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Abstract

The principle that the prosecution must prove the guilt of the accused beyond reasonable doubt is basic to the administration of criminal justice (*Woolmington v The Queen*). The purpose of this article is to determine the outer limits of the principle by reviewing some recent cases in the High Court of Australia. These cases show that the Woolmington principle is not absolute. It does not govern every aspect or stage of a criminal trial. It is hoped that by studying the exceptions to the general principle, its central meaning will be seen in sharper focus.

Keywords

Woolmington v The Queen, reasonable doubt, criminal law

Cover Page Footnote

A special thanks to my colleagues Professor Eric Colvin and Assistant Professor Janet McDonald for pointing out some rough spots - remaining blotches are of course all mine.

UNRAVELLING THE GOLDEN THREAD - WOOLMINGTON IN THE HIGH COURT OF AUSTRALIA

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The principle that the prosecution must prove the guilt of the accused beyond reasonable doubt is basic to the administration of criminal justice (Woolmington v The Queen).¹ The purpose of this article is to determine the outer limits of the principle by reviewing some recent cases in the High Court of Australia. These cases show that the Woolmington principle is not absolute. It does not govern every aspect or stage of a criminal trial. It is hoped that by studying the exceptions to the general principle, its central meaning will be seen in sharper focus.

Reginald Woolmington and his wife, Violet Kathleen, separated shortly after their marriage. On the day in question Reginald went to Violet's home. He armed himself with a sawn-off shotgun, which he tied with string to the inside of his coat. Violet came to the door when he knocked. They went together into the front room. Some time later the rifle discharged and Violet fell dead. No-one saw the shooting. Woolmington said it was an accident. He was tried for wilful murder before Finlay J but the jury disagreed after only one hour and twenty-five minutes. He was then retried before Swift J at Bristol Assizes. The judge told the jury that once the fact of the killing was proved by the prosecution, it was for the accused to prove that it was an accident. Woolmington was convicted and sentenced to hang. The Court of Criminal Appeal declined to grant leave to appeal. The Attorney-General certified that the case involved a point of law of exceptional public importance, and the conviction was reviewed by the House of Lords, which set it aside. Swift J's direction amounted to a reversal on the onus of proof. Viscount Sankey's words are as famous as any spoken in the House of Lords:

* A special thanks to my colleagues Professor Eric Colvin and Assistant Professor Janet McDonald for pointing out some rough spots - remaining blotches are of course all mine.

1 [1935] AC 462.

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Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exceptions. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.²

The importance of *Woolmington* cannot be doubted. It is the jealous protection of liberty from which the golden thread is spun.³ Areas of the criminal trial in which the ordinary criminal standard do not operate are anomalous.⁴ The Queensland legislature was recently moved to reaffirm the importance of the criminal standard in relation to drafting legislation.⁵ The *Woolmington* principle has been faithfully applied throughout the common law world. In *Hunt* the House of Lords diluted the principle somewhat by holding that statutory exceptions could be express or implied.⁷ In Australia, the principle has been followed in the common law and Code states, although neither the Griffith nor Tasmanian Codes contain any specific

2 Ibid at 482.

3 *Thompson* (1989) 169 CLR 1 at 29 per Brennan J.

4 *Saraswati v The Queen* (1991) 172 CLR 1 at 9 per Deane J.

5 See *Legislative Standards Act* (Qld) 1992.

6 [1987] 1 AC 352; [1986] 3 WLR 1115. The accused was charged with unlawful possession of a controlled drug, namely, morphine contrary to s 5(2) of the *Misuse of Drugs Act*. Under the regulations it is provided that substances containing less than .02 per cent of morphine compounded in such a way that the morphine cannot be recovered are not within the scope of the prohibition. The Crown called evidence that Hunt was found in possession of a substance containing morphine but did not call evidence as to the proportion of morphine in the powder. Hunt did not give evidence and submitted there was no case to answer. He changed his plea to guilty after the Crown ruled that there was a case to answer. He appealed his conviction to the House of Lords. The Lords dismissed the appeal. The court held that exceptions might be express or implied and the burden of proof might be placed on the accused whether the exception appeared in the same clause of the instrument creating the offence or in a subsequent provision and whether the offence was triable summarily or upon indictment, and would be discharged on the balance of probabilities; and that where the linguistic construction did not clearly indicate where the burden lay the court might look to other considerations to determine the intention of Parliament, such as the mischief at which the provision was aimed and practical considerations such as, in a particular case, the ease or difficulty for the respective parties of discharging the burden of proof.

