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CRIMINAL PROCEEDING

1. PROOF

1.1 Burden of proof

1.1.1 Legal burden

- (A) In criminal proceedings the prosecution bears the onus and legal burden (*Woolmington*)
- (B) Exceptions
 - (1) SIAM/insanity: the accused bears the legal burden (s 23A of Crimes Act)
 - (2) Other statutory defences as provided by the relevant legislation

1.1.2 Evidential burden

Evidential burden is shifted to the accused in relation to most defences.

- (A) If the evidential burden is discharged by the accused, the legal burden is on the prosecution to disprove the matter e.g. self defence (s 419 of Crimes Act)
- (B) If legal burden is shifted to the accused, the evidential burden is inevitable on the accused, e.g. SIAM

1.2 Standard of proof

1.2.1 Case of prosecution: beyond reasonable doubt (s 141(1) of EA)

- (A) Direct evidence: if accepted, the evidence on its own establishes the fact.
- (B) Circumstantial evidence: it establishes a fact from which further inferences must be drawn (*Shepherd*)

In case resting on circumstantial evidence, it is not correct that jury may only draw inference on facts each of which is proven BRD. But an indispensable intermediate step in the reasoning process does have to be proved BRD.

1.2.2 Case of defendant: balance of probabilities (s 141(2) of EA)

2. ADDUCING EVIDENCE

2.1 Witnesses

2.1.1 Calling a witness

(A) Prosecution's responsibility to call a witness

- (1) Prosecution should call all available witnesses necessary to unfold narrative (particularly eyewitness to disputed events) (*Apostilides*)
- (2) Exceptions
 - (a) Repetitious evidence
 - (b) Expert evidence? A numerical imbalance in expert testimony might occasion in a miscarriage of justice (*Velevski*)
 - (i) *Apostilides* guidelines apply primarily to evidence of facts, not evidence of expert opinion (*Gleenson CJ and Hayne J*)
 - (ii) Prosecution should have called the witnesses but a miscarriage of justice was cured by a direction of the judge (*Gummow and Callinan JJ*)
 - (c) Unreliable, untrustworthy witnesses – on proper grounds. Mere suspicion or scepticism without interviewing with the witness is not enough (*Kneebone*)
- (3) Insufficient reason to not call the witness:
 - (a) Conflict with other evidence or Crown's case theory (*Kneebone*)
 - (b) Witness is in the defendant's camp or sympathetic (*Kneebone*)