# THE WRONG DIRECTION

## A case study and anatomy of successful Australian criminal appeals

Judge Sydney Tilmouth[1]

*A review of successful criminal appeals across Australia in the seven and a half year period to 31 December 2012, produces a number of unexpected results. The study demonstrates that appeals succeed Nationwide mostly in relation to unreasonable or unsupportable verdicts, and then in descending order on the topics of similar fact evidence, procedural error in the summing up itself, in defining the elements of offences, complaint evidence in sexual cases, in correctly defining the applicable mental element or intention, lies by an accused, excesses by prosecution counsel, other procedural errors, expert evidence, complicity, consent, fresh evidence, self defence, identification, and delay (Longman warning). The most surprising finding is that judge induced error in the course of directing juries is more common than expected, followed by an equally disconcerting number of excesses by prosecuting counsel, leading to miscarriages of justice. Another unexpected conclusion relates to what appears to be a disproportionate number of appeals allowed in Victoria as compared with other jurisdictions.*

### Introduction

The genesis of this paper resides in a request by Doyle CJ, for me to identify where judges most consistently fell into error in their directions in criminal trials and which led to convictions being overturned in the Court of Criminal Appeal. I agreed to undertake a systematic study of the South Australian decisions in order to identify what the problem areas were. This was soon expanded to encompass all appellate decisions throughout Australia.

### Scope of the case study

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The adequacy of coverage is dependent upon having considered all the appeals against conviction in the Courts of Criminal Appeal and the High Court of Australia, and then on correctly identifying the successful ground or grounds of appeal. The latter is not always an easy or straightforward task. It may be that some cases were missed, or an additional successful ground of appeal overlooked. Nonetheless, even accepting the room for such occasional slips, it is to be doubted these would impinge on the general trends emerging over the years of the study.

The analysis commences from judgments handed down from 1 June 2005 and ends on 31 December 2012. It relates to verdicts of juries and in a few cases verdicts entered by judges when the right to trial by jury was waived. There is no magic in this period, apart from the fact that there has to be a commencement and a cut-off date. This study therefore covers a period of just over seven and a half years.

There were 614 successful appeals in this period. In at least 76 instances, appeals were allowed on two or more grounds. On the other hand where a direction or ruling was criticised but did not lead to reversal, it is not incorporated in the study. This is because the core task was to identify the subjects producing appealable error and resulting in either orders for retrial, in some cases verdicts for lesser offences, or even to outright acquittal.

**An overview**

Of the cases surveyed, 481 emanated from the District Courts or the County Court of Victoria, whereas 133 originated in the Supreme Courts. This fact is of no particular significance in itself, as most Supreme Courts (except for those in the Territories and Tasmania where there are no intermediate jury trial courts), exercise little original criminal jurisdiction in terms of the number of trials held, compared to those heard in the District or County Courts. Correspondingly the Supreme Courts are most frequently represented in homicide appeals, as those courts generally exercise exclusive jurisdiction over

such cases and hence are most heavily represented when misdirections as to provocation and self defence are involved.

Not unsurprisingly more appeals came from the most populous jurisdictions.[2] Convictions were set aside in 24 instances involving misdirection by the High Court of Australia, six each from Victoria and Queensland, five from Western Australia, four from New South Wales, two from South Australia and one from the Northern Territory: *Stevens v R*,[3] *Fingleton v R*,[4] *Mallard v R*,[5] *Phillips v R*,[6] *AJS v R*,[7] *AK v State of Western Australia*,[8] *Baiada Poultry Pty Ltd v R*,[9] *Baini v R*,[10] *Braysich v R*,[11] *Burns v R*,[12] *Cesan & Mas Rivadavia v R*,[13] *Cooper v R*,[14] *Dickson v R*,[15] *Douglass v R*,[16] *Evans v R*,[17] *Gassy v R*,[18] *Handlen & Paddison v R,*[19] *Mahmood v State of Western Australia*,[20] *Momcilovic v R*,[21] *R v Dang Quang Nguyen*,[22] *Patel v R*,[23] *Pollock v R*,[24] *Stubley v Western Australia*,[25] and *Muslimin v R.*[26]

What is of some interest is that far more appeals were allowed in Victoria (186) than in New South Wales (107). In fact the next highest 'success' rate occurred in Queensland where 156 appeals were allowed. Then in order were South Australia (76), Western Australia (57), trailing off into the

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2 Successful High Court appeals by an accused are recorded under the jurisdiction of origin.
3 (2005) 227 CLR 319 (Qld)
4 (2005) 227 CLR 166 (Qld)
5 (2005) 224 CLR 125 (WA)
6 (2006) 225 CLR 303 (Qld)
7 (2007) 235 CLR 505 (Vic)
8 (2008) 232 CLR 438 (WA)
9 (2012) 246 CLR 92 (Vic)
10 (2012) 87 ALJR 180 (Vic)
11 (2011) 243 CLR 434 (WA)
12 (2012) 246 CLR 334 (NSW)
13 (2008) 236 CLR 358 (NSW)
14 (2012) 87 ALJR 32 (NSW)
15 (2010241 CLR 491 (Vic)
16 (2012) 86 ALJR 1086 (SA)
17 (2007) 235 CLR 521 (NSW)
18 (2008) 236 CLR 293 (SA)
19 (2011) 245 CLR 282 (Qld)
20 (2008) 232 CLR 397 (WA)
21 (2011) 245 CLR 1 (Vic)
22 (2010) 242 CLR 491 (Vic)
23 (2012) 86 ALJR 954 (Qld)
24 (2010) 242 CLR 233 (Qld)
25 (2011) 242 CLR 374 (WA)
26 (2010) 240 CLR 470 (NT)

smaller jurisdictions, the Northern Territory (14), the Australian Capital Territory (11) and Tasmania (7). These results tabulate in this way:

| *APPEALS AUDIT SUMMARY TABLE* | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | SA | VIC | NSW | QLD | WA | ACT | NT | TAS | National |
| District Court | 66 | | 92 | 127 | 42 | | | | 327 |
| Supreme Court | 10 | 32 | 15 | 29 | 15 | 11 | 14 | 7 | 133 |
| County Court | | 154 | | | | | | | 154 |
| | 76 | 186 | 107 | 156 | 57 | 11 | 14 | 7 | **614** |
| | | | | | | | | | |
| Multiple Grounds | | | | | | | | | |
| DC | 7 | | 11 | 17 | 4 | | | | |
| SC | 1 | 4 | 1 | 3 | 3 | | 1 | | |
| CC | | 24 | | | | | | | |
| | 8 | 28 | 12 | 20 | 7 | | 1 | | **76** |

**The present study**

As of the end of December 2012 the national and jurisdiction by jurisdiction pattern emerges, in order of national significance as tabulated in the table at the end of this study.

The individual jurisdictional patterns do not always coincide with the national pattern, but they are not all that dissimilar, with the exception of Western Australia. Putting aside unreasonable and unsupportable verdicts, in my home state of *South Australia* the main subjects of error were judge induced (7), self defence (6), complaint evidence (5), the mental element (4), lies by accused (4), complicity (4), directions as to witnesses (4), followed by similar fact evidence (3), and expert evidence (3). For *New South Wales* they are in order, similar fact evidence (14), elements of offence (9), judge related error (8), excesses by prosecuting counsel (8), complicity (6), failure to discharge the jury (6), and then expert evidence (5). So far as *Victoria* is concerned, similar fact evidence heads the list (18), followed by judicial error in the summing up (13), directions as to mental element (12), lies by the accused (12), complaint evidence (11), elements of offence (10), miscellaneous procedural errors (11), directions as a consent (9), excesses by prosecuting counsel (8), failure of defence to cross examine (8), errors with respect to date

or particulars of offence (7). Turning to *Queensland* they are similar fact evidence (12), then mental element (8), procedural error in the summing up (7), elements of offence (7), complaint evidence (7), fresh evidence (7), directions as to complicity (6), lies by accused (5), excesses by prosecuting counsel (5), miscellaneous procedural errors (5), and as to witnesses (5). The pattern in *Western Australia* has greater variation from the norm, with procedural error by the trial judge heading the list (6), followed by directions as to the accused as a witness (5), then similar fact evidence (4) and fresh evidence appeals (4). In *Tasmania* there are only single incidents of any category. In the *Australian Capital Territory* there were multiple errors in burden of proof (2) and change of plea (2) and in the *Northern Territory* there were multiple errors in just date and particulars of the offence (2).

**An anatomy of the successful appeals**

**Unreasonable or unsupportable verdict** (83)

The highest number of successful appeals occurred on the basis of unreasonable or unsupportable verdicts. These of course do not expose error, as trial judges lack the power to stop cases short of finding no cases to answer or giving *Prasad* directions, even if forming the view that a guilty verdict would be set aside on appeal: *Doney v The Queen*.[27] The figures do not reflect the fact that in many cases acquittals were entered on one or just a few counts, and in others when lesser alternative verdicts of guilty were substituted on appeal, so it should not be taken that the whole appeal necessarily succeeded outright. Likewise, verdicts overturned on the basis of fresh evidence do not by definition, adversely reflect on trial Judges. Likewise those appeals allowed due to the incompetence of trial counsel are not generally speaking brought about by judicial error, essentially because of the fact that judges have limited means of dealing with such problems, short of aborting trials altogether.

The relatively large proportion of cases in which appeals were allowed on the basis of unreasonable or unsupportable verdicts, is doubtless a direct

[27] (1990) 171 CLR 207 at 213-214

consequence of the High Court's insistence that the Courts of Criminal Appeal exercise a duty to undertake an independent assessment of the evidence, in the course of which they must scrutinise the nature and quality of the evidence, a principle first developed in *M v The Queen,*[28] as expressed in the later decisions for instance of *MacKenzie v The Queen*,[29] *Jones v The Queen*,[30] *MFA v The Queen*,[31] *Phillips v The Queen*,[32] *Cornwell v The Queen*,[33] *SKA v The Queen*,[34] and *Michaelides v The Queen*.[35]

**Similar fact, propensity and tendency evidence** (52)

It is not surprising in the least that this complex area of the law creates problems. The situation is compounded of late by a surge of statutory 'reforms' difficult to interpret and apply. Under the rubric of 'similar fact evidence' lies a plethora of circumstances as explained in *Pfennig v The Queen*:[36]

> *There is no one term which satisfactorily describes evidence which is received notwithstanding that it discloses the commission of offences other than those with which the accused is charged. It is always propensity evidence but it may be propensity evidence which falls within the category of similar fact evidence, relationship evidence or identity evidence. Those categories are not exhaustive and are not necessarily mutually exclusive. The term "similar fact" evidence is often used in a general but inaccurate sense.*

There is no easy, simple or singular formula governing the admission of evidence of this kind, or as to the content of 'standard' directions for juries. As McHugh J acutely observed in *Pfennig v The Queen*;[37] '…the interests of justice require the trial judge to make a value judgment, not a mathematical calculation.' The decision to admit such evidence is often finely balanced and almost invariably made under pressure of time.