7 Interestingly, *Hunt* was recently approved in passing by the High Court of Australia in *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 at 257 on the question whether particular matters referred to in a statutory provision are properly seen as exceptions to the general rule imposing liability. If so, the question is whether the legislature intended to impose upon the accused the ultimate burden of coming within the exception. The intention may be express or implied.

reference to the requirement of proof beyond reasonable doubt.⁸ Although the operation of *Woolmington* within its primary area of operation (proving the elements of the offence and negating any relevant defence) is assured, some recent cases show that the principle is not absolute. Anomalous they may be, but there are areas of the criminal trial process where *Woolmington* does not apply.⁹

Proof of jurisdiction

Until recently the leading case on jurisdiction was the bizarre case of aerial hi-jacking, *Hildebrandt*,¹⁰ which came before the Queensland Court of Criminal Appeal. Hildebrandt boarded in Sydney an airliner bound for Brisbane. Somewhere in the vicinity of Casino, which is close to the Queensland border in northern New South Wales, he summoned a flight steward and, brandishing a firearm, demanded that the plane return to Sydney. Wires could be seen protruding from the seat pocket. He was holding one in each hand. He said that if the wires touched the bomb would explode. Fortunately, he was disarmed and the airliner landed safely in Brisbane. He was duly charged with 'putting' or 'depositing' an explosive device on an aircraft, contrary to subsections 470 and 470A of the *Criminal Code* (Qld). The difficulty for the Crown was to identify events occurring in *Queensland* which could amount to a 'putting' or a 'depositing' of the bomb on the aircraft. The evidence was that he had manufactured the device wholly in New South Wales and, apart from holding the wires, had not touched it after the aircraft crossed the border into Queensland. The defence argued that it was for the Crown to prove beyond reasonable doubt that the elements of the offence occurred in Queensland. The trial judge directed the jury that the matter of jurisdiction was to be decided on the balance of probabilities. If they thought it probable that the accused had 'put' or 'deposited' the bomb in the aircraft after it entered Queensland airspace, they could convict. On appeal, the Queensland Court of Criminal Appeal held this to be a misdirection. The issue of jurisdiction fell to be determined on the criminal rather than the civil standard, that is, beyond reasonable doubt.

Thus stood the law until *Thompson v The Queen*¹¹ came before the High Court. On 30 December 1981 the bodies of two women were recovered from a burnt-out car on the Monaro Highway some miles from Canberra. The accident occurred a number of miles from the place where the Monaro Highway crosses the border into New South Wales. The driver escaped unharmed. His explanation was that he had lost control of the car which had

8 *Mullen v The Queen* (1938) 59 CLR 124; *Packett v The King* (1937) 58 CLR 190 at 212, 222; *Stingel* (1990) 171 CLR 312 at 332.

9 I hasten to add that one of the cases (*Shepherd v The Queen* below n 23) does not mention *Woolmington* at all.

10 [1964] Qd R 43; see also *Hildebrandt* (1963) 81 WN (Pt 1), (NSW) 143 at 150.

11 (1989) 169 CLR 1; (1989) 41 A Crim R 134.

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crashed and burned. His explanation was accepted by the investigating officers. Several years later, he was convicted of a murder arising from a separate incident which had certain similarities with the Monaro deaths. An investigation into the 1981 killings then took place, as a result of which he was charged on two counts of murder. The Crown case was that the accused had shot the women and set fire to the car to make it look like an accident. The defence contested the power of the Australian Capital Territory Supreme Court to try the case, arguing that it was possible that the accused had shot his victims in New South Wales and staged the accident across the border in the Australian Capital Territory. In that event, the matters were properly dealt with in New South Wales. The defence sought a special verdict on the issue of jurisdiction, which the trial judge refused to allow, directing the jury that it was sufficient if they were satisfied on the balance of probabilities that the deaths occurred in the Australian Capital Territory. The accused was convicted. The High Court granted special leave to appeal but dismissed the appeal. Mason CJ and Dawson J (with whom Gaudron J agreed) considered that the jurisdictional issue was properly a matter to be decided on the balance of probabilities.¹² The following passage is worth quoting at length.

