1990</i> (NSW) authorises an alteration to, or inference with, the fundamental principle and, therefore the system of criminal justice administered by the courts.</li> </ul>  |
| <b>Held</b>  | <ul style="list-style-type: none"> <li>• <b>HCA ruled in favour of the Commission</b> – impact of compulsory examination on the fundamental principle was to be assessed as a matter of 'practical reality'</li> <li>• CPA (NSW) requires a magistrate hearing committal proceedings to discharge the accused if the magistrate considers that the evidence is not capable of satisfying a jury to the requisite standard that the accused has committed an indictable offence.</li> <li>• <b>The fundamental principle:</b> the golden thread of the system of criminal law is the duty of the prosecution to prove the prisoner's guilt (ie. presumption of innocence)</li> </ul> |

[Australian Federal Police v Zhao \[2015\] HCA 5](#)

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|--------------|---|
| <b>Facts</b> | <ul style="list-style-type: none"> <li>• Jin, the second respondent in <i>Zhao</i> sought to stay proceedings to recover property under the <i>Proceeds of Crime Act 2002</i> (Cth) until after his criminal trial. Jin's affidavit in support of his application that he was concerned that if he had to make a detailed affidavit or be cross-examined regarding the purchase of the Restrained Property and source of funds, there is real risk that such evidence would prejudice his criminal case.</li> </ul> |
| <b>Held</b>  | <ul style="list-style-type: none"> <li>• Allowed appeal – second respondent is at risk of prejudice.</li> <li>• To warrant a stay of the forfeiture proceedings, it must be apparent that the person whose property is in question is at risk of prejudice in the conduct of his or her defence in criminal trial.</li> </ul>   |

[Lee \(No 2\) \[2014\] 308 ALR 252](#)

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| <b>Facts</b> | <ul style="list-style-type: none"> <li>• Lee was examined before and required to produce documents to the NSW Crime Commission. At this time a search warrant was also executed on his premises. Guns, ammunition and white powder containing pseudoephedrine and over \$1 million in cash was seized. His son arrived at the premises during the search and was charged with firearms offences. The Father was charged in relation to the alleged proceeds of crime.</li> <li>• Wrongful release and possession of evidence (not improperly obtained)</li> </ul>   |
| <b>Held</b>  | <ul style="list-style-type: none"> <li>• Conviction successfully appealed on the basis that the Commission had given unauthorised disclosure of the transcript of the lees' compulsory NSWCC examination and the associated compulsorily produced documents to the prosecution team preparing to run the Lees' criminal trial on firearm and drug charges. <ul style="list-style-type: none"> <li>○ Material assisted prosecution providing at least a possible scenario for where the defence might suggest there is some innocent explanation that they don't know anything about drugs.</li> </ul> </li> </ul> |

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|  | <ul style="list-style-type: none"> <li>o Unauthorised disclosure amounted to a removal of the privilege against self-incrimination and altered the trial in a fundamental respect.</li> <li>o Fundamentally altered the position of the prosecution vis-à-vis the accused; without legislative authority.</li> </ul> |
|--|--|

## GUIDING PRINCIPLES IN CRIMINAL PROCEEDINGS

- Minimum guarantee to be informed of the charge: In determination of any criminal charge, everyone shall be entitled to the to be informed promptly and in detail of the nature and cause of the charge: *ICCPR Article 14(3)*.
- Statutes may set boundaries on the charging process and require strict compliance: see **AG v Built**
- *CPA (NSW) s 11* requires description of offence... is *sufficient* in law.
  - o Pleadings must describe the essential legal and factual elements of the offence – ie. time, place, manner in which the alleged offence took place: see **Kirk v Industrial Court**.

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| <a href="#"><i>Attorney General (NSW) v Built NSW Pty Ltd [2013] NSWCCA 299</i></a> |   |
| <b>Facts</b>  | <ul style="list-style-type: none"> <li>• Person authorised to commence proceedings mistakenly thought they could delegate this role to their legal representative.</li> <li>• Summons used the language of one subsection of the legislation but charged an offence in another subsection.</li> </ul> |
| <b>Held</b>   | <ul style="list-style-type: none"> <li>• <b>Judge dismissed summons; and summons did not charge an offence known to law.</b></li> <li>• Could not be corrected by amendment or further particulars, or treated as 'some slip or clumsiness' that could be ignored.</li> </ul>                         |

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| <a href="#"><i>Kirk v Industrial Court (NSW) [2010] 239 CLR 531</i></a> |  |
| <b>Facts</b>  | <ul style="list-style-type: none"> <li>• Accused was charged with failing in its occupational health and safety obligations to an employee who died driving an all-terrain vehicle on Kirk's farm.</li> </ul>  |
| <b>Held</b>   | <ul style="list-style-type: none"> <li>• <b>Pleadings lacked sufficient factual detail of the manner of the offence –</b> sufficient detail to enable Kirk to determine what he should have done in the management of the farm to prevent the accident that occurred.</li> </ul> |

