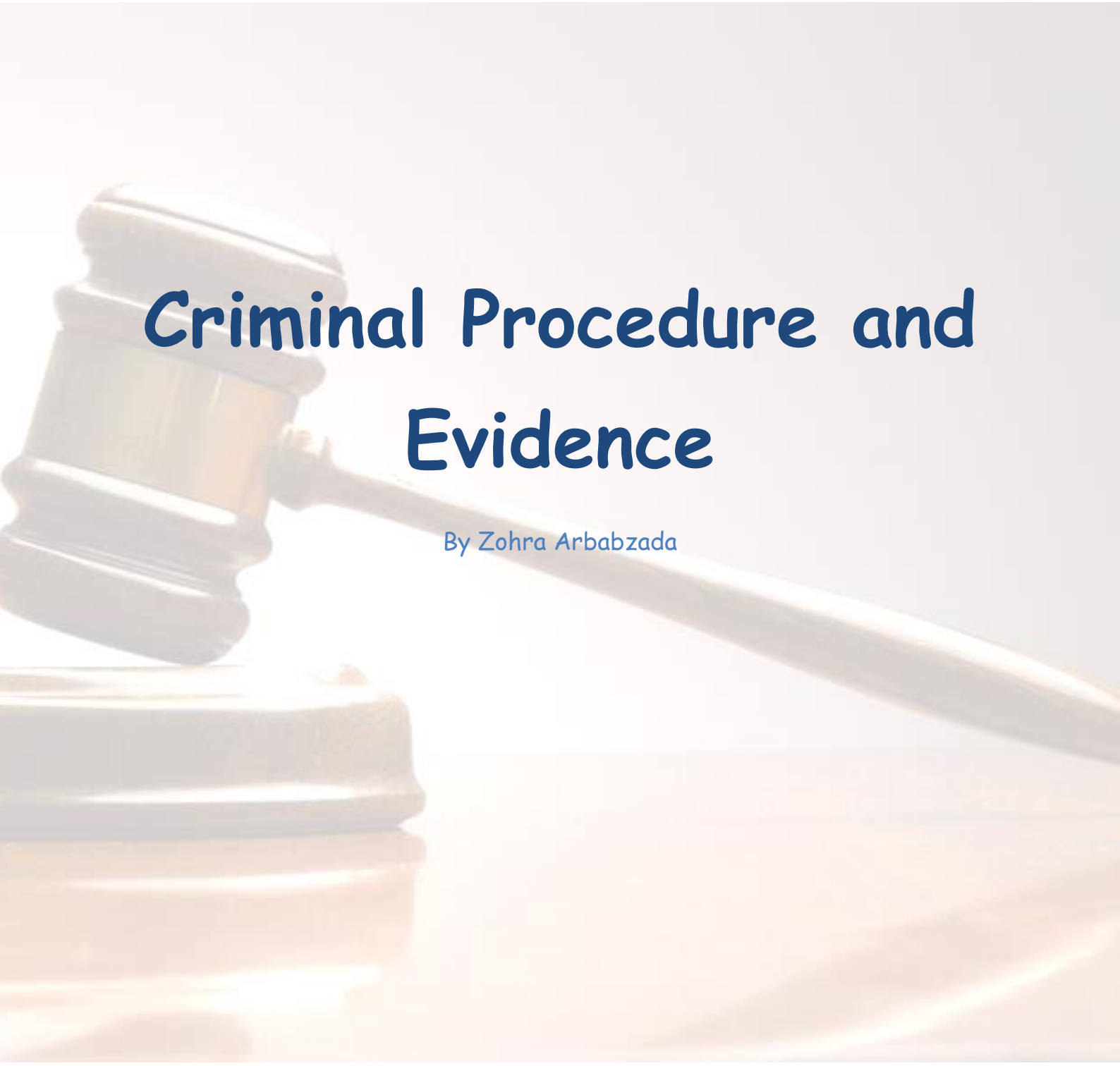

Criminal Procedure and Evidence

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Contents

Testimonial, Documentary and Other Evidence

- **Category 1: Documentary evidence**
  - **What is a document?**
    - A document is basically anything that is a record of information. This could include the label on a water bottle
    - Document is defined in dictionary of EA 95. Includes:
      - Anything on which there is writing
      - Anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them
      - Anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or
      - A map, plan, drawing or photograph
    - S 47(1) EA 95 tells us that a reference in this Part to a document in question is a reference to a document as to the contents of which it is sought to adduce evidence.
    - S 47(2) EA 95 tells us that a reference in this Part to a copy of a document in question includes a reference to a document that is not an exact copy of the document in question, but that is identical to the document in question in all relevant respects.
  - **Is the original document needed?**
    - S 51 EA 95 tells us that the original document rule is abolished. This is in response to the Commissioner v Young case.
    - S 48(4) EA 95 tells us that a party can give oral evidence if the original copy of the document is not available.
    - **Commissioner v Young**
      - **Facts:** OLD LAW. Mr Young gets killed by a passing train. Body is taken to the morgue. Mrs Young sues the Commissioner of the Railway. Commissioner tries to prove that Mr Young was drunk; therefore being what caused him to come in the pathway of the train. Dr Sheldon took some blood from Mr Young's body and placed it in a jar and sealed it. He then placed a label on it.
      - **Issue:** The Court could not accept the oral evidence of the label because the label was a document, hence should be submitted as documentary evidence, not testimonial evidence. This could not be done, because back in those days, an original document must be shown, which they could not show. Also, the oral evidence would constitute secondary evidence, not original.
      - **Held:** The judge held that they cannot orally read out the label in court; it must instead be submitted as documentary evidence. Today, the label would have been admissible to be read orally.
    - **Butera Case**
      - **Facts:** OLD LAW. Butera was charged with conspiracy of trying to import drugs. To prove a conspiracy you have to prove that they planned it. This could include discussions with each other. In this case, the evidence they had was recordings on a cassette tape. It was the original tape; however the problem was the language. It was a mix of three languages. A transcript was obtained, however this didn't help as a translation was still needed. It was getting more and more away from being an "original document".
      - **Held:** The Court said that the transcript and translation are not evidence because they are not originals. The transcript and translation were considered an aide memoire. The original cassette was deemed as so much more important because it included quotes,

tones, the person's voice, etc. Therefore the Court felt that it was important that the jury should be able to hear if it is the accused in the recording.