The fundamental principle of our criminal law is that the accused's guilt must be established beyond reasonable doubt. The law requires that standard of proof of the commission of a criminal offence in order to eliminate or minimise the chance that an innocent person might be found guilty with all the grave consequences that such an erroneous condemnation would have for the accused, for our system of justice and for the community generally. The fundamental principle is not offended if the facts essential to the existence of jurisdiction in the court to enter judgment are required to be established according to the civil standard of proof. That is a discrete question which may be left to a jury upon the lesser standard of proof without diverting them from the standard which they are otherwise required to apply in determining guilt or innocence. The policy or purpose which underlies the fundamental principle is sufficiently served and the protection of the accused adequately assured if the criminal standard of proof is applied to all the facts relied upon to make out the elements of the offence. To apply that standard to the proof of facts establishing the jurisdiction of the trial court would extend the protection of an accused person to the point of entitling him to an acquittal on the ground that the prosecution could not prove beyond reasonable doubt that the offence was committed in one State or Territory rather than another, even though, if jurisdiction were assumed, the circumstances would be such as to show beyond reasonable doubt that the accused committed the offence charged. To extend the protection in this way would travel beyond the interests which the law seeks to safeguard in imposing the criminal standard of proof and at the same time adversely affect the public interest in the administration of justice by allowing a wrongdoer to escape conviction, notwithstanding that the balance of probabilities suggests that the wrongdoer

¹² Above n 2 at 15; 142.

is subject to the jurisdiction from which he seeks to escape. A wrongdoer clearly subject to the laws of one of two jurisdictions would escape the laws of both, even where such laws were identical, simply because the prosecution could not prove the place of the commission of the offence beyond reasonable doubt. The prospect of this outcome would be lessened if the civil standard of proof were to be applied.¹³ (citations omitted)

This was so 'notwithstanding differences in statute law in the various States and territories (including differences as to penalties).'¹⁴ Brennan J held that in general the issue of jurisdiction turned on the civil standard, but where the matters charged would not be criminal in the competing jurisdiction, or where the maximum punishment was less, then *Woolmington* should apply with all its protective vigour.¹⁵ Deane J agreed in substance with this view.¹⁶

Proof of guilt based upon circumstantial evidence

Our second case, *Shepherd v The Queen*,¹⁷ concerns the application of the *Woolmington* rule in the context of circumstantial evidence. The general principle is that a jury cannot return a verdict of guilty unless circumstances are such as to be inconsistent with any reasonable hypothesis other than the guilt of the accused.¹⁸ The question that has arisen is whether it is permissible for a jury to infer guilt from a fact or collection of facts which have not been established beyond reasonable doubt. In *Chamberlain v The Queen*¹⁹ Gibbs CJ and Mason J (as he then was) adopted a *Woolmington* approach and answered this question in the negative.

[T]he jury cannot view a fact as a basis for an inference of guilt unless at the end of the day they are satisfied of the existence of that fact beyond

13 Ibid at 12; 141-2.

14 Ibid at 13; 142.

15 Ibid at 29; 154. It is not clear from Brennan J's judgment whether differences in penal practice will lead to the issue being tested on the criminal standard. For example, sentencing rules relating to remissions and administrative pre-release schemes may differ substantially from one jurisdiction to another. Should such differences be a ground for adopting the stricter standard?

16 *Thompson* was applied by the Queensland Court of Criminal Appeal in *Weissensteiner* (1992) 62 A Crim R 96.

17 (1990) 170 CLR 573; noted (1991) 15 Crim LJ 203.

18 *Peacock* (1911) 13 CLR 619 at 634.

