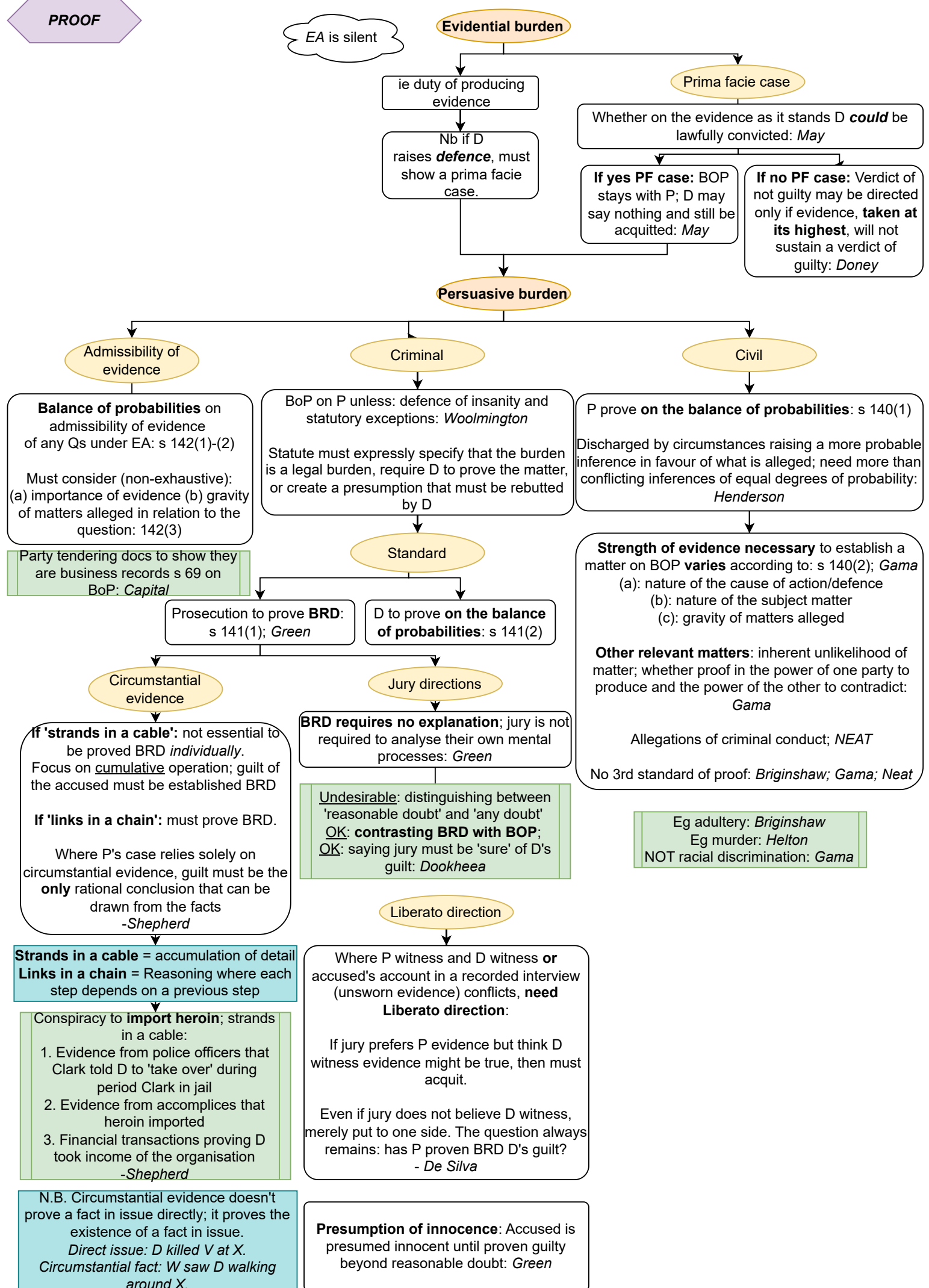




WITNESSES

Calling Witnesses

EA is silent as to calling of witnesses so this is left to common law: s 11(1).

Civil Trials

Judges cannot call witnesses without the consent of both parties: *Clark*

Section 26 **only relates to the questioning of Ws** and does not confer on judges a broad power to call witnesses: *Sharp*

Nevertheless, it appears clear that the Ct may call a witness in appropriate circumstances given its **general power to control proceedings**: s 11; *Odgers*

Power is to be exercised only in 'the **most exceptional case**': *Sharp*

1. **Consent** of the parties
2. Party's **lack** of competent legal **representation**
3. Relevant **third party** interest (eg a child whose interest not adequately served by partisan contest)

Criminal Trials

Judges can call witnesses in the '**most exceptional circumstances**': *Apostilides*

TJ calls psychiatric evidence to establish **mental illness** for **unrepresented accused** in murder case: *Damic*

The **prosecutor** has the **obligation** to ensure the Crown case is presented **with fairness** to the accused and to the court: *Kneebone*

Fairness **requires** presentation of:

- all available, cogent and admissible evidence: *Nguyen*
- all **relevant and material witnesses**: *Velevski*

Mixed statements: P must lead **whole of evidence**, not just incriminating parts and omit exculpatory parts (police statement that he threw bottles but did so in self-defence): *Nguyen*

Material witnesses: P failed to call D's spouse who witnessed him SA her daughter: *Kneebone*

Expert evidence: Different from witnesses of fact. Fairness does not require a headcount/balancing of opinions: *Velevski*

P must have a **principled basis** for not calling a material witness: *Kneebone*

Not sufficient:
Tactical advantage: *Nguyen*
Conflicts with other evidence or Crown's case theory: *Kneebone*
W in D's camp/sympathetic to D: *Kneebone*

Sufficient:
Unchallenged merely repetitious
Positive reasons for believing them to be unreliable

Failure to call particular W is only grounds for setting aside a conviction if it appears to give rise to **miscarriage of justice**: *Kneebone*; *Apostilides*