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28 (1994) 181 CLR 487.
29 (1996) 190 CLR 348.
30 (1997) 191 CLR 439 at 452
31 (2002) 213 CLR 606
32 (2006) 225 CLR 303
33 (2007) 231 CLR 260
34 (2011) 243 CLR 400 at [4]
35 (2013) 87 ALJR 456
36 (1995) 182 CLR 461 at 464
37 (1995) 182 CLR 461 at 528–529

Owing to the complexity of the subject, the abject potential for prejudice to an accused person and the myriad of factual situations that commonly arise, the common law developed a series of hedges or safeguards against admission. These were a first rule of exclusion as a matter of policy: *Perry v The Queen*,[38] that the evidence bear no reasonable explanation other than the inculpation of the accused in the offence charged: *Hoch v The Queen,*[39] that the proposed evidence was not reasonably explicable on the basis of concoction;[40] that it 'contains a strong degree of probative force': *Sutton v The Queen*,[41] and *Pfennig v The Queen*,[42] and that it has a really material bearing on the issues to be decided: *Phillips v The Queen*.[43]

The various statutory modifications generally serve to water down these safeguards against admission. To begin the *Uniform Evidence* Acts were interpreted to exclude the *Pfennig* test of admission: *R v Ellis*,[44] and on further appeal *Ellis v R.*[45] An identical view was taken of s 132B(2) of the *Evidence Act 1977* (Qld) in *Roach v The Queen*.[46] The case study indicates the kinds of problems anticipated by McClellan CJ in *R v Qualtieri*,[47] regularly arise, namely the complexity involved in clearly categorising the purpose for which the evidence is tendered and in formulating appropriate directions to ensure there is no misunderstanding of the use to which the evidence can legitimately be put.

A closer analysis of the cases reveals that appeals were allowed in this category of similar fact, tendency or coincidence evidence, essentially for the following reasons. First, inadequate directions (25): *Phillips v R*,[48] *R v RJP,*[49]

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38 (1982) 150 CLR 580 at 585
39 (1988) 165 CLR 292 at 294–295
40 (1988) 165 CLR 292 at 297
41 (1984) 152 CLR 528 at 533
42 (1995) 182 CLR 461 at 481
43 (2006) 225 CLR 303 at 224
44 (2003) 58 NSWLR 700
45 [2004] HCA Trans 488 (1 December 2004)
46 (2011) 242 CLR 610; (2011) 210 A Crim R 300.
47 (2006) 171 A Crim R 463.
48 (2006) 225 CLR 303
49 (2011) 215 A Crim R 315.

*R v Rodden*,[50] *R v PRW*,[51] *R v Rajakaruna (No 2)*,[52] *R v Gardiner*,[53] *R v Anders*,[54] *R v Qualtieri*,[55] *R v Hess*,[56] *R v ES* (*No 1*),[57] *R v WO*,[58] *R v UB*,[59] *R v JDK*,[60] *R v ML*,[61] *R v NJB*,[62] *R v CAU*,[63] *R v Glennon (No 3)*,[64] *R v Taylor*,[65] *R v Ellul*,[66] *R v CAH*,[67] *R v GVV*,[68] *R v JDK*,[69] *R v Paton*,[70] *R v SJF*,[71] and *R v WFS*;[72] wrongful admission (11): *R v Watkins*,[73] *R v RR*,[74] *Buiks v State of Western Australia*,[75] *R v Dean*,[76] *R v O'Keefe*,[77] *R v RWC*,[78] *R v Ninyette*,[79] *R v Riley*,[80] *R v HG*,[81] *R v S, PC*,[82] and *R v KS*;[83] erroneous joinder (7): *R v MAP*,[84] *R v BBG*,[85] *R v May*,[86] *R v MRO*,[87] *R v Makarov*,[88] *Baini v The Queen*,[89]and *R v N, SH*;[90] incurable risk of impermissible propensity reasoning (6): *R v CHS*,[91]

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50 (2008) 182 A Crim R 227.
51 [2005] SASC 463.
52 (2006) 168 A Crim R 1
53 (2006) 162 A Crim R 233
54 (2009) 193 A Crim R 202
55 (2006) 171 A Crim R 463
56 [2008] QCA 048
57 [2010] NSWCCA 197
58 [2006] QCA 21
59 (2007) 178 A Crim R 450
60 (2009) 194 A Crim R 333
61 [2009] VSCA 106
62 [2010] NTCCA 5
63 [2010] QCA 46
64 (2005) 158 A Crim R 74
65 [2006] VSCA 53
66 (2008) 185 A Crim R 311
67 (2008) 186 A Crim R 288
68 (2008) 194 A Crim R 242
69 (2009) 194 A Crim R 333
70 [2011] VSCA 72
71 [2011] VSCA 281
72 (2011) 223 A Crim R 327
73 (2005) 153 A Crim R 434
74 [2011] VSCA 442
75 (2008) 188 A Crim R 362
76 [2009] QCA 309
77 [2009] NSWCCA 121
78 [2010] NSWCCA 332
79 [2012] WASCA 184
80 [2011] NSWCCA 238
81 (2007) 171 A Crim R 55
82 (2008) 189 A Crim R 446
83 (2007) 176 A Crim R 419
84 [2006] QCA 220
85 (2007) 174 A Crim R 86
86 [2007] QCA 333
87 (2010) 29 VR 527
88 [2008] NSWCCA 293
89 (2012) 293 ALR 472; [2012] HCA 59
90 [2010] SASCFC 74
91 (2006) 159 A Crim R 560

*Dair v State of Western Australia*,[92] *R v Auons*,[93] *R v L'Estrange*,[94] *R v BBQ*,[95] *R v PPP*,[96] and insufficient underlying probative force or value (3): *R v AE*,[97] *R v DJV*,[98] *Stubley v State of Western Australia.*[99]

It follows from this analysis that prosecuting counsel should clearly articulate the use(s) the evidence is to be put. They should consider what they propose to say to the jury about it and then what directions are given with respect to it. If prosecutors are unable to identify succinctly the uses of the evidence, or clear directions cannot be formatted to limit such uses and to contain misuse, or to guard against undue prejudice, then the evidence is unlikely to be admissible.

**Procedural error in summing up** (42)

It is here perhaps, certainly seen from the perspective of a judge, that the most surprising result of this survey is to be found. This heading lumps together judge instigated errors made in the course of summing up to juries. These kinds of incursions into the trial process may be sub-categorised as follows: failure to adequately put the defence case (16): *R v Hendriksen*,[100] *R v Smith*,[101] *R v Gose*,[102] *R v J, JA*,[103] *R v Schneiders*,[104] *R v Osborne*,[105] *R v Poduska*,[106] *R v Wong*,[107] *R v El-Jalkh*,[108] *R v Harman*,[109] *State of Western Australia v Pollock*,[110] *R v AS*,[111] *R v S,G*,[112] *R v CC*,[113] *R v Marlborough*,[114]

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92 (2008) 182 A Crim R 385
93 [2010] VSCA 223
94 (2011) 214 A Crim R 9
95 (2009) 196 A Crim R 173
96 (2010) 200 A Crim R 533
97. [2008] NSWCCA 52
98 (2008) 200 A Crim R 206
99 (2011) 242 CLR 374; (2011) 207 A Crim R 202
100 (2007) 173 A Crim R 512
101 [2008] SASC 135
102 (2009) 22 VR 150.
103 (2009) 199 A Crim R 1
104 [2007] QCA 210
105 [2007] VSCA 250
106 [2008] VSCA 147
107 [2009] NSWCCA 101
108 [2009] NSWCCA 139
109 [2009] VSCA 78
110 (2009) 195 A Crim R 527
111 [2010] NSWCCA 218
112 (2011) 109 SASR 491

and *R v Ghebrat*;[115] imbalance in summing up (7): *R v Taleb*,[116] *R v Zurek,*[117] *R v Lorraway*,[118] *Gassy v The Queen*,[119] *R v Knight*,[120] *R v Abdel-Hady*,[121] and *R v Irvine*;[122] leaving alternative basis of liability not relied on (7): *R v Robinson,*[123] *R v SAB*,[124] *R v Abbouchi*,[125] *R v Falcone*,[126] *R v Cannell*,[127] *R v Duwah*,[128] and *Hurst v Tasmania*,[129] prejudicial comment (4): *R v Glennon (No 3)*,[130] *R v Smith & Corp*,[131] *Mahood v State of Western Australia*,[132] and *Leyshon v The State of Western Australia*;[133] mis-stating the evidence (3): *R v Kovacs*,[134] *Maher v WA*,[135] and *R v Thomas*;[136] undue intervention to examine witnesses (2): *R v Mohammadi*,[137] and *R v Buckoke*;[138] impermissibly cross-examining an accused (1): *R v Brdarovski*;[139] the failure to relate the issues to the evidence (1): *R v Thompson*;[140] and making unduly prejudicial criticism of counsel in presence of jury (1): *R v RLT*.[141]

The simple remedy for this kind of errant intervention is for trial judges to heed the High Court's constant admonition to keep out of the arena, stated by Gaudron ACJ, Gummow, Kirby and Hayne JJ in *RPS v The Queen*.[142]:

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113 [2010] NSWCCA 337
114 [2011] WASCA 51
115 (2011) 214 A Crim R 140
116 [2006] NSWCCA 119
117 [2006] QCA 543
118 [2007] QCA 142
119 (2008) 236 CLR 293 (SA)
120 [2010] QCA 372
121 [2011] NSWCCA 196
122 (2009) 25 VR 75
123 (2006) 162 A Crim R 88
124 (2008) 187 A Crim R 305
125 [2008] VSCA 171
126 (2008) 190 A Crim R 440
127 [2009] QCA 094
128 [2011] VSCA 262
129 [2011] TASCCA 12
130 (2005) 158 A Crim R 74
131 (2008) 37 WAR 297
132 (2008) 232 CLR 397
133 [2006] WASCA 132
134 [2007] QCA 143
135 [2010] WASCA 156
136 [2007] QCA 226
137 (2011) 112 SASR 17
138 [2011] SASCFC 147
139 (2006) 166 A Crim R 366
140 (2008) 187 A Crim R 89
141 [2006] NSWCCA 357
142 (2000) 199 CLR 620 at [41]

> [42] … But although a trial judge may comment on the facts, the judge is not bound to do so except to the extent that the judge's other functions require it. Often, perhaps much more often than not, the safer course for a trial judge will be to make no comment on the facts beyond reminding the jury, in the course of identifying the issues before them, of the arguments of counsel.

**Elements of offence** (32)

This category involves such diverse errors whereby judges have simply misconstrued or misunderstood the elements of offences, such that no pattern or common denominator emerges. It is not possible to be prescriptive or universal about this. For instance there were issues as diverse as people smuggling and terrorism, through to simple assault. It might be noted in passing that eight cases here involved misdirections on dishonesty of some species or another.