19 *Chamberlain* (1983) 153 CLR 521. The disappearance of nine week old Azaria Chamberlain from a camping ground at Ayer's Rock on 17 August 1980, the subsequent conviction of mother Lindy for murder and father Michael as an accessory after the fact to murder, and the unsuccessful appeals to the High Court of Australia, mark one of the darkest chapters in the history of Australian criminal justice. After the publication of the report of the Commission of Inquiry set up to investigate the affair, 7 long years after their convictions, Lindy and Michael were pardoned and legislation was passed to enable the matter to be referred to the Northern Territory Court of Criminal Appeal, which duly quashed the original convictions: *Re Conviction of Chamberlain* (1988) 93 FLR 239.

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reasonable doubt. When the evidence is circumstantial, the jury, whether in a civil or in a criminal case, are required to draw an inference from the circumstances of the case; in a civil case the circumstances must raise a more probable inference in favour of what is alleged, and in a criminal case the circumstances must exclude any reasonable hypothesis consistent with innocence.²⁰

This came to be known as the '*Chamberlain* direction'. It was based on *Van Beelen* where the South Australian Court of Criminal Appeal said:

As a matter of common sense, it is impossible to infer guilt from facts which are in doubt...[T]he jury should be told that they can draw inferences only from facts which are clearly proved...²¹

In *Chamberlain* Gibbs CJ and Mason J noted that the South Australian Court had shrunk from the logical conclusion that the jury could draw inferences *only* from facts which are proved beyond reasonable doubt although that conclusion was implicit in their reasoning.²² But their Honours thought that any primary facts must first be proved beyond reasonable doubt before an inference of guilt could be drawn.²³

The *Chamberlain* direction was reconsidered by the High Court in *Shepherd*.²⁴ The accused stood convicted of conspiracy to import heroin into Australia. The Crown case was based upon three separate and independent strands of evidence: evidence of former accomplices who had been granted immunity; evidence of a police undercover agent who shared a cell with the accused; and evidence of various financial transactions which were said to prove that the accused had laundered drug money in Australia. The trial judge declined to give a '*Chamberlain* direction'. The New South Wales Court of Criminal Appeal²⁵ held that the trial judge had erred in failing to give the *Chamberlain* direction, but (differently constituted)²⁶ dismissed the

20 *Chamberlain*, *ibid* at 536.

21 (1973) 4 SASR 353 at 374-5.

22 (1983) 153 CLR 521 at 538.

23 *Ibid* at 539. Gibbs CJ and Mason J applied this analysis to the evidence and concluded that in light of the expert evidence led by the defence, it was not open for the jury to be satisfied beyond reasonable doubt that any blood found in the car was in fact foetal blood. Therefore, the existence of foetal blood in the car could not be relied upon as the basis for an inference of guilt (at 559). But that did not mean that the verdict was unsafe. When the evidence as a whole was considered together its probative force was greatly increased. In a telling statement, their Honours said: '[T]he evidence as a whole entitled the jury safely to reject the hypothesis that the baby was removed from the tent by a dingo, and to be satisfied that the baby's throat had been cut in the car by Mrs Chamberlain.' (at 568.) For the avoidance of doubt it would have been preferable to qualify the word 'satisfied' with the words 'beyond reasonable doubt' in this passage!

24 (1990) 170 CLR 573.

