Circumstantial Evidence

Commentary

Evidence may be used directly or circumstantially. Usually, in a circumstantial evidence case, the jury is asked to infer guilt from a number of circumstances, which, when taken as a whole, eliminate the hypothesis of innocence.

Commonly, three directions are given in substantially circumstantial cases, namely:

1. A direction about drawing inferences: See Summing-up, General, Primary Facts and Inferences, especially footnote 7.;

2. A direction that "guilt should not only be *a* rational inference but should be *the only rational inference* that could be drawn from the circumstances": See *R v Perera* [1986] 1 Qd R 211 at 217; *R v Owen* (1991) 56 SASR 397 at 406; and

3. A direction that if there is any reasonable hypothesis consistent with innocence, the jury's duty is to acquit: See *R v Holman* [1997] 1 Qd R 373 at 380.

The second and third directions above are different ways of conveying, or emphasising, the meaning of "beyond reasonable doubt": See *R v Holman* [1997] 1 Qd R 373 at 380.

It is not in every circumstantial case that particular items of evidence need be proved by the prosecution beyond reasonable doubt: see Dalton JA in *R v Waters* [2023] QCA 243, in which her Honour said at [139]:

> "If an inference of guilt is open on the evidence, the question for the jury is whether the inference has been proved beyond reasonable doubt – not whether any particular fact has been proved beyond reasonable doubt. … Ordinarily, in a circumstantial evidence case, guilt is inferred from a number of circumstances – often numerous – which taken as a whole eliminate the hypothesis of innocence. The cogency of the inference of guilt is derived from the cumulative weight of circumstances, not the quality of proof of each circumstance."

However, there will be cases where it is necessary to isolate and identify for the jury "intermediate facts" constituting indispensable links in a chain of reasoning towards an inference of guilt; if so it may well be appropriate to tell the jury that such facts must be proved by the prosecution beyond reasonable doubt.

Where the evidence consists of "strands in a cable" rather than "links in a chain", it will not be appropriate to give the direction just mentioned". See *R v Jones* [1993] 1 Qd R 676 at 680; cf JRS Forbes, *Evidence Law in Queensland*, 3rd ed (1999) at [A.106] ;*Shepherd v The Queen* (1990) 170 CLR 573 at 578.

Where the case is not based entirely or substantially on circumstantial evidence, a modified direction in respect of circumstantial evidence may be appropriate when summing-up in respect of an element of the offence which is based entirely or substantially on circumstantial evidence.

Suggested direction

Circumstantial evidence is evidence of circumstances which can be relied upon not as proving a fact directly but instead as pointing to its existence. It differs from direct evidence, which tends to prove a fact directly: typically, when the witness testifies about something which that witness personally saw, or heard. Both direct and circumstantial evidence are to be considered.

[A possible addition is**: It is not necessary that facts in dispute be proved by direct evidence. They may be proved by circumstantial evidence alone, by direct evidence alone, or by a combination of direct and circumstantial: that is, both direct and circumstantial evidence are acceptable proof of facts. So, you should consider all the evidence, including circumstantial evidence.]**

To bring in a verdict of guilty based entirely or substantially upon circumstantial evidence, it is necessary that guilt should not only be a rational inference but also that it should be the only rational inference that could be drawn from the circumstances.

If there is any reasonable possibility consistent with innocence, it is your duty to find the defendant not guilty. This follows from the requirement that guilt must be established beyond reasonable doubt.