**Complaint** (28)

Errors in relation to complaint evidence occurred in six cases where such evidence was wrongly admitted (6): *Bellemore v State of Tasmania*,[143] *R v MAG*,[144] *R v BRL*,[145] *R v WSJ*,[146] *R v HSG*[147] and *R v Lanagan;*[148] those in which the direction as to proper use was not strong enough (6): *R v Beattie*,[149] *R v Oldfield*,[150] *R v Sierke*,[151] *R v OP*,[152] *R v Stoian*,[153] and *R v* Geddes;[154] in cases of inadequate directions as to the limited use of such evidence (5): *R v Mason*,[155] *R v Demiri*,[156] *R v FP*,[157] *R v BAZ*,[158] and *R v Amjad*;[159] four cases in which the jury or the accused were impermissibly asked the question

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143 (2006) 170 A Crim R 1
144 [2005] VSCA 47
145 [2010] VSCA 258
146 [2010] VSCA 339
147 [2011] VSCA 163
148 [2005] QCA 209
149 (2008) 188 A Crim R 542
150 (2006) 163 A Crim R 242
151 [2011] SASCFC 53
152 [2011] QCA 323
153 [2010] QCA 263.
154 [2011] VSCA 354
155 [2006] QCA 125
156 [2006] VSCA 64
157 (2007) 169 A Crim R 318
158 [2005] QCA 420
159 [2010] SASCFC 68

'why would the complainant lie' (4): *R v South*,[160] *R v SAB*,[161] *R v Davis*,[162] and *R v Bajic*;[163] those in which the judge was accused of telling a jury to ignore a motive for the complainant to lie (3): *R v Sluczanowski*,[164] *R v Kong*,[165] and *R v H, T;*[166] those in which the judge wrongly disallowed defence counsel to cross-examine on prior sexual experience (2): *R v Sadler*,[167] and *R v ERJ*;[168] when evidence going to the veracity of the complainant was not allowed: *R v PDW*;[169] and finally over the failure to relate the directions to the particular count(s) to which the evidence relates: *R v S*, *DD.*[170]

Given the wide range of errors involved, it is not possible to identify how misdirections in this troublesome area of the law can be avoided. Obviously enough close attention must be paid to admission in the first place and the limits of use and misuse in the second. It is however suggested that many of the problems seen in this area are the product of the illogical and discredited basis upon which the law continues to allow complaint evidence in sexual cases, aptly described by Holmes J in *Commonwealth v Cleary*,[171] as 'a perverted survival of the ancient requirement that a woman should make hue and cry as a preliminary to an appeal of rape'.

**Mental element (intent)** (27)

As with the elements of offences, here again it is not possible to identify an easy solution. Many of the issues involve questions of statutory interpretation in order to establish just what the specific intent required actually was. It can be said however that defining recklessness does cause problems as

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160 [2007] NSWCCA 117
161 (2008) 187 A Crim R 305
162 [2007] VSCA 276
163 (2005) 154 A Crim R 196
164 [2008] SASC 185
165 [2009] QCA 34
166 (2010) 204 A Crim R 150
167 (2008) 189 A Crim R 310
168 (2010) 200 A Crim R 270
169 (2009) 197 A Crim R 1
170 (2010) 109 SASR 46
171 172 Mass 175 (1898) at 176

in *R v Barrett*,[172] *R v Garlick (No 2)*,[173] *R v Fang*,[174] and *Hurst v State of Tasmania*.[175]

**Lies by accused and post offence conduct** (27)

It was entirely expected that this subject would prove to be a significant source of error. The problem with leaving lies as evidence of guilt inherently resides in the dangerous circular or "bootstraps" component involved: *Edwards v The Queen*,[176] and because of a tendency for juries to think proven lies establishes propositions to the contrary: *R v Baker*,[177] and *R v KCW*.[178] The other thing is that the law in this area has become too complex for juries to understand, especially in Victoria, as the twelve points made in *R v Renzella*,[179] perhaps demonstrates.

The cases examined reveal errors in lies directions over the failure to give an adequate *Edwards* direction, i.e. that some lies were deliberate, relate to a material issue, spring from 'a realisation of guilt and a fear of the truth' and clearly shown to be lies by other evidence (9): *R v Ali (No 2)*,[180] *R v Tiwary*,[181] *R v MC*,[182] *R v SBB*,[183] *R v Fouyaxis*,[184] *R v Dupas (No 3)*,[185] *R v Graham*,[186] *R v McCullagh (No 2)*,[187] and *R v Farquharson*;[188] when the evidence did not support a conclusion of an implied admission of guilt (8): *Martinez v State of Western Australia*,[189] *R v Redmond*,[190] *R v Ignatova*,[191] *R v Dykstra*,[192] *R v*

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172 (2007) 171 A Crim R 315 (murder)
173 (2007) 170 A Crim R 265 (cultivation)
174 [2010] NSWCCA 254 (possession of unlawfully imported substance)
175 [2011] TASCCA 12
176 (1993) 178 CLR 193 at 209
177 [1999] NSWCCA 129 at [57]
178 [1999] NSWCCA 112 at [73]
179 (1996) 88 A Crim R 65 at 68–70
180 (2005) 158 A Crim R 469
181 [2008] NSWCCA 319
182 [2009] VSCA 122
183 (2007) 175 A Crim R 449
184 (2007) 99 SASR 233
185 (2009) 28 VR 380; (2009) 198 A Crim R 454
186 [2011] QCA 187
187 [2005] VSCA 109
188 (2009) 26 VR 410
189 (2007) 172 A Crim R 389
190 [2006] VSCA 75
191 [2010] VSCA 263
192 [2011] QCA 175

*MMJ*,[193] *R v G, GT*,[194] *R v McKey*,[195] and *R v Healey;*[196] the failure to direct the jury to consider whether there might be reasons for lying other than arising from a consciousness of guilt (4): *R v ON*,[197] *R v SBB*,[198] *R v Burns*,[199] and *R v DJF*;[200] error in leaving lies as evidence of guilt at all (3): *Bowman v WA*,[201] *R v Zilm*,[202] and *R v Baring & Leonard;*[203] the failure to relate the lie to particular count (2): *R v Kalajdic*,[204] *R v Heyes*,[205] and the failure to separately identify the relevant lie or lies: *R v Johnstone.*[206]

The solution here is simple enough. Prosecuting counsel should be discouraged from misplaced reliance on alleged lies for the reasons spelt out in *R v Heyde.*[207] There Gleeson CJ approved an earlier judgment of Street CJ in *R v Sutton*,[208] to the effect that the process was 'fraught with the risk of miscarriage'. Second, they ought heed the advice of King CJ in *R v Harris*,[209] that 'in any but the rarest of cases, [do] lies proceed from a consciousness of guilt'. Indeed the majority in *Zoneff v The Queen*,[210] gave a timely reminder of '… the risk that its use by the trial judge may itself suggest guilt …'. Still further prosecutors should be 'required to previously identify the lie or lies in issue and the basis on which they are said to be capable of implicating the accused in the commission of the particular offence charged: *Zoneff v The Queen.*[211]

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193 (2006) 166 A Crim R 501
194 (2007) 97 SASR 315
195 (2012) 219 A Crim R 227
196 [2008] NSWCCA 229
197 [2009] QCA 62
198 (2007) 175 A Crim R 449
199 (2009) 103 SASR 514
200 (2011) 205 A Crim R 412
201 [2008] WASCA 63
202 [2006] VSCA 72
203 (2005) 155 A Crim R 326
204 [2005] VSCA 160
205 (2006) 160 A Crim R 435
206 (2011) 31 VR 320
207 (1990) 20 NSWLR 234 at 236
208 (1986) 5 NSWLR 697 at 670
209 (1990) 52 A Crim R 1 at 3
210 (2000) 200 CLR 234 at [15]
211 (2000) 200 CLR 234 at [16]-[17]

The safer and preferable course by far, is simply to instruct the jury that the evidence is relevant only to the credit of the accused: *Osland v The Queen.*[212] Realistically speaking, the High Court put all but the death knell on leaving lies as evidence of guilt in *Dhanhoa v The Queen,*[213] by ruling that it was 'as a general rule, unnecessary and inappropriate to give an *Edwards* direction'.

**Excesses of prosecuting counsel** (25)

Perhaps the second most revealing conclusion arising from this study is the number of cases in which over enthusiasm of crown counsel has served to compromise the fair conduct of trials. There are a number of discernible areas where this kind of problem continually occurs. They consist of inadequate disclosure (9): *Mallard v R*,[214] *R v Law*,[215] *R v Farquharson*,[216] *R v HAU*,[217] *R v Cornwell*,[218] *R v AJ*,[219] *R v Aouad & El-Zeyat*,[220] *R v Sonnet*[221] and *R v Rajakaruna (No 2)*;[222] failing to advise in advance of reliance on issues first raised in final address (5): *R v Howard*,[223] *R v Cohen*,[224] *R v Lameri*,[225] *R v Cittadini*,[226] and *R v GDD*;[227] intemperate or inflammatory comments in the closing address (3): *R v Livermore*,[228] *R v Smith*,[229] and *R v Wheatley*;[230] misplaced reliance on the failure of defence counsel to comply with the rule in *Browne v Dunn* (3): *R v Johnson*,[231] *R v Khamis*,[232] and *R v Bugeja &*

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212 (1998) 197 CLR 316 at [44]
213 (2003) 217 CLR 1 at [34]
214 (2005) 224 CLR 125 (WA)
215 (2008) 182 A Crim R 312
216 (2009) 26 VR 410
217 [2009] QCA 165
218 [2009] QCA 294
219 [2011] VSCA 215.
220 (2011) 207 A Crim R 411
221 (2010) 208 A Crim R 220
222 (2006) 168 A Crim R 1
223 (2005) 156 A Crim R 343
224 [2006] NSWCCA 247
225 [2007] NSWCCA 111
226 [2009] NSWCCA 302
227 [2010] NSWCCA 62
228 (2006) 67 NSWLR 659
229 (2007) 179 A Crim R 453
230 [2012] QCA 055
231 [2011] VSCA 29
232 (2010) 203 A Crim R 121

*Johnson*;[233] the failure to tender exculpatory portions of a record of interview: *R v J, JA*;[234] improper comments on the accused's failure to give evidence: *R v AJE*;[235] the failure to call an exculpatory witness: *R v Jensen*,[236] and late change in the Crown case causing prejudice: *Patel v The Queen.*[237] In one astonishing instance prosecuting counsel actually spoke to radio and television journalists in terms prejudicial to an accused before the trial: *R v MG.*[238]

There are of course rare occasions when judges might be called upon 'to redress and correct extravagances, excesses or unwarranted propositions developed or indulged in by counsel', as suggested by Street CJ in *R v Glusheski,*[239] views repeated by Hunt CJ at CL in *R v McCarthy & Ryan.*[240] It is vital these days that the jury should be told they are not bound by the opinions of the presiding judge, nor relieved thereby of the responsibility for forming their own view: *Broadhurst v The Queen*.[241]

**Miscellaneous procedural errors** (21)

The cases grouped here do not comfortably fit within the other categories identified elsewhere. These involved the failure to adjourn for various reasons (8): *R v SM*,[242] (to investigate questions of fitness to plead and stand trial), *R v East*[243] and *R v Wright*,[244] (to obtain legal representation), *Lewis v State of Western Australia (No 2)*,[245] (indictment amended one day before trial to allege assault occasioning grievous bodily harm instead of assault occasioning, adjournment refused to enable defence to obtain medical evidence): *R v Loc Tien Hoang*,[246] and *Isherwood v Tasmania*,[247] (failure to

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233 (2010) 30 VR 493
234 (2009) 199 A Crim R 1
235 [2012] WASCA 185
236 (2009) 23 VR 591.
237 [2012] HCA 29 (Qld)
238 (2007) 69 NSWLR 20
239 (1986) 33 A Crim R 193 at 195
240 (1993) 71 A Crim R 395 at 407
241 [1964] AC 441 at 464
242 [2011] VSCA 332
243 (2008) 190 A Crim R 225
244 (2012) 221 A Crim R 536
245 (2008) 37 WAR 483
246 (2007) 173 A Crim R 64
247 [2010] TASCCA 11

advise unrepresented accused of rights) and *R v Naidu*,[248] (failure to adjourn trial that would prejudice pending murder trial), plus one involving an overly lengthy adjournment of six weeks to enable the prosecution to obtain evidence in response to an alibi: *R v Miller.*[249]

The remainder were successful for various reasons: *R v Rigoli*,[250] (indictment failed to afford sufficient description of conduct charged), *R v FTG*,[251] (excluding admissible evidence in the defence case), *R v Shalala & Zoudi*,[252] and *R v Beckett*,[253] (refusing to allow withdrawal of concession), *R v Haoui*,[254] (late introduction of technical expert evidence), *Cesan v The Queen*,[255] (judge falling asleep), *R v GP*,[256] (failing to recuse for bias), *R v Abraham*,[257] (accused not arraigned on new indictment), *R v DK*,[258] (refusing application to recall complainant), *R v Latorre*,[259] (error in holding agency principles applied to criminal responsibility), *R v Jamal*,[260] (accused denied opportunity to be present at view) and *Braysich v The Queen*,[261] and *Baiada Poultry Pty Ltd v R*,[262] (withholding a statutory defence).