25 Street CJ and Campbell J, Lee J dissenting.

26 Roden, Finlay and Newman JJ.

appeal on the ground that no substantial miscarriage of justice had occurred.²⁷

On appeal, it was argued that the trial had miscarried because the trial judge had failed to tell the jury that in a case turning on circumstantial evidence no inference could be drawn from any fact unless that fact was established beyond reasonable doubt. The High Court dismissed the appeal. Mason CJ conceded that the joint judgment in *Chamberlain* had given rise to 'misconceptions'.²⁸ His Honour therefore suggested that the judgment be understood in the following terms, as expounded by Dawson J (with whom Gaudron and Toohey JJ concurred).²⁹ There was no law or practice requiring a *Chamberlain* direction in every case based on circumstantial evidence. But where a fact or series of facts formed an indispensable link in a chain of reasoning supporting an inference of guilt, that inference could not be drawn if the supporting facts were in doubt.³⁰ Whether a *Chamberlain* direction was required would depend upon the individual circumstances. But in general, there was no rule of law which required a jury to discount facts not established beyond reasonable doubt. Only where the process of reasoning involved links in a chain rather than strands of a rope, would the criminal standard of proof be applied to those links deemed to be 'intermediate' or 'indispensable'.³¹ But circumstantial evidence was sometimes like strands of rope, relying upon a series of interrelated and mutually independent facts.

McHugh J had no doubt that the judgment of Gibbs CJ and Mason J in *Chamberlain* laid down that no fact, intermediate or otherwise, could be used

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- 27 *Criminal Appeal Act 1912 (NSW)*, s 6(1). The manner in which the matter came before the High Court is somewhat complex and recounted by McHugh J (at 587). The procedural steps are however irrelevant to the substantive issue in the case.
- 28 Above n 18 at 575. Stephen Odgers has argued that the principle of *Chamberlain* should apply only to appellate review of convictions on the basis that they are unsafe and unsatisfactory: see Odgers, 'Proof and Probability' (1989) 4 Aust Bar Review 137 at 145-148; *Shepherd* (case-note) (1991) 15 Crim LJ 203 at 204.
- 29 *Ibid* at 581 (per Dawson J).
- 30 'It may sometimes be necessary or desirable to identify those intermediate facts which constitute indispensable links in a chain of reasoning towards an inference of guilt', per Dawson J at 579; 585. Such facts will ordinarily require a *Chamberlain* direction.
- 31 Where the evidence consists of strands in a rope rather than links in a chain, it will not be appropriate to give a direction requiring proof beyond reasonable doubt with respect to each strand in the cable. This is illustrated by *Shepherd* itself and by a recent decision of the Queensland Court of Appeal in *Jones* (1993) 1 Qd R 676. The appellant was convicted on charges of burglary, rape and armed robbery. The prosecution's case was based upon identification evidence and evidence that the appellant was the perpetrator based upon DNA profiling. The latter was said to involve an extremely low possibility (about 1 in 15,000) of error. The appellant's counsel said that the scientific evidence should have been subject to a '*Shepherd* direction', namely, that it should be entirely rejected unless the basis for the statistical evaluation was accepted beyond reasonable doubt. The Court rejected the appeal. Given that there were two independent strands of evidence (the description evidence and the DNA profiling) there was no requirement arising from *Shepherd* to subject each strand to a requirement of proof beyond reasonable doubt.

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as a basis for an inference of guilt unless that fact was proved beyond reasonable doubt, and had been acted upon by several courts accordingly.³² However, the rule was misconceived and should be rejected. His Honour thought that in a case turning on circumstantial evidence an inference of guilt *could* be drawn from a combination of facts no one of which, by itself, is established beyond reasonable doubt. A jury was not obliged to evaluate each piece of evidence separately. The evidence should be viewed as a whole. It might then support an inference which could not be drawn from any one of the facts in isolation.³³ Circumstantial evidence was a cumulative process, operating in geometrical progression, by eliminating other possibilities.³⁴ His Honour rejected the notion that, as a matter of logic, any fact is, or is not, *necessary* for the proof of guilt. Each case will turn on its own facts. A conviction may be justified despite a failure to prove an essential aspect of the Crown case beyond reasonable doubt because of irresistible proof coming from elsewhere.³⁵ But where the facts are scant, an inference of guilt beyond reasonable doubt may be untenable unless each fact is proved beyond reasonable doubt.

