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**i. Relevance:** *Section 55-58 Evidence Act*

**ii. Burden and Standard of Proof:**

**Legislation:** *Section 140-142 Evidence Act*

**Case Law:** *Smith v. The Queen [2001] & Shepherd v. The Queen [1990]*

*1.1. Relevance – Sections 55 & 56*

## **I. Relevance & Burden and Standard of Proof**

**Remember:**

### **55 Relevant evidence**

(1) The evidence that is relevant in a proceeding is evidence that, **if it were accepted**, could **rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue** in the proceeding.

(2) In particular, evidence is not taken to be irrelevant only because it relates only to:

- (a) The credibility of a witness; or
- (b) The admissibility of other evidence; or
- (c) A failure to adduce evidence.

**I. Threshold Question:** Is the evidence relevant? (pt 3.1)

**YES:** Evidence is **ADMISSIBLE**, **UNLESS** excluded by another section [s 56(1)]

**NO:** Evidence is **INADMISSIBLE** [s 56(2)]

**II. Section 55(1):**

Court must ask: **Could the evidence, if accepted, affect the probability, even indirectly, of the existence of a fact in issue in the proceedings?**

### **Admission v. Use of Evidence**

**Admission:** If admitted evidence is not relevant for a particular purpose, it is inadmissible for that purpose.

**Evidence:** Evidence that has been admitted need not be used in all the ways it is relevant

### **Admissibility:**

- **Common Sense Approach:** Information may be relevant, and thus potentially admissible, where it bears upon the assessment of the probability of the existence of a fact in issue by assisting in the evaluation of other evidence [*HML v. R*]
- Evidence that is relevant only to credibility is indirectly relevant to a fact in issue ‘because it affects the weight of evidence’.
- Judges must ask: Is the evidence ‘reasonably capable’ of rationally affecting the assessment of the probability of the existence of a fact in issue in the proceeding, rather than the higher test, that the evidence actually affects the relevant probability [*Zaknic Pty Ltd v. Svelte Corporation Pty*].

### **Case Law:**

***Papakosmas v. R:*** Whether the complaint ‘P raped me’ was relevant and admissible. The court held that it was admissible in terms of determining credibility.

**‘If it [the evidence] were accepted’:** Judges must determine the relevance of evidence on the assumption that the fact-finder will accept that evidence. The reliability or probative force is determined after determining the relevance of the evidence.

**‘Evidence...is relevant [if it] could rationally affect’:** Could implies a lower threshold for admission.

***Neal v R:*** evidence that D was in an unhappy and sexless marriage was relevant and therefore admissible re sexual assault and rape charges

**R v Whyte:** “he tried to rape me” relevant. Victim has understanding of events that is quite different than that of a third party

**R v. Chanthovixay:** DNA evidence linked the D to other evidence at the crime scene that suggested guilt. Court accepted the evidence, notwithstanding the existence of other evidence of innocence. **The mere possibility of evidence being connected to a crime was all that was necessary to make the evidence relevant. (could instead of would - low threshold)**

**Smith v. R:** The majority of the HC found that police evidence, in that situation, was not evidence that could rationally affect the assessment by the jury of the question of guilt.

**Evans v. R:** HC found that an in-court demonstration was relevant and could rationally affect the jury’s assessment.

**‘...directly or indirectly affect the assessment of the probability of’:** Evidence need only be reasonably capable of affecting the assessment of the probability of the existence of a fact in issue, thus ‘relevant evidence need not render a fact in issue probable, or sufficiently probable’ it is enough to make the fact more probable.

**Indirectly:** Evidence has an indirect relevance if the fact in issue relates solely to the credibility of a witness, or to the admissibility of other evidence.

**‘...the existence of a fact in issue in the proceeding’:** Facts that are necessary by law to establish the claim, liability, or defense, forming the subject matter of the proceeding. Facts in issue are separated into two categories:

- a) **Main facts in issue:** Those which are commonly defined by the pleadings, but whether so defined or not, are those which the applicable legal principles require to be proved if some cause of action or defense is to be made out.
- b) **Subordinate or collateral facts in issue:** Those which P is obliged to prove if guilt is to be established, or which the D must prove if some positive defence is relied on.

iii. **‘Evidence is not taken to be irrelevant only because’:** Three listed categories are not irrelevant merely because of their categorisation.

a) **‘the credibility of a witness’:** Evidence that is relevant only to credibility is indirectly relevant to a fact in issue ‘because it affects the weight of evidence’ given by the witness. This evidence may be inadmissible if it fails to satisfy an exception to the credibility rule [s 102].

b) **‘the admissibility of other evidence’:** Incorporates the notion of ‘relevance on a voir dire’  
Voir Dire = A trial within a trial

c) **‘a failure to adduce evidence’:** Adduces evidence relevant only in order to prevent the drawing of a *Jones v. Dunkel* inference or a *Weissensteiner* inference

**Jones v. Dunkel:** Party’s failure to adduce evidence may permit the court to draw an inference that nothing in that evidence would have assisted the party’s case’.

Both inferences are drawn when a party would be expected to adduce the absent evidence.