**Expert evidence** (20)

At first sight one would not have expected the subject of expert evidence to have caused much of a problem for trial judges, as the applicable principles are well settled. However error emerges mostly at the point of admissibility. Hence most cases involve wrongly admitted expert evidence as going beyond the area of expertise or given in relation to a subject on which the jury was

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[248] (2011) 31 VR 212; (2011) 209 A Crim R 244
[249] (2007) 177 A Crim R 528; [2007] QCA 373
[250] [2006] VSCA 1
[251] (2007) 172 A Crim R 340
[252] (2007) 176 A Crim R 183
[253] [2011] 1 Qd R 259
[254] (2008) 188 A Crim R 331
[255] (2008) 236 CLR 358
[256] (2010) 27 VR 632
[257] [2010] QCA 225
[258] [2011] VSCA 407
[259] [2012] VSCA 280
[260] [2012] NSWCCA 198
[261] (2011) 243 CLR 434 (WA)
[262] (2012) 246 CLR 92 (Vic)

capable of applying its own knowledge and experience (7): *R v Barrett,*[263] *R v SBV*,[264] *R v Quang Duc Nguyen*,[265] *R v Partington*,[266] *R v Landon*,[267] *R v Italiano*,[268] and *R v Anandan*.[269] Other decisions in point involved the failure to demonstrate expertise (3): *R v Bjordal,*[270] *R v Hien Puoc Tang*,[271] and *R v CAU*;[272] the lack of proof of the underlying factual foundation (2): *R v Ping*,[273] and *R v Klamo*;[274] and in other cases when properly admitted, the failure to address conflicting expert evidence(2): *Riley v State of Western Australia*,[275] and *R v CJ;*[276] the refusal to admit relevant expert evidence in the defence case: *R v BDX;*[277] for breaches of the *Expert Witness Code of Conduct*: *R v Wood;*[278] because the evidence was simply inadmissible: *Bellemore v State of Tasmania*,[279] for giving it weight it did not deserve: *R v Eaton*,[280] and *R v A*,[281] and for impermissible cross-examination of a defence expert: *R v L'Estrange.*[282]

Since admissibility is the prime area of fault, the solution is to pay close regard to the principles governing admission and to apply the accepted principles detailed in the oft-cited judgment of Heydon JA in *Makita (Aust) Pty Ltd v Sprowles*,[283] namely that the expert evidence must be in a field of 'specialised knowledge', there must be an identifiable aspect of that field in which the witness demonstrates expertise by reason of specified training, study or experience, the opinion proffered must be 'wholly or substantially based on

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[263] (2007) 171 A Crim R 315
[264] [2011] QCA 330
[265] (2007) 173 A Crim R 557
[266] (2009) 197 A Crim R 380
[267] (2011) 109 SASR 216
[268] [2012] WASCA 260
[269] [2011] VSCA 413
[270] (2005) 93 SASR 237
[271] (2006) 161 A Crim R 377
[272] [2010] QCA 046
[273] (2005) 159 A Crim R 90
[274] (2008) 184 A Crim A 262
[275] (2005) 30 WAR 525
[276] [2012] NSWCCA 258
[277] (2009) 194 A Crim R 57
[278] [2012] NSWCCA 21
[279] (2006) 170 A Crim R 1
[280] [2005] QCA 191
[281] [2010] NTCCA 14
[282] (2011) 214 A Crim R 9
[283] (2001) 52 NSWLR 705 at [85]

the witness's expert knowledge', the foundation facts upon which it is based must be identified and admissibly proved and the expert must explain how the field of 'specialised knowledge' applies to the facts so as to produce the opinion propounded.

**Complicity** (19)

It might have been expected that misdirections on complicity would feature more prominently than it does because of the multiple bases upon which an accused can be found liable as an accomplice. Trials become particularly complicated when more than two accused are charged, as is often the case.

Appeals were allowed in this area because of error in directions because of a lack of evidence demonstrating criminal participation (6): *R v Taufahema*,[284] *R v Lawton*,[285] *R v Arafan*,[286] *R v Markou*,[287] *Cooper v The Queen*,[288] relating to the degree of harm or knowledge that must be foreseen (5): *R v Hartwick, Clayton & Hartwick,*[289] *R v Bosworth, Biggins, Nance & Richards*,[290] *R v Nguyen, ATCN & Huynh*,[291] *R v Mavropoulos*,[292]and *R v Graham*;[293] misdirections on the requirements of aiding and abetting: *R v Golding*,[294] and *R v Butler*,[295] and (mere presence and readiness to give aid insufficient), over the necessity of directing on the intention to aid the principal offender (2): *R v Pearce*,[296] and *R v Lam*;[297] the complete absence of a directions on accessorial liability: *R v Melling*;[298] a mis-statement of the law

284 (2006) 162 A Crim R 152
285 [2011] QCA 265
286 (2010) 206 A Crim R 216
287 (2012) 221 A Crim R 48
288 (2012) 293 ALR 17; (2012) 87 ALJR 32 (NSW)
289 (2006) 159 A Crim R 1 (affirmed at (2006) 81 ALJR 439
290 (2007) 170 A Crim R 110
291 (2007) 180 A Crim R 267
292 [2009] SASC 190
293 [2011] QCA 187
294 (2008) 100 SASR 216
295 [2011] QCA 265
296 [2012] QCA 082
297 (2008) 185 A Crim R 453
298 [2010] QCA 307

applicable at the time of trial: *Handlen & Paddison v The Queen*;[299] unnecessarily leaving extended common purpose: *R v May*,[300] and the failure to relate the complicity principles to the facts of the case: *R v JAM-V*.[301]

A major difficulty with complicity directions lies in the first place with identifying the degree of foresight required with respect to the specific charge involved. In order to avoid overly complex directions, it might be wise to exercise restraint in introducing the doctrine of common purpose, which is usually necessary only where the accused was not present and assisting at the commission of the crime and the crime was only incidental to the prime object of the common criminal venture: *R v Stokes & Difford*,[302] *R v Clough*,[303] *R v Tillott*,[304] *R v Tangye*,[305] *R v Kostic*,[306] and *R v JAM-V*.[307]

The multiple layers of liability now available to the prosecution, derive from a series of High Court decisions which brought about the effective merger of the doctrines of 'common purpose' and 'joint criminal enterprise': *Miller v The Queen*,[308] *McAuliffe v The Queen*,[309] and *Gillard v The Queen*.[310] The High Court acknowledged the undue complexities involved in *Huynh, Duong & Sem v The Queen*,[311] owing to 'the perceived need to direct on accessorial liability as an alternative to joint enterprise liability'.[312] The court proceeded to suggest that '(O)ne way of reducing the length and complexity of the directions on the law would have been to raise with the prosecutor the utility of leaving the accessorial case'.[313] A detailed analysis of the current law of complicity and proposals for reform can be found in the report from the Hon Justice Mark

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299 (2011) 245 CLR 282 (Qld).
300 (2012) 215 A Crim R 527.
301 [2005] SASC 417.
302 (1990) 51 A Crim R 25 at 36
303 (1992) 64 A Crim R 451 at 455
304 (1995) 38 NSWLR 1 at 42–43
305 (1997) 92 A Crim R 545 at 556
306 (2004) 151 A Crim R 10at [54]
307 [2005] SASC 417
308 (1980) 55 ALJR 23
309 (1995) 183 CLR 108 at 113
310 (2003) 219 CLR 1 at [109]
311 (2013) 228 A Crim R 306
312 Above at [21]
313 [2013] HCA 6 at [34]

Weinberg *Simplification of Jury Directions*, available in the Supreme Court of Victoria web site and in the recent Report 136, *Jury Directions,* NSW Law Reform Commission. The main difference between the two is that Weinberg does away with extended common purpose, whereas the NSW report does not. They are both at one on the need for simplification.

**Consent** (18)

It is difficult to appreciate just why the relatively straightforward concept of consent should cause this number of appeals to succeed. Not much of a discernible pattern emerges from the various misdirections involved. However most cases concerned the failure to direct in relation to an awareness of the lack of consent, or as to honest and reasonable but mistaken belief as to consent (10): *R v Watt*,[314] *WCW v State of Western Australia*,[315] *R v Zilm*,[316] *R v Gordon*,[317] *R v Wignall*,[318] *R v Kormez*,[319] *R v Roberts*,[320] *R v GBD*,[321] *R v Chalas*[322] and *R v Brennan*;[323] or the effect of intoxication thereon: *R v O'Loughlin*.[324] One involved the refusal to allow the tender in the defence case of a video that might have supported the defence case as to consent: *R v AM*,[325] and another concerned misdirections as to the use of complaint evidence as it related to the issue of consent: *Bolton v State of Western Australia.*[326] In *R v KO*,[327] an appeal was allowed over the failure to direct that the prosecution was required to negative consent.

Other variants of inadequate directions on the subject were: *R v Aiken*,[328] (threats of physical force insufficient to vitiate consent), *R v W*,[329] (applying a

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[314] [2006] QCA 539
[315] (2008) 191 A Crim R 22
[316] [2006] VSCA 72
[317] [2010] VSCA 207
[318] [2010] VSCA 327
[319] [2011] VSCA 160
[320] [2011] VSCA 162
[321] (2011) 215 A Crim R 447
[322] [2009] VSCA 215
[323] [2012] VSCA 151
[324] [2011] QCA 123
[325] (2006) 164 A Crim R 558
[326] (2007) 180 A Crim R 191
[327] [2006] QCA 034
[328] (2005) 157 A Crim R 515

statutory definition not in force), *R v Winchester*,[330] (the meaning of 'freely and voluntarily given') and *R v Neal*,[331] (failure to direct prosecution must prove complainant did not give informed consent to assuming risk).

**Fresh evidence** (17)

As noted earlier, appeals on the basis of fresh evidence do not adversely reflect on trial judges, because by definition fresh evidence comes to light after a trial has concluded. None of the cases in this survey involve the reception of evidence on appeal wrongly excluded at trial.

**Self defence** (16)

The topic of self defence has long been recognised as confusing and complex for juries to absorb. In *Viro v The Queen*,[332] the High Court preferred its own decision in *Reg v Howe*,[333] over the decision of the Privy Council in *Palmer v The Queen*,[334] and formulated a well known series of six propositions defining self defence at common law. However it was very soon thereafter recognised that 'trial judges continued to encounter difficulties in explaining the elements of the *Viro* formulation to juries', such that the majority in *Zecevic v Director of Public Prosecutions*,[335] agreed to reformulate the self defence criteria. The differences between the two formulations, was that in *Viro* self-defence was confined to responses to unlawful attacks, whereas the defence was not excluded when the accused was the original aggressor and where excessive or disproportionate force was used in the belief that it was necessary in self-defence, and did not automatically result in a verdict of manslaughter in the *Zecevic* reformulation.