- **TODAY'S LAW:** S 48 EA 95 now combats this issue as it allows transcripts and translations into evidence. This change was made because a.) Sometimes the original tape is not available and b.) when the jury uses the transcript, although they have been instructed to use it as an aid memoire, the Court have recognised that they would still probably process it as evidence. HOWEVER, just because this section states that you can use a transcript, it doesn't mean that you have to.

- **Anita Cobby Case**
  - **Facts:** One of the guys who were charged had an IQ of 60. The transcript of what he said to police was really sophisticated.
  - **Held:** It was held that the police made up the transcript, therefore it was not admissible. This is an example of how s 48 EA 95 although allowing for a transcript to be brought into evidence, does not make it admissible.

- S 48 EA 95 tells us that a party may adduce evidence of the contents of a document by tendering the document in question by any of the methods specified in this section.
- Remember, this section does not make the evidence admissible.
- Just because documents will be allowed to prove things doesn't mean that the content of the document will be admissible.
- **Proof of voluminous or complex documents**
  - S 50(1) EA 95 tells us that the court may, on the application of a party, direct that the party may adduce evidence of the contents of 2 or more documents in question in the form of a summary if the Court is satisfied that it would not otherwise be possible conveniently to examine the evidence because of the volume or complexity of the documents in question.
  - S 50(2) EA 95 tells us that the Court may only make such a direction if the party seeking to adduce the evidence in the form of a summary has:
    - (a) Served on each other party a copy of the summary that discloses the name and address of the person who prepared the summary, and
    - (b) Given each other party a reasonable opportunity to examine or copy the document in question.
  - S 50(3) EA 95 tells us that the opinion rule does not apply to evidence adduced in accordance with a direction under this section.
- **Electronic communications is an exception to the hearsay rule**
  - S 71 EA 95 tells us that the hearsay rule does not apply to a representation contained in a document recording an electronic communication so far as the representation is a representation as to:
    - (a) the identity of the person from whom or on whose behalf the communication was sent, or
    - (b) the date on which or the time at which the communication was sent, or
    - (c) the destination of the communication or the identity of the person to whom the communication was addressed.
- **Evidence produced by processes, machines and other devices**
  - S 146(1) EA 95 tells us that this section applies to a document or thing that:
    - (a) is produced wholly or partly by a device or process, and
    - (b) that is tendered by a party who asserts that, in producing the document or thing, the device or process has produced a particular outcome
  - S 146(2) EA 95 tells us that if it is reasonably open to find that the device or process is one that, or is of a kind that, if properly used, ordinarily produces that outcome, it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that, in producing the document or thing on the occasion in question, the device or process produced that outcome.
- **Documents produced by processes, machines and other devices in the course of business**