## Duplicity

|   |  |
|---|--|
| <a href="#"><i>Johnson v Miller [1937] 59 CLR 467</i></a> |  |
| <b>Facts</b>  | <ul style="list-style-type: none"> <li>• Complainant proposed to lead evidence that there had been 30 men seen coming out of premises where it was an offence to be a licensee which a person was seen to be coming out of on a Sunday morning (ie. drinking after hours).</li> <li>• But charged a single offence on the basis that "a certain person" had been seen. Complainant refused to provide particulars of the men.</li> </ul>   |
| <b>Held</b>   | <ul style="list-style-type: none"> <li>• Complaint dismissed – <ul style="list-style-type: none"> <li>o Initial complaint of "certain persons" was duplicitous <ul style="list-style-type: none"> <li>▪ Duplicity – if evidence reveals multiple offences in a charge</li> <li>▪ Eg. if prosecution called more than one person to testify they were on the premises after hours it would expose latent duplicity in the charge.</li> </ul> </li> <li>o Amended complaint of "a certain person" was bad because it was no longer possible for accused to know the particular offence he was called to answer.</li> </ul> </li> </ul> |

## PRINCIPLES IN PROSECUTING

- Prosecution should not be instituted unless there is **admissible, substantial and reliable evidence** that a criminal offence known to the law has been committed by the alleged offender.
- Considerations of factors 'in the public interest'; consideration of weight and other factors depends on the particular circumstances of each case– see p. 22
- **Overcharging:**
  - Multiple charging might encourage an accused ultimately to plead guilty to a lesser number of or less severe charges, but prosecutor has obligations of fairness.
  - Overloading an indictment is inappropriate
- **Prosecutorial discretion:** general unavailability of judicial review in exercise of prosecutorial discretion due to the separation of executive power (re. prosecutorial decisions) and judicial power (to hear and determine criminal proceedings); policy and public interest considerations unreviewable; judges have sanctions to enforce standards of fairness and prevent abuse of process: **Likiardopolous [2012] 247 CLR 265.**
- **Stay proceedings:** Courts can stay proceedings that are an abuse of process if multiplicity issue arises early. Prosecutor can then review the charges and limit overcharging.

### Prosecution's discretion

| <a href="#">Likiardopolous [2012] 247 CLR 265</a> |   |
|---|---|
| <b>Facts</b>                                      | <ul style="list-style-type: none"> <li>• Likiardopolous (L) and others participated in a prolonged two-day attack on intellectually handicapped 22-year old man killing him.</li> <li>• Prosecution argued that L engaged in the assault directly and also directed or encouraged the others to assault the victim.</li> <li>• Seven people were charged with the victim's murder but charges were reduced and dropped, eventually five people pleaded guilty to lesser offences, not murder.</li> <li>• L was convicted of murder.</li> <li>• Prosecution ran a case that L was liable as a participant in a joint criminal enterprise and that he was liable as an accessory by encouraging the principle offenders</li> <li>• L appealed submitting that it was an abuse of process for prosecution to accept pleas to lesser offences while prosecuting him as an accessory to murder.</li> </ul> |
| <b>Held</b>                                       | <ul style="list-style-type: none"> <li>• Prosecutor's exercise of its discretion to accept pleas was beyond the court's review.</li> <li>• Evidence grounding the charges against each participant differed.</li> <li>• Nothing in the conduct of the proceedings produced unfairness of the kind that would lead a court to intervene to prevent abuse of its process.</li> <li>• L had greater moral culpability as he dominated the younger people in the household.</li> </ul>  |

### Prosecution's disclosure and fairness obligations

- **Avoid trial by ambush:** principles of a fair trial require disclosure of full information and evidence relied on in support of allegations – including documentary evidence, oral testimony, cross-examination of witnesses.
- **Low bar for prosecution:** prosecutorial-obligation bar is set very low, those prosecuting on behalf of the community are not entitled to act as if they were representing private interest in civil litigation;
  - Suppression of credible evidence tending to contradict evidence of guilt militates against the basic elements of a fair trial: **Lawless [1979] 142 CLR 659** (Murphy J dissenting)
  - Acquittal of innocent incomparably more important than the conviction and punishment of the guilty: **Van Der Meer [1988] 82 ALR 10** (Deane J)

[Mallard \[2005\] 224 CLR 125](#)

|              |  |
|--------------|--|
| <b>Facts</b> | <ul style="list-style-type: none"><li>• 1994 conviction for murder of a Perth jewellery shop owner revealed multiple instances of non-disclosure.</li></ul>  |
| <b>Held</b>  | <ul style="list-style-type: none"><li>• Of particular concern are the items in which evidentiary material, consistent with innocence and presenting difficulties for the prosecutor's hypothesis of guilt were actually suppressed or removed from the material supplied to the defence.</li></ul> |