In an effort to obviate continuing problems in the directions on self-defence the Court of Criminal Appeal in New South Wales provided a set of

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329 (2006) 162 A Crim R 264
330 [2011] QCA 374
331 (2011) 213 A Crim R 190
332 (1978) 141 CLR 88 at 146-147
333 (1958) 100 CLR 448
334 [1971] AC 814
335 (1987) 162 CLR 645 at 661

written directions which could be supplied to a jury in *R v Jones*,[336] Matters have not become any clearer by a succession of legislative interventions, which if anything have only served to compound the complexities involved.[337]

An examination of the cases in this review demonstrates that judges err in the following ways: the failure to leave the defence for the jury to consider (3): *Mason v State of Western Australia*,[338] *R v Roberts*,[339] and *R v Kruezi*;[340] for reversing the onus of proof (3): *R v Lockhart,*[341] *R v Burns*,[342] and *R v Tran and Tran,*[343] over the failure to leave an alternative verdict of manslaughter: *R v Dunn*;[344] misdirections on the proportionality test: *R v Said*;[345] giving directions insufficiently related to the facts of the case of each accused: *R v Bosworth, Biggins, Nance & Richards*;[346] for giving confusing directions: *R v Muir*;[347] the failure to direct on defence of property: *R v Cuskelly*,[348] for misdirections when the accused was the 'original aggressor': *R v Anandan*;[349] a misdirection that the force used was not intended to cause death or grievous bodily harm: *R v Hung*;[350] the failure to direct on the response to lawful conduct: *R v Crawford*,[351] an inadequate direction as to the grounds for belief that accused needed to act in self-defence: *R v Cortivo*,[352] and in the case of insufficient evidence to eliminate self defence: *R v Sharpley.*[353]

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336 (1995) 78 A Crim R 504 at 514

337 *Crimes Act 1900* (NSW) ss 418–423, *Criminal Law Consolidation (Self Defence) Amendment Act 1991* (SA) s 15, *Crimes (Homicide) Act* No 77 of 2005 (Vic), *Criminal Code 1899* (Qld) ss 267, 271, 272, 278, *Criminal Code 1913* (WA) ss 244, 248-55, *Criminal Code 1983* (NT) ss 27, 28, 29, *Criminal Code Act* (NT) 1991, ss 46 and 47 of the *Criminal Code 1924* (Tas), (s 46, s 47, s 49, as amended by the *Criminal Code Amendment (Self-Defence) Act 1987* (Tas)), *the Criminal Code (ACT)* 2002 s 42 and the *Criminal Code Act 1995* (Cth) s 10.4

338 (2005) 154 A Crim R 219

339 (2011) 211 A Crim R 398

340 [2005] QCA 301

341 [2005] WASCA 121

342 (2009) 103 SASR 514

343 (2011) 109 SASR 595

344 (2006) 94 SASR 177

345 [2009] VSCA 244

346 (2007) 170 A Crim R 110

347 [2009] SASC 94

348 [2009] QCA 375

349 [2011] VSCA 413

350 [2012] QCA 341

351 [2008] NSWCCA 166

352 (2010) 204 A Crim R 55

353 [2011] QCA 124

**Identification** (15)

Since the High Court's decision in *Domican v The Queen*,[354] the law settling the directions required in identification cases are far more uniform nationally than previously. The High Court adopted the English practice laid down in *R v Turnbull*,[355] requiring judges to warn juries of the special need for caution, by reference to the possibility that mistaken witnesses can be convincing, that a number of such witnesses can all be mistaken and to examine closely the circumstances in which the identification by each witness came to be made.

Not unexpectedly, convictions were overturned mostly when the warning given proves inadequate to the circumstances (10): *R v Evan, Robu and Bivolaru*,[356] *Murray v Western Australia*,[357] *R v Dupas (No 3)*,[358] *R v Morgan*,[359] *R v Aslet*,[360] *R v WSJ*,[361] *R v Sindoni*,[362] *R v Mendoza*,[363] *R v Franicevic*,[364] and *R v Martin.*[365] Otherwise appeals succeeded over the failure to give a warning at all when one was warranted (2): *R v Pretorius*,[366] and *Mills v State of Western Australia*;[367] or simply when the evidence was too weak to sustain a conviction (2): *Rankins v State of Western Australia*,[368] and *R v Szitovszky*,[369] and in one case owing to the failure to give an adequate voice identification warning: *R v Braslin.*[370]

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354 (1992) 173 CLR 555
355 [1977] QB 224
356 (2006) 175 A Crim R 1
357 [2009] WASCA 18
358 (2009) 198 A Crim R 454
359 [2009] VSCA 225
360 [2009] NSWCCA 188
361 [2010] VSCA 339
362 (2011) 211 A Crim R 187
363 (2007) 173 A Crim R 157
364 [2010] QCA 036
365 [2012] NTCCA 2
366 [2007] QCA 432
367 (2008) 189 A Crim R 411
368 [2007] WASCA 51
369 [2009] VSCA 50
370 [2011] TASCCA 14

As a consequence, in cases where the *Domican* principles apply,[371] it is necessary to warn in cogent and effective terms (conveyed with the authority of the judge's office behind it), of the dangers of convicting in terms appropriate to the circumstances of the case, as to the factors which may affect the identification process, by directing attention to any weaknesses in the identification evidence and by isolating and identifying any matter of significance which may reasonably be regarded as undermining the reliability of that evidence.

**Delay 'Longman' warning** (15)

It was to be anticipated that this area of discourse would pose some problems, once again not helped by extensive legislative intervention, which by and large abolishes the 'dangerous to convict' type of direction formulated in *Longman*, and mandates a more or less standard direction to the effect that there may be many reasons why a complainant might not have come forward sooner.

The study reveals that appeals were successful either because of the failure to identify and warn appropriately as to forensic disadvantage or prejudice (8): *R v KJ*,[372] *AM v State of Western Australia*,[373] *R v RW*,[374] *R v GVV*,[375] *R v Morrow,*[376] *R v David,*[377] *R v Cassebohm*,[378] and *FJL v Western Australia;*[379] where the warning given was not strong enough (5): *R v WSP*,[380] *R v Sheehan*,[381] *R v W,GC*,[382] and *R v Taylor (No 2)*,[383] *R v CAH*;[384] for the

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371 (1992) 173 CLR 555 at 561-562
372 (2005) 154 A Crim R 139
373 (2008) 188 A Crim R 457
374 (2008) 184 A Crim R 388
375 (2008) 20 VR 395
376 (2009) 213 A Crim R 530
377 [2008] QCA 311
378 [2011] SASCFC 29
379 [2010] WASCA 8
380 [2005] NSWCCA 427
381 (2006) 163 A Crim R 397
382 [2007] SASC 129
383 (2008) 184 A Crim R 77
384 (2008) 186 A Crim R 288

failure to give a warning at all in one: *Hunt v State of Western Australia (No 2)*,[385] and an unsafe conviction by reason of delay in another: *R v ADG*.[386]

**Witnesses** (14)

This class of case encompasses a variety of errors, more particularly the failure to determine if a child witness had a sufficient understanding of the obligation to be truthful (5): *R v BBR*,[387] *R v RJ*,[388] *R v J, AP*,[389] *R v Chalmers*,[390] and *R v MBT*;[391] where a witness was wrongly declared hostile: *R v Kong*;[392] where a witness statement was wrongly admitted: *R v Reid*;[393] upon the failure to warn of the dangers in testimony based on recovered memory: *R v WB*;[394] the refusal to permit cross-examination of a complainant: *R v Moss*;[395] inadequate directions as to the unsworn evidence of a child witness: *R v French*;[396] the failure to direct a jury to treat evidence of potential accomplice with care: *R v Glastonbury*;[397] the wrongful admission of evidence the subject of a prior acquittal: *R v HP*;[398] the failure to direct a jury in relation to prior inconsistent statements: *R v Salih*,[399] and the failure to direct on the implications of a witness given a sentenced on the basis of an undertaking to give evidence against appellant: *R v Simpson.*[400]

**Date and particulars of offence** (13)

Under the rubric of this heading are five categories. They are separate counts charging identical conduct (6): *R v Ngo*,[401] *R v Tyson*,[402] *R v Ahmed*,[403]

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385 (2008) 189 A Crim R 248
386 [2011] VSCA 430
387 (2009) 195 A Crim R 330
388 (2010) 208 A Crim R 174
389 (2012) 113 SASR 529
390 [2011] QCA 134
391 [2012] QCA 343
392 [2009] QCA 34
393 [2007] TASSC 102
394 (2009) 197 A Crim R 18
395 [2011] SASCFC 93
396 (2012) 114 SASR 287
397 (2012) 115 SASR 37
398 (2011) 32 VR 687; (2011) 211 A Crim R 229
399 (2005) 160 A Crim R 310
400 [2008] QCA 077
401 [2007] VSCA 240
402 (2005) 16 NTLR 161
403 (2007) 179 A Crim R 154

*R v Filipovic & Gelevski*,[404] *R v Maggs*,[405] and *R v PDW*,[406] the inability to identify precise occasion(s) of offending (5): *R v DWB*,[407] *R v Osborne*,[408] *R v Nugent*,[409] and *R v Veysey;*[410] charging supply of not less than a commercial quantity when quantity particularised less than that: *R v Boujaoude*;[411] the failure to prove the victim was under 18 years of age: *R v King*,[412] and when the indictment charged separate offences in a single count: *R v Fowler.*[413]

The common problem here mostly but not always, stems from charges of multiple sexual offences or multiple complainants, or both, usually accompanied by evidence of uncharged acts allegedly following the same pattern as the offences charged.

**Burden of proof** (13)

Long gone are the days when attempts were regularly made to inject into the sacred traditional formula 'beyond reasonable doubt', such inept qualifications as 'the more serious a crime, the greater the care that must be taken', 'merely a fanciful or theoretical doubt', 'doubt beyond reason', 'comfortable satisfaction', 'beyond any skerrick of doubt', 'moral certainty', 'feeling sure' and the like.[414]

Error resulted however in other respects, by directing juries that it was a matter of choice or preference which version to accept (3): *R v Zurek,*[415] *R v McBride*,[416] and *R v M,EG*,[417] directing that acceptance of the evidence of

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404 (2008) 181 A Crim R 83
405 (2008) 184 A Crim R 23
406 (2009) 25 NTLR 72; (2009) 197 A Crim R 1
407 (2008) 190 A Crim R 133
408 [2009] VSCA 88, *R v SLJ* (2010) 24 VR 372
409 [2011] QCA 127
410 (2011) 214 A Crim R 215
411 (2008) 181 A Crim R 281
412 (2011) 215 A Crim R 237
413 [2012] QCA 258
414 The cases using these and akin expressions are collated in *Australian Criminal Trial directions* at [1-1000-115 – 1-1000-125]
415 [2006] QCA 543
416 [2008] QCA 412
417 [2007] SASC 128

the accused was an essential preliminary to a not guilty verdict: *R v Briske*;[418] expressing 'reasonable doubt' as ratio: *R v Cavkic, Athanas & Clarke*;[419] or as a 'good chance': *R v Walton*;[420] by suggesting it was open to convict on a standard of proof no higher than plausibility: *R v WG*;[421] the failure to direct if there is an evidentiary basis for a defence the prosecution bears the onus of disproving it beyond reasonable doubt: *R v Deblasis*;[422] a misdirection as to a reverse onus: *R v W, GC (No 2)*,[423] and *R v Punna-Ophasi*,[424] and general misdirection as to the onus (3): *R v DF*,[425] *R v Murdoch*,[426] and *R v Fouyaxis*.[427]

The High Court has rigidly and consistently insisted ever since *R v Brown*;[428] that the expression 'beyond reasonable doubt alone must be used, and nothing else': *Darkan v the Queen*.[429] That view is nowadays a minority one in the common law world. The United Kingdom, Canada and New Zealand take the stance that a direction along the lines of 'you must be sure that the defendant is guilty' suffices: *R v Bentley*,[430] *R v Lifchus*,[431] and *R v Wanhalla*.[432] It might only be added that it is the practically universal experience of trial judges to encounter bemused expressions on the faces of jurors every time the standard direction is given – they inevitably thirst for more assistance!