- S 147(1) EA 95 tells us that this section applies to a document or thing that:
  - (a) is produced wholly or partly by a device or process, and
  - (b) that is tendered by a party who asserts that, in producing the document or thing, the device or process has produced a particular outcome
- S 147(2) EA 95 tells us that if:
  - (a) the document is, or was at the time it was produced, part of the records of, or kept for the purposes of, a business (whether or not the business is still in existence) and
  - (b) the device or process is or was at that time used for the purposes of the business;
- It is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that, in producing the document or the occasion in question, the device or process produced that outcome.
- S 147(3) EA 95 tells us that S 147(2) does not apply to the contents of a document that was produced:
  - (a) for the purposes of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding, or
  - (b) in connection with an investigation relating or leading to a criminal proceeding.

Attestation of documents

- S 149 EA 95 tells us that it is not necessary to adduce the evidence of an attesting witness to a document (not being a testamentary document) to prove that the document was signed or attested as it purports to have been signed or attested.

Postal articles

- S 160(1) EA 95 tells us that it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that a postal article sent by prepaid post addressed to a person at a specified address in Australia or in an external Territory was received at that address on the 4th working day, after having been posted.
- S 160(2) EA 95 tells us that this section does not apply if the :
  - (a) proceeding relates to a contract, and
  - (b) all the parties to the proceeding are parties to the contract, and
  - (c) s 160(2)(a) is inconsistent with a term of the contract.
- S 160(3) EA 95 tells us that a working day means a day that is not:
  - A Saturday or Sunday, or
  - A public holiday or a bank holiday in the place to which the postal article was addressed.

Electronic communications

- S 161(1) EA 95 tells us that if a document purports to contain a record of an electronic communication other than one referred to in s 162 (lettergrams and telegrams), it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that the communication:
  - (a) was sent or made in the form of electronic communication that appears from the document to have been the form by which it was sent or made; and
  - (b) was sent or made by or on behalf of the person by or on whose behalf it appears from the document to have been sent or made, and
  - (c) was sent or made on the day on which, at the time at which and from the place from which it appears from the document to have been sent or made, and
  - (d) was received at the destination to which it appears from the document to have been sent; and
  - (e) if it appears from the document that the sending of the communication concluded at a particular time – was received at that destination at that time.
- S 161(2) EA 95 tells us that s 161(1) does not apply if:
  - (a) proceeding relates to a contract, and
  - (b) all the parties to the proceeding are parties to the contract, and
  - (c) this provision is inconsistent with a term of the contract.

Category 2: Testimonial evidence

- S 12 EA 95 tells us that every person who is competent to give evidence can give evidence.
  - E.g. a five year old child could give evidence if they can demonstrate competence
  - **Competence and compellability of defendant's in criminal proceedings**

- S 17(2) EA 95 tells us that a defendant is not competent to give evidence as a witness for the prosecution.
- S 17(3) EA 95 tells us that an associated defendant is not compellable to give evidence for or against a defendant in a criminal proceeding, unless the associated defendant is being tried separately from the defendant.

▪ **Determining competency**

- S 13(1) EA 95 tells us that a person is not competent to give evidence about a fact if, for any reason, the person does not have the capacity to understand a question about the fact, or the person does not have the capacity to give an answer that can be understood to a question about a fact. Reasons could include mental, intellectual or physical disability.
- S 13(3) EA 95 tells us that a person who is competent to give evidence about a fact is not competent to give sworn evidence about the fact if the person does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence.
    - **Can a child give truthful evidence?**
        - Children are not more likely to lie than adults; however they can get confused more easily. They may not know they are telling lies.
        - S 13(5) EA 95 tells us that if someone is not competent to give evidence because of this subsection, they can then give unsworn evidence if the Court has told the person that it is important to tell the truth, that he or she may be asked questions that they do not know, and that they may be asked questions that suggest certain statements are true or untrue.

▪ **Spouses can object to giving testimonial evidence**

- S 18(2) EA 95 tells us that if a person is the spouse, de facto partner, parent or child of a defendant, they may object to giving evidence.
- S 19 EA 95 tells us that S 18 does not apply in proceedings for an offence against a provision of Part 2, 2A, 3, 4 or 5 of the Crimes Act 1900, etc.