**Accused as witness** (12)

There are obvious delicacies involved in framing directions when an accused gives evidence. It is acutely necessary to avoid any possibility of discounting that evidence on account of the desire to be acquitted, thereby

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418 [2007] SASC 314
419 (2005) 155 A Crim R 275
420 [2008] QCA 9
421 (2010) 199 A Crim R 218
422 (2007) 179 A Crim R 31
423 (2007) SASC 129
424 [2012] ACTCA 46
425 [2011] ACTCA 11
426 [2012] VSCA 7
427 (2007) 99 SASR 233
428 (1913) 17 CLR 570
429 (2006) 227 CLR 373 at [69]
430 [2001] 1 Cr App R 307
431 [1997] 3 SCR 320
432 [2007] 2 NZLR 573

undermining the benefit of the presumption of innocence: *Robinson v the Queen (No 2)*.[433]

Even so trial judges fell into error when they suggested the accused had an interest in the outcome of the case (all but one being Western Australian) (6): *R v Leyshon*,[434] *R v Thorne*,[435] *R v Lawson*,[436] *Etherton v State of Western Australia*,[437] *R v Eastough (No 2)*,[438] and *R v Seivers*;[439] for the failure to make it clear that even when the jury rejects the evidence of an accused, they must nevertheless proceed to determine if they are satisfied beyond reasonable doubt of accused's guilt (2): *R v Daniel*,[440] and *R v Woods*;[441] for the failure to draw attention to the distinction between what the accused knew at relevant times, and what he was driven to acknowledge, in retrospect, in the witness box: *R v Smith*;[442] the failure to give a direction upon evidence of good character: *R v Gordon*;[443] for giving rise to possibility that the jury did not appreciate the accused's evidence was available as a basis for entertaining a reasonable doubt as to intent: *R v Butler*,[444] and allowing the wrongful cross-examination on material ruled inadmissible: *R v Sage*.[445]

**Failure to discharge jury or juror** (11)

The cases falling into this group are those in which appeal courts have determined trial judges wrongly failed to discharge a juror, or sometimes the whole jury, when they should have, more specifically on the grounds of juror complaints of alleged intimidatory actions by an accused: *R v Munn*;[446] juror misconduct by searching the internet: *R v Smith*;[447] accused's prior convictions

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[433] (1991) 180 CLR 531 at 535-356
[434] [2006] WASCA 132
[435] [2006] WASCA 218
[436] [2008] WASCA 212
[437] (2005) 153 A Crim R 64
[438] [2010] WASCA 88
[439] [2010] ACTCA 9
[440] (2010) 207 A Crim R 449; [2010] SASCFC 62
[441] (2008) 102 SASR 422
[442] [2006] SASC 331
[443] [2010] VSCA 207
[444] [2006] QCA 51
[445] [2009] VSCA 156
[446] [2006] NSWCCA 61
[447] (2010) 209 A Crim R 206

inadvertently placed before jury: *R v Halliday*;[448] juror knowing the family of a witnesses: *I v State of Western Australia*;[449] unexpected dock identification of the accused: *R v Aslett*;[450] reinstating a discharged juror: *R v Walters*;[451] empanelling a juror disqualified from serving: *R v Petroulias*;[452] directions to balance of jury as to reason for discharge of two jurors productive of a miscarriage: *R v Chung & Rechichi*;[453] material inadvertantly admitted of related inquiry in a matter of public notoriety and widespread media reporting: *R v Heading*,[454] and somewhat remarkably when a person who was not called up for jury duty but was selected: *R v Tan*.[455]

**Alternative verdicts** (11)

The most obvious example in this category is the failure to leave manslaughter in murder cases in accordance with the decisions of the High Court in *Gilbert v The Queen*,[456] and *Gillard v The Queen.*[457] The appeals in *R v Gill & Mitchell*,[458] *Nguyen v The Queen,*[459] *R v Carney*,[460] *R v Ly, Nguyen and Ngo*,[461] and *R v Tran*,[462] are examples of the kind. Others involving the failure to leave alternative verdicts were: *R v Christy*,[463] where assault could have been left as an alternative to assault with intent to rape, *R v Tilley*,[464] whether basic offence of threatening life was available on a charge of aggravated threatening life, *R v Mifsud*,[465] when larceny available as alternative to robbery, *R v Blackwell*,[466] when reckless infliction of grievous bodily harm available on charge of malicious infliction of grievous bodily harm, *R v*

448 (2009) 198 A Crim R 194
449 (2006) 165 A Crim R 420
450 [2009] NSWCCA 188
451 [2007] QCA 140
452 (2007) 199 A Crim R 151
453 (2010) 25 VR 221
454 (2011) 111 SASR 32
455 [2007] NSWCCA 223
456 (2000) 201 CLR 414
457 (2003) 219 CLR 1
458 (2005) 159 A Crim R 243
459 (2010) 242 CLR 491
460 [2011] NSWCCA 223
461 (2011) 111 SASR 259
462 [2012] VSCA 283
463 (2007) 173 A Crim R 373
464 (2009) 197 A Crim R 262
465 [2009] NSWCCA 313
466 (2011) 208 A Crim R 392

*LLW*,[467] upon error to direct the jury to refrain from considering alternative count until they complete consideration of the principal charge and *R v McKeagg*,[468] verdict of attempt substituted for a conviction of manufacturing a drug.

**Failure of defence to cross-examine** (11)

It might at first sight have been supposed that the failure of defence counsel to cross-examine according to the rule in *Browne v Dunn*, might have fallen within the incompetence category. However, the essential problem here is not the breach of the principle, but that too much is made of it by prosecutors. In point of fact, if anything, these cases might on one view, better belong with these involving prosecution excess, but as it is a recurrent issue especially in Victoria, it is dealt with separately. Appeals were allowed when it was simply inappropriate to give *Browne v Dunn* directions (3): *R v MG*,[469] *R v Coswello*,[470] and *R v KC*;[471] where a direction as to the possible explanations for defence counsel's failure to put the salient allegations to witnesses was required (2): *R v SWC*,[472] and *R v Oldfield*;[473] where inappropriate directions were given from which the jury might infer the accused's evidence was invented: *R v Baran*;[474] and *R v Drash*,[475] for a misdirection that a jury they might reject the accused's evidence and accept the complainant's evidence: *R v Morrow*;[476] the wrongful rejection of evidence because of non-compliance: *R v Khamis*;[477] when a prosecutor misled the jury by suggesting that because counsel did not put a certain proposition the reverse was true: *R v Bugeja & Johnson*,[478] and in *R v Dunrobin*,[479] because of the

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467 [2012] VSCA 54
468 (2006) 162 A Crim R 51
469 (2006) 175 A Crim R 342
470 [2009] VSCA 300
471 (2011) 207 A Crim R 241
472 (2007) 175 A Crim R 71
473 (2006) 163 A Crim R 242
474 [2007] VSCA 66
475 [2012] VSCA 33
476 (2009) 213 A Crim R 530
477 (2010) 203 A Crim R 121
478 (2010) 30 VR 493
479 [2008] QCA 116.

misplaced insistence of the judge that defence counsel should put to a witness statements made in accused's record of interview.

The simple but fundamental solution is to heed the High Court's warning in *MWJ v the Queen*,[480] that 'reliance on the rule in *Browne v Dunn* can be both misplaced and overstated'. Accordingly, 'judges should in general abstain from making adverse findings about parties and witnesses in respect of whom there has been non-compliance with it', and prosecutors should heed the advice therein that an 'offer to tender a witness for further cross-examination will … in many cases suffice to meet, or blunt a complaint of surprise or prejudice resulting from a failure to put a matter in earlier cross-examination.'

**Bad character** (10)

The decisions falling within this somewhat nebulous category, include mostly prejudicial evidence inadvertently admitted (7): *R v Beattie*,[481] appellant's drug use, *R v KAH*,[482] appellant gave evidence that he was 'always in gaol', *R v Hess*,[483] jury improperly informed of appellant's criminal history, *Narrier v State of Western Australia*,[484] evidence of previous conviction wrongly disclosed, *R v Roughan & Jones*,[485] evidence that one accused had been in jail before; evidence of accused's reputation for violence: *R v Richardson*;[486] evidence wrongly admitted when probative value was outweighed by prejudicial effect: *R v Mustafa*;[487] error in finding character raised and in allowing the Crown to call evidence in rebuttal thereof (2): *R v PGM*,[488] and *R v MJ*;[489] police witness deliberately raising prejudicial character evidence, and the tender of an entire file containing prejudicial material: *R v Heedes*.[490]

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[480] (2005) 80 ALJR 329 at [39]-[40]
[481] (2008) 188 A Crim R 542
[482] [2012] QCA 154
[483] [2008] QCA 048
[484] (2008) 188 A Crim R 32
[485] (2007) 179 A Crim R 389
[486] [2009] VSCA 4
[487] (2005) 151 A Crim R 580
[488] (2006) 164 A Crim R 426
[489] [2012] ACTCA 53
[490] [2008] WASCA 142

**Incompetent defence counsel** (10)

There are many appeals launched on this basis, but they rarely succeed. Appeal courts take the robust view that tactical decisions made during the course of trials, bind the appellant as legitimate forensic choices. The focus is therefore on the consequences of the alleged incompetence and the extent to which it contributed to a miscarriage of justice, rather than the cause or nature of the incompetence.

Convictions were reversed because defence counsel inexplicably elicited evidence of the whole of an accused's criminal record (2): *R v Mouroufas*,[491] and *R v Seymour*;[492] the failure to cross-examine on critical matters and to elicit good character evidence: *R v Bazan*;[493] for the failure to object to irrelevant and highly prejudicial evidence: *R v Steve*;[494] the failure to provide an accused with a transcript of the complainant's statements sufficient to obtain adequate instructions: *R v SBH*;[495] for the failure to adduce important evidence: *R v Kho*;[496] the omission to cross-examine a complainant on evidence inconsistent with other material, or to call good character evidence: *R v Hurst*;[497] on account of a failure to cross-examine a critical witness *KLM v State of Western Australia*;[498] upon the omission to call good character evidence: *R v Sharma*,[499] and because of deficiencies in legal advice leading to a misinformed plea of guilty: *R v Williamson*.[500]

**Change of plea** (9)

Strictly speaking when an appeal court determines that judges ought to have allowed an application to change a plea from guilty to not guilty, or should not have accepted a plea of guilty, this involves no misdirection as such.

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491 [2007] NSWCCA 58
492 (2006) 162 A Crim R 576
493 [2010] SASCFC 50
494 (2008) 189 A Crim R 68
495 [2008] QCA 264
496 [2012] NSWCCA 71
497 [2011] SASCFC 152
498 (2009) 194 A Crim R 503
499 [2011] VSCA 356
500 [2012] QCA 139

Since there are a number of cases leading to orders for retrial, they have been incorporated in this study notwithstanding. They include cases when a plea was entered on a mistaken basis (3): *R v Maddison*,[501] *R v Johnston*,[502] and *R v Stewart*;[503] the failure to recognise the facts raised a complete defence: *R v GV*;[504] when a plea was entered without a proper understanding of what was entailed and when a well-founded defence was available: *R v Hennessy*;[505] when the plea was not made in the exercise of free choice: *R v Wade*;[506] when a judge indicated a 'substantial discount' on plea of guilty: *R v Guariglia*,[507] when the judge wrongly considered he was functus officio: *R v Gomez*,[508] and where a defendant was pressured into a plea by defence lawyers: *R v Nerbas*.[509]

**Circumstantial evidence** (8)

The grounds on which appeals were allowed on this topic were so varied that no consistent class of error is apparent. These comprise a misdirection that credibility was bolstered by circumstantial evidence: *Azarian v State of Western Australia*;[510] when the prosecution was unable to exclude a reasonable hypothesis consistent with innocence (2): *R v Shalala, Zoudi & El-Azar*;[511] *R v Hong*;[512] for the failure to give a *Sheppard* direction: *R v Sharp*;[513] the failure to give specific directions on the use of crucial pieces of circumstantial evidence: *R v Dan*;[514] when the circumstantial evidence directions incorrectly suggested the defence bore the onus of proof: *R v Woods*;[515] and upon misdirecting that the accused's explanation had to be of 'equal strength' or

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501 [2007] ACTCA 18
502 [2009] NSWCCA 82
503 [2010] SASCFC 72
504 [2006] QCA 394
505 [2010] QCA 345
506 [2012] 2 Qd R 31
507 (2010) 208 A Crim R 49
508 [2006] ACTCA 18
509 (2011) 210 A Crim R 494
510 (2007) 178 A Crim R 19
511 (2007) 176 A Crim R 183
512 [2009] NSWCCA 242
513 [2012] QCA 342
514 [2007] QCA 66
515 (2008) 102 SASR 422

equally consistent, to displace inference of guilt (2): *R v Mannella*,[516] and *R v McLeod*.[517]

**Provocation** (7)

Appealable error occurred in the context of provocation cases in the failure to direct on provocation when it was open (3): *R v Cowan*,[518] *R v Maher*,[519] and *Evans v The State of Western Australia*;[520] when misdirections were given in relation to the 'ordinary man test' (3): *R v McKeown*,[521] *R v Margach*,[522] *R v Barrett*,[523] and in *Pollock v R*,[524] where the directions wrongly invited the jury to exclude provocation if there was an interval between the act of provocation and the act causing death.

**Errors in handling jury** (7)

Appeals succeeded here because of withdrawing from the jury an element of an offence the prosecution was required to prove: *R v Previsic*;[525] withdrawing circumstances of aggravation: *Alvarez-Pizalla v the State of Western Australia [No 2]*;[526] the failure to inform counsel of the terms of a jury question (3): *R v Black*,[527] *R v Kashani-Malaki*,[528] and *R v MJR*;[529] for failing to accede to a jury request for parts of transcript to be read: *R v De Simone*;[530] and in requiring a jury to acquit on the principal count before delivering a verdict on an alternative count: *R v LLW*.[531]

**Majority verdict** (6)

516 [2010] VSCA 357
517 [2008] NSWCCA 127
518 (2005) 157 A Crim R 345
519 [2010] WASCA 156
520 [2011] WASCA 182
521 [2006] VSCA 74
522 (2007) 173 A Crim R 149
523 (2007) 171 A Crim R 315
524 [2010] HCA 35
525 (2008) 185 A Crim R 383
526 [2008] WASCA 105
527 (2007) 15 VR 551
528 [2010] QCA 222
529 (2011) 216 A Crim R 349
530 [2008] VSCA 216
531 [2012] VSCA 54

Judges fell into error here by failing to direct juries they must be unanimous as to the basis for conviction (2): *R v Klamo*,[532] and *Fermanis v State of Western Australia* (2007);[533] and owing to the failure to comply with the statutory requirements for taking a majority verdict (4): *R v AGW*,[534] *R v Hanna*,[535] *R v Hunt*,[536] and *R v RJS*,[537] (as well as in the latter case for directing in terms undermining an effective *Black* direction).

**Jurisdiction** (6)

Appeals were allowed with respect to jurisdictional issues in *R v Swansson & Henry*,[538] when convictions were held to be nullities as the trials proceeded on more than one indictment; in *R v Janceski*,[539] because the indictment was signed by an unauthorised person, in *R v WAF & SBN*,[540] on account of there being insufficient evidence to conclude which charges fell within the geographic jurisdiction, and in *Dickson v The Queen*,[541] as a conviction was entered under State legislation which was directly inconsistent with Federal legislation.

**Fitness to plead or stand trial** (5)

In this instance convictions were reversed when evidence of potential incapacity to understand the proceedings came out in sentence proceedings after a trial (2): *R v Wills*,[542] and *R v Robinson*;[543] because of the failure of the accused's legal representatives to satisfy themselves the accused was mentally competent to make a valid election for trial by judge alone: *R v Minani*;[544] over the failure to leave the question of mental impairment to the jury:

[532] (2008) 184 A Crim A 262; (2008) 18 VR 644
[533] (2007) 33 WAR 434
[534] [2008] NSWCCA 81
[535] (2008) 191 A Crim R 302
[536] (2011) 81 NSWLR 181
[537] (2007) 173 A Crim R 100
[538] (2007) 168 A Crim R 263
[539] (2005) 64 NSWLR 10
[540] (2009) 196 A Crim R 56
[541] (2010) 241 CLR 491
[542] (2007) 173 A Crim R 208
[543] [2008] NSWCCA 64
[544] (2005) 154 A Crim R 349

*R v Langley*;[545] and for deficiencies in the directions as to mental impairment: *R v Fitchett.*[546]

**Fraud** (5)

Under this topic, error emerged by instructing a jury that intent to defraud could be constituted by non-economic interests: *Bolitho v State of Western Australia*;[547] for the failure to direct that the prosecution must exclude the possibility of an honestly held innocent belief (2): *R v Fackovec*,[548] and *R v Mill*;[549] upon the failure to direct that the accused must know of an disentitlement to claim benefits: *R v Sood*;[550] and the omission to instruct that statements as to future events constitute deception only if mis-stating the accused's present intention: *R v Lo Presti.*[551]

**Mistake** (5)

These are all Queensland *Criminal Code* cases. Appealable error occurred in *R v SBC*,[552] for introducing irrelevant references in the context of mistake in consent in *R v Waine*,[553] over the failure to leave mistaken belief as a defence in *R v Kovacs*,[554] for a general misdirection as to mistake, in *R v Dunrobin*,[555] and on account of erroneous and deficient directions in *R v Wilson.*[556]

**Vulnerable or special witnesses** (5)

The recurrent problem in this area was the failure to direct in accordance with mandatory statutory terms when special measure are taken for 'vulnerable' witnesses, or in the case of playing the recorded evidence of such

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545 (2008) 184 A Crim R 410
546 (2009) 195 A Crim R 575
547 (2007) 171 A Crim R 108
548 [2007] VSCA 93
549 [2007] QCA 150
550 (2006) 165 A Crim R 453
551 (2005) 158 A Crim R 54
552 [2007] QCA 283
553 (2005) 157 A Crim R 490
554 [2007] QCA 143
555 [2008] QCA 116
556 (2008) 189 A Crim R 511

witnesses: *R v Galvin*,[557] *R v Michael*,[558] *R v Kovacs,*[559] *R v MBE*,[560] and *R v Amjad.*[561]

**Distress** (5)

It was held to be erroneous to direct a jury they could rely on evidence of distress as independent support for the complainant's evidence in: *R v Meyer*,[562] and *R v Mitic*,[563] over the failure to warn of its inherent limitations in *R v Brdarovski*,[564] and when evidence of unrelated distress was simply inadmissible in: *R v Williams*,[565] and *R v Ambury.*[566]

**Confessions** (5)

Cases coming within this category were the tender of, involuntary confessions (2): *R v SL*,[567] and *R v Thomas*,[568] when an interview should have been excluded: *R v LR*[569], for the failure to direct the jury on the use of exculpatory statements: *R v Weetra*,[570] and when an edited transcript of an interview presented an incomplete prejudicial picture: *R v Ortega-Farfan.*[571]

**Intoxication** (5)

Reversal occurred when inadequate directions were given as to effects of intoxication on the formation of basic or specific intent: *R v Childs*,[572] and *R v Bellchambers*;[573] when no direction was given specifically on the question of alcohol as it related to the question of belief in consent: *R v MC*;[574] where a

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557 (2006) 161 A Crim R 449
558 (2008) 181 A Crim R 490
559 (2008) 192 A Crim R 345
560 (2008) 191 A Crim R 264
561 [2010] SASCFC 68
562 [2007] VSCA 115
563 [2011] VSCA 373
564 (2006) 166 A Crim R 366
565 (2008) 192 A Crim R 218
566 [2012] QCA 178
567 [2005] VSCA 292
568 (2006) 163 A Crim R 567
569 (2005) 156 A Crim R 354
570 (2010) 108 SASR 232
571 (2011) 215 A Crim R 251
572 (2007) 172 A Crim R 450
573 [2008] NSWCCA 235
574 [2009] VSCA 122

charge had the effect of foreclosing the issue of the effect of intoxication upon proof of intent: *R v TC*;[575] and in *R v Eustance*,[576] following the refusal to direct the jury to take intoxication into account.

**Duress, compulsion, necessity** (4)

Trial judges fell into error regarding such defences by excluding evidence of duress in *R v Nguyen,*[577] and *R v Nguyen*,[578] in *Johnson v State of Western Australia*,[579] by not leaving a defence of sudden or extraordinary emergency with the jury to consider, and in *R v Warnakulasuriya*,[580] by leaving the jury with the erroneous impression that 'extraordinary emergency' could not exist unless it demanded some immediate action.

**Multiple counts** (4)

The failure to sever quite different charges led to convictions being overturned in *R v Smith & Corp*;[581] the failure to distinguish between the evidence on separate counts in *R v Lorraway*,[582] in light of incurable impermissible prejudice when a trial proceeded as if evidence was cross-admissible when it was not in: *R v Maiolo*,[583] and because of an inadequate ‘separate consideration’ direction in *R v C,J*.[584]

**Accused’s failure to give evidence** (4)

Apart from the decision in *R v AJE*,[585] cited above, appeals were allowed in *R v Johnston*,[586] and *R v Bevin*,[587] on account of the failure to

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575 (2008) 21 VR 596
576 [2009] QCA 028
577 (2008) 181 A Crim R 72
578 [2009] NSWCCA 26
579 (2009) (2009) 194 A Crim R 470
580 (2012) 220 A Crim R 211
581 (2007) 175 A Crim R 528
582 [2007] QCA 142
583 [2011] SASCFC 86
584 [2012] SASCFC 11
585 [2012] WASCA 185
586 [2007] NSWCCA 133
587 [2008] QCA 310

mention the right to decline to give evidence in the summing-up, and on account of an inadequate direction on the subject in *R v Schneiders*.[588]

**Trial by judge alone** (4)

Here judges fell into error effectively by misdirecting themselves, in giving too much weight to evidence of uncharged acts in *R v Sweeny*,[589] furnishing inadequate reasons in *AK v State of Western Australia,*[590] on account of the failure to undertake a statutory enquiry into appellant's understanding of an election for trial by judge alone in *R v RTI,*[591] and in *Douglass v The Queen*,[592] for the failure to record any finding respecting the accused's evidence before convicting.