- **Category 3: Real or other evidence**
    - This is basically anything else, i.e. anything that isn't documentary or testimonial. An example would be the gun that was used in the crime. It has a direct connection.
    - This evidence is directly perceived by the jury
    - S 53(1) EA 95 tells us that a judge may order for a demonstration, experiment or inspection to be held.
    - S 52 EA 95 tells us that this Act does not affect the operation of any Australian law or rule of practice so far as it permits evidence to be adduced in a way other than by witnesses giving evidence or documents being tendered in evidence. This section is basically stating that the common law is preserved
    - S 52 EA 95 tells us that the common law position is preserved
    - **Kozul v R**
        - **Facts:** There was an altercation between A and D, upon which A refused D admission into a cabaret club. The two men ended up in a struggle. D said to A "I'll kill you", and made a movement, which A thought was D reaching for his knife. A drew a gun from his belt, but did not intend to fire the gun. Then D struck A on the right hand ("the blow") which caused the gun to go off and struck a taxi. In Court, the jury conducted an experiment using the gun used to try and determine whether a "blow" could cause the gun to go off. They did this experiment in a back room of the Court.
        - **Issue:** The issue was whether or not this experiment was allowed.
        - **Held:** The learned trial judge had erred by suggesting that the jury should conduct an experiment designed in part to discover the extent to which a blow to the hand might cause a finger to move, whether by reflex action or in spontaneous response to emotion. In the circumstances of this case, an experiment conducted by the jury for such a purpose would have gone beyond an

examination and evaluation of the evidence provided by the gun, and would have had the purpose of gathering additional evidence.

- **Reasons for why it was held this way:**
  - Parties are the ones who can present evidence. The jury is not allowed to go in search of evidence
  - The jury conducted their own experiment in the jury room
  - Inspection is different to experimentation
  - All of the evidence has to be in open court, to give the defendant a chance to object or intervene. It's not fair to the defendant for the experiment to be conducted out of view in a back room of the Court.
  - The jury could have done the demonstration in Court. The main problem here was the fact that the experiment was done behind closed doors in the jury room.
- **Conclusion:** Despite the trial judge's error, the Court found that there had been no miscarriage of justice and that the matter did not warrant special leave to appeal.
  - **What is the point of an appeal?**
    - The appeal could be made in the hopes of "getting let off" etc, but in this particular case, even if the error hadn't been made, there was still an overwhelming amount of evidence which still pointed to D being guilty.
    - Appeals don't always "get you off" – however, they still need to occur to rectify errors in points of law and get the correct point of law across.

- **Experiments conducted during case out of court**
  - This case was incorporated into law under s 53(4) EA 95 which tells us that the court (including the jury) is not to conduct an experiment in the course of its deliberations.
  - **GIO v Bailey**
    - **What happened**: In this case, the judge found the accused guilty. In explaining his reasons for why he found so, he said that "furthermore, I have observed the plaintiff's demeanour as she walked through the back of the courtroom each day".
    - **Issue:** The statement he made was his own evidence; it was not evidence that was presented by the parties.
    - **Conclusion**: A judge can't do his own discovery either. A judge can't take something into account if it hasn't been given the opportunity to be tested.
- **In court demonstrations**
  - **Evans v The Queen**
    - **Facts**: P had required D at trial to dress up in a balaclava and overalls (what the person who committed the crime was allegedly wearing) and to walk in front of the jury and say particular words.
    - **Issue:** Should this in house demonstration have been allowed considering s 53 EA 95?
    - **Held:** A "view" was an out of court examination of land or of chattels too large to be taken into court. The purpose of a view was to assist the trier of the fact, by enabling an examination of the dimensions, appearance and relative positions of the features of the things viewed to "understand and weigh the oral evidence".
    - **Conclusion:** This case concluded that s 53 EA 95 does not apply to in-court demonstrations, experiments and inspections. This means all in-court "other evidence" is governed by common law.
  - **Re v Milat**
    - **Facts**: Ivan did not want to go to the forest. When there is a view, all parties of the case need to be present.
    - **Issue:** The question for the Court was whether or not they could go anyway.

- **Held:** They could all go, because s 53 EA 95 simply requires both parties to be given an opportunity to go. He was given this opportunity but refused to go. Therefore, they could all still go.
- **Ratio:** s 53(3)(c) EA 95 tells us that the judge is to take into account the danger that the demonstration, experiment or inspection might be unfairly prejudicial, might be misleading or confusing or might cause or result in undue waste of time. This needed to be considered.

- **Can a view be used as just an aid memoire or can it also be used as evidence?**
  - S 54 EA 95 tells us that the court including jury may draw a reasonable inference from what it sees, hears or otherwise notices during a demonstration, experiment or inspection.
  - In the old days, it used to be that a view could only be used as an aid memoire.

Relevance and Adducing Evidence

Relevance

- **Definition of relevance**
  - S 55(1) EA 95 defines relevant evidence as evidence that, if accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.
  - S 55(2) EA 95 tells us that evidence is NOT to be taken as irrelevant if it only relates to:
    - The credibility of a witness, or – s 55(2)(a) EA 95
    - The admissibility of other evidence, or – s 55(2)(b) EA 95
    - A failure to adduce evidence – s 55(2)(c) EA 95
  - **Papakosmas v The Queen 1999**
    - **Held:** As a threshold test, relevance should require only a **logical connection** between evidence and a fact in issue.
  - **Smith v The Queen 2001**
    - **Issue:** The fact in issue was whether the accused was the person in surveillance photo of robbing the bank. Two police officers gave evidence that the accused was the person in the photo – relevance of that evidence.
    - **Held:** The evidence was held inadmissible as it was not relevant. The jury had access to the same items as the police in forming their opinion, thus the evidence if accepted, could not rationally affect the jury's decision. In other words, **there is no discretion to be exercised in determining relevance.**
  - **Evans v The Queen 2007**
    - **Facts:** Evans was on trial for armed robbery. The robbery was filmed in video. Robber was wearing balaclava, sunglasses and said certain phrases. During the trial, the prosecution made D to dress up and say phrases to the jury.
    - **Issue:** Is it relevant for jury to see the defendant dressed up and walking around, saying those phrases?
    - **Held:** The court held that it doesn't rationally affect the fact in issue. At most, Evans might resemble the robber in the film. Resemblance is not in issue. It is whether Evans is the robber in the film. Gummow and Hayne said that the way Evans walked and talked could rationally affect the fact in issue. Heydon J said that if dressed up Evan didn't resemble the robber, then it would be relevant. If it is relevant, it could rationally affect the fact in issue.
- **Provisional relevance**
  - S 57(1) EA 95 tells us that if the determination of the question whether evidence adduced by a party is relevant depends on the court making another finding, the Court may find that the evidence is relevant:
    - If it is reasonably open to making that finding, or – s 57(1)(a) EA 95
    - Subject to further evidence being admitted at a later stage of the proceeding that will make it reasonably open to making that finding. – s 57(1)(b) EA 95
- **Inference as to relevance**
  - S 58(1) EA 95 tells us that if a question arises as to the relevance of a document or thing, the Court may examine it and may draw any reasonable inference from it, including an inference as to its authenticity or identity.
- **When evidence IS NOT relevant**
  - S 56(2) EA 95 tells us that evidence that is not relevant in the proceeding is not admissible.
- **When evidence IS relevant**
  - S 56(1) EA 95 tells us that relevant evidence is admissible, unless an exclusionary rule applies and excludes it.

Adducing evidence

- **Civil proceedings**
  - Failure to adduce particular evidence may lead to adverse inferences being drawn where such evidence would reasonably have been expected.

- Jones v Dunkel 1959 tells us that this adverse inference may be that the evidence, if adduced, would not have assisted the party's case.

- **Criminal proceedings**
  - **Accused**
    - **Dyers v The Queen 2002**
      - **Held**: The accused is not bound to give evidence. It is for the prosecution to prove its case beyond reasonable doubt
      - **Ratio**: This case tells us that not only is the accused not bound to give evidence, but it is for the prosecution to prove its case beyond reasonable doubt.
    - **Azzopardi v The Queen 2001**
      - **Context:** The context was that there existed a civil proceeding case called Jones v Dunkel 1959 where it was found that an adverse inference may be drawn if the evidence that is adduced would not have assisted the party's case
      - **Held:** The Dunkel inference may only arise in the most unusual circumstances. For example, facts that would explain/contradict the inference that prosecutor wishes the jury to draw lies within knowledge of a person that defence has not called. In such a case, a comment may be available on the failure to call that witness.
      - **Ratio:** This case tells us that such an inference may only arise in most unusual circumstances
  - **Prosecution**
    - **Dyers v The Queen 2002**
      - **Held**: for the prosecution to decide which evidence it will adduce, the judge may (but is not obliged to) question prosecution, so as to discover the reasons for declining to call a particular person. If the judge, after making such an inquiry, finds that the prosecutions reason for not calling the witness is insufficient, the judge can opt to tell the jury that he would have reasonably expected the prosecution to call that person.
      - **Ratio**: This case tells us that the prosecution is not obliged to call all witnesses
    - **Smith v The Queens 2001**
      - **Facts**: The fact in issue was whether the accused was the person in surveillance photo robbing bank. Two police officers gave evidence that the accused was the person in the photo – relevance of that evidence
      - **Held**: Evidence was held inadmissible as it was not relevant. Jury had access to the same items as the police in forming their opinion, thus the evidence if accepted, could not rationally affect the jury's decision.