**Accident** (4)

An appeal was successful in *R v Huy Tran Le*,[593] because of a misdirection to the effect that the jury was entitled to exclude accident if they found the accused intended to injure, irrespective of whether an ordinary person in the position of the accused would not have foreseen the injury as a possible outcome, in *R v Condon*,[594] and in *R v Kuruvinakunnel*,[595] on the basis of the necessity to instruct the jury that if they were satisfied beyond reasonable doubt the driving was objectively dangerous, they must consider whether they were satisfied the accused was not momentarily and suddenly asleep, and in *Stevens v R*,[596] over the failure to leave the defence altogether.

**Mishandling questions from the jury (4)**

Appeals were allowed in *R v Black*,[597] and in *R v Kashani-Malaki*,[598] because a trial judge failed to inform counsel of the terms of a question asked

588 [2007] QCA 210
589 [2008] SASC 300
590 (2008) 232 CLR 438
591 (2005) 158 A Crim R 172
592 (2012) 86 ALJR 1086 (SA)
593 [2009] QCA 343
594 [2010] QCA 117
595 [2012] QCA 330
596 (2005) 227 CLR 319
597 (2007) 15 VR 551

by a jury, for the failure to comply with a request from a jury for a transcript or re-reading of certain evidence in *R v De Simone*,[599] and in *R v MJR*,[600] for non-disclosure of a jury note that might have led to an application to discharge the jury.

**Limited use of evidence** (4)

The four cases entered here are quite fact specific. They were: *R v S,PC*,[601] (evidence of nude photographs wrongly led as evidence of disposition), *R v Lester*,[602] (opinion evidence of one party of view of a relationship was held not to be the same as evidence of the relationship), error in directing possession of a shot gun was evidence of a disposition to commit the precise crime charged in: *R v Merriman*,[603] and inadmissible representations by the deceased used as evidence of tendency to assault in: *R v Azizi*.[604]

**Possession** (4)

Error was detected in relation to directions as to joint possession in *R v Perfili*;[605] and a misdirection in a reverse statutory onus situation was identified in *R v Henderson & Warwick*;[606] inadequate directions were given as to the meaning of 'knowingly possessed' in *R v Campbell*,[607] and it was held that the occupier's presumption of possession did not apply to a trafficking offence in *Momcilovic v The Queen.*[608]

**Post offence conduct** (4)

This subject is closely allied to lies, as identical principles apply to both. In *R v Burns*,[609] it was held a judge had misdirected in relation to flight as

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598 [2010] QCA 222
599 [2008] VSCA 216,
600 (2011) 216 A Crim R 349
601 (2008) 189 A Crim R 446
602 (2008) 190 A Crim R 468
603 [2007] VSCA 133
604 [2012] VSCA 205
605 (2006) 95 SASR 560
606 (2009) 22 VR 662
607 (2009) 195 A Crim R 374
608 (2011) 245 CLR 1 (Vic)
609 (2009) 103 SASR 514

evidence of guilt, whereas in *R v McCullagh (No 2)*,[610] there were misdirections as to evidence of activities designed to conceal the deceased's body, there were misdirections as to use of post offence conversations and the onus of proof in *R v Farquharson*,[611] and the omission to direct on a prosecution assertion that evidence of the appellant's behaviour amounted to evidence of consciousness of guilt in *R v DJF*.[612]

**Right to silence** (3)

This section relates to the exercise of the right to silence in police interviews. Appeals were granted when the prosecution invited a jury to draw a negative inference from the exercise of that right in *R v Anagnostou*,[613] because of the omission to give any directions with respect thereto in *R v GAJ*,[614] and for an inadequate direction on the topic in *R v Roberts*.[615]

**Alibi** (3)

In *R v Mohammadi*,[616] it was held that by failing to instruct a jury that if it rejected the alibi evidence, the prosecution still bore the onus of proving its case, constituted appellable error, as did the failure to allow alibi evidence to be called in *R v Skondin*,[617] as it was for wrongly allowing the tender of an alibi notice in *R v Glastonbury*.[618]

**Accused's failure to call evidence** (2)

In *R v Corish*,[619] it was held to be a misdirection to instruct a jury that it was open to find a witness's failure to give evidence was not satisfactorily explained, and in *R v DJF*,[620] because of the failure to correct the prosecution suggestion that the defence might have called the accused's wife.

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[610] [2005] VSCA 109
[611] (2009) 26 VR 410
[612] (2011) 205 A Crim R 412
[613] [2009] VSCA 47
[614] [2011] QCA 141
[615] [2011] VSCA 162
[616] (2011) 112 SASR 17
[617] [2005] NSWCCA 417
[618] (2012) 115 SASR 37
[619] (2006) 170 A Crim R 162
[620] (2011) 205 A Crim R 412

**Directed Verdict** (2)

In *R v Previsic*,[621] it was held to be an error to direct a jury that a certain state of affairs amounted to 'damage' on a charge of criminal damage and in *Alvarez-Pizalla v State of Western Australia*,[622] an appeal was allowed in part because alleged circumstances of aggravation were wrongly removed from consideration by a jury.

**Evidence read** (1)

The basis of appellate reversal in this instance was in failing to give any directions as to how evidence read to a jury was to be assessed: *R v Ali Ali (No 2)*.[623]

**Claim of right** (1)

In *R v Bedford*,[624] it was held that claim of right as a defence to robbery should not have been withdrawn from the jury.

**Voluntariness** (1)

In the decision of *R v Blacker*,[625] a trial judge was held to have erred by the omission to direct that in order to find the accused guilty of negligently causing serious harm, it was necessary to find he acted voluntarily.

**Conclusions**

It can be seen that the area of 'similar fact', tendency and co-incidence evidence is where trials most often miscarry, this subject heads the list of errors in New South Wales, Victoria and Queensland, as well as nationally. Other notable areas are judge-induced procedural error, elements of offence, complaint evidence, directions on intent, lies by accused, excesses by prosecuting counsel, miscellaneous procedural errors, expert evidence, complicity, consent, fresh evidence and self-defence in that order.

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621 (2008) 185 A Crim R 383
622 [2008] WASCA 105
623 (2005) 158 A Crim R 469
624 (2007) 172 A Crim R 492
625 (2011) 211 A Crim R 250

Although the reasons why the Court of Criminal Appeal of Victoria more frequently intervenes than other Courts of Criminal Appeal, forms no part of this study, one gathers when reading the Victorian decisions, that overly complicated and lengthy directions are common in that State. There is also an evident unwillingness by the Court of Criminal Appeal to readily apply the proviso, which some might think is not such a bad thing!

# Table of successful appeals by jurisdiction and subject matter

| APPEALS TABLE | National | SA | NSW | VIC | QLD | WA | ACT | NT | TAS |
|---|---|---|---|---|---|---|---|---|---|
| Unreasonable or unsupportable verdict | 83 | 13 | 10 | 23 | 30 | 4 | 1 | 2 | |
| Similar fact evidence | 52 | 3 | 14 | 18 | 12 | 4 | | 1 | |
| Procedural error in summing up | 42 | 7 | 8 | 13 | 7 | 6 | | | 1 |
| Elements of offence | 32 | 2 | 9 | 10 | 7 | 3 | | 1 | |
| Complaint | 28 | 5 | 2 | 11 | 7 | 1 | | 1 | 1 |
| Mental element (intent) | 27 | 4 | 3 | 12 | 8 | | | | |
| Lies by accused | 27 | 4 | 4 | 12 | 5 | 2 | | | |
| Excesses by prosecuting counsel | 25 | 1 | 8 | 8 | 5 | 2 | | 1 | |
| Miscellaneous procedural errors | 21 | | 3 | 10 | 5 | 2 | | | 1 |
| Expert evidence | 20 | 3 | 5 | 4 | 4 | 2 | | 1 | 1 |
| Complicity | 19 | 4 | 6 | 3 | 6 | | | | |
| Consent | 18 | | 1 | 9 | 4 | 2 | | 1 | 1 |
| Fresh evidence | 17 | 1 | 1 | 2 | 7 | 4 | 1 | 1 | |
| Self defence | 16 | 6 | 1 | 2 | 4 | 2 | 1 | | |
| Identification | 15 | | 2 | 5 | 3 | 3 | | 1 | 1 |
| Delay Longman warning | 15 | 2 | 2 | 6 | 2 | 3 | | | |
| Witnesses | 14 | 4 | 1 | 3 | 5 | | | | 1 |
| Date and particulars of offence | 13 | 1 | 1 | 7 | 2 | | | 2 | |
| Burden of proof | 13 | 4 | | 4 | 3 | | 2 | | |
| Accused as witness | 12 | 3 | | 2 | 1 | 5 | 1 | | |
| Failure to discharge the jury | 11 | 1 | 6 | 2 | 1 | 1 | | | |
| Alternative verdicts | 11 | 2 | 3 | 5 | | 1 | | | |
| Failure of defence to cross-examine | 11 | | 2 | 8 | 1 | | | | |
| Bad character | 10 | 1 | 1 | 1 | 4 | 2 | 1 | | |
| Incompetent defence counsel | 10 | 2 | 4 | 1 | 2 | 1 | | | |
| Change of plea | 9 | 1 | 1 | 1 | 4 | | 2 | | |
| Circumstantial evidence | 8 | 1 | 2 | 2 | 2 | 1 | | | |
| Provocation | 7 | | | 3 | 2 | 2 | | | |
| Errors in handling jury | 7 | | | 5 | 1 | 1 | | | |
| Majority verdict | 6 | | 4 | 1 | | 1 | | | |
| Jurisdiction | 6 | 1 | 2 | 2 | 1 | | | | |
| Fitness to plead or stand trial | 5 | | 3 | 2 | | 1 | | | |
| Fraud | 5 | | 1 | 2 | 1 | 1 | | | |
| Mistake | 5 | | | | 5 | | | | |
| Vulnerable or special witnesses | 5 | 1 | 1 | | 3 | | | | |
| Distress | 5 | | | 3 | 2 | | | | |
| Confessions | 5 | 1 | | 2 | 2 | | | | |
| Intoxication | 5 | 1 | 1 | 2 | 1 | | | | |
| Duress, compulsion, necessity | 4 | | 2 | | | 2 | | | |
| Multiple counts | 4 | 1 | 1 | | 1 | 1 | | | |
| Accused's failure to give evidence | 4 | | 1 | 2 | | 1 | | | |
| Trial by judge alone | 4 | 2 | 1 | | | 1 | | | |
| Accident | 4 | | | | 4 | | | | |
| Mishandling questions from the jury | 4 | | | 2 | 2 | | | | |
| Limited use of evidence | 4 | 1 | | 2 | 1 | | | | |
| Possession | 4 | 1 | | 2 | 1 | | | | |
| Post offence conduct | 4 | 1 | 1 | 2 | | | | | |
| Right to silence | 3 | | | 2 | 1 | | | | |
| Alibi | 3 | 2 | 1 | | | | | | |
| Accused's failure to call evidence | 2 | 1 | 1 | | | 1 | | | |
| Directed verdict | 2 | | | 1 | | 1 | | | |
| Evidence read | 1 | | | 1 | | | | | |
| Claim of right | 1 | 1 | | | | | | | |
| Voluntariness | 1 | | | | | | | 1 | |
| | | | | | | | | | |