Stealing and receiving

Our third case relates to the area of stealing and receiving. Usually, provision is expressly made for alternative findings.³⁶ These rules are mostly silent as to what standard of proof applies in the event that the jury is satisfied beyond reasonable doubt that one of the two offences was committed but cannot be certain which one.³⁷

32 Above n 18 at 589; 591; see *Mathews* (1984) 36 SASR 503 at 507; *Sorby* [1986] VR 753 at 789.

33 In the *Chamberlain* case, the fact that it was not shown beyond reasonable doubt that the blood in the case was foetal blood, or that the jump suit was cut with scissors, did not mean that the jury should have been told to ignore this evidence. The question whether a dingo took the baby appears (wrongly) to have been regarded as a primary fact. Thus, it seems to have been assumed that if the jury were satisfied beyond reasonable doubt that a dingo did not take Azaria, an inference of guilt could be drawn, as if disproof of a possible hypothesis beyond reasonable doubt could, *of itself*, provide the basis for an inference of guilt beyond reasonable doubt. See also *Richard* (1986) 34 A Crim R 407 at 409 (NSW, CCA); *Weissensteiner* (1992) 62 A Crim R 96; *Robinson* (1991) 55 A Crim R 318.

34 *Kilbourne* [1973] AC 729 at 758, per Lord Simon of Glaisdale (quoted by McHugh J at (1990) 170 CLR at 592).

35 His Honour gave as an example a failure to prove the *opportunity* to commit the crime combined with irresistible proof of *motive* and *means* which, in his view, could justify a conviction: *op cit* at 592.

36 Under the *Criminal Codes* of Queensland and Western Australia (ss 568(4) and 586(4) respectively) where the jury find that the accused either stole or received the property but are unable to say which of those offences was committed, the accused is not entitled to an acquittal but may be convicted of the least serious offence. In South Australia s 196 of the *Criminal Law Consolidation Act 1935* (SA) provides that charges of stealing and receiving specific property may be included in separate counts on the same information and tried together as alternative counts.

37 In some jurisdictions it appears that D may be convicted of stealing even though it is not proved beyond reasonable doubt that D stole the goods, if it is proved [beyond

In *Gilson v The Queen*³⁸ the applicant was charged in South Australia with one count of shop breaking and larceny and one count of receiving such stolen goods. The prosecution relied upon the doctrine of recent possession, some of the stolen property having been found in the applicant's flat. The trial judge gave the following direction, which was supported by clear authority in South Australia:³⁹

[I]f you reach the stage that you are satisfied beyond reasonable doubt that the accused is guilty of either of those two offences [shopbreaking and larceny or receiving]...then you must determine on the balance of probabilities which of those offences it is which he has committed.⁴⁰

On appeal against conviction, the High Court unanimously held that there was no substantial miscarriage of justice, and dismissed the appeal. However, divergent views were expressed concerning the direction. Brennan J approved the 'balance of probabilities' direction as appropriate, at least where the statutory maxima were the same. He said:

The principle in *Woolmington*, properly understood, is calculated to ensure that an accused's liability to punishment depends wholly on the jury's verdict and that liability to punishment is established beyond reasonable doubt...[W]here larceny and receiving are charged in the alternative and the maximum penalty for each of those offences is the same, it does no violence to the principle in *Woolmington* to direct the jury that, provided they are satisfied beyond reasonable doubt that the accused is guilty either of larceny or of receiving, they should convict of that offence which they find established on the balance of probabilities to have been committed...The principle in *Woolmington* is practical and protective; it is not a device for permitting the guilty to escape by raising a dilemma of proof between offences when the accused has been proved beyond reasonable doubt to have committed one or other of them and a conviction for one exposes him to no greater punishment than conviction for the other.⁴¹

reasonable doubt] that D was either the thief or a receiver, provided that it is also proved [on the balance of probabilities] that D was the thief. If this latter fact is not proved, then D may be convicted of receiving. In *Attorney-General of Hong Kong v Yip Kai-foon* [1988] AC 642 (PC) the balance of probabilities approach was held to be a misdirection: see also *Archbold: Pleading, Evidence and Practice in Criminal Cases* 43rd ed (1988); likewise in Victoria, see *Bruce* [1988] VR 579 and in Canada, see *Kowlyk* [1988] 2 SCR 59 (1988) 43 CCC (3d) 1; *aliter* in New Zealand, see *Adams, Criminal Law and Practice in New Zealand* (1971) para 1731.

38 (1991) 172 CLR 353; (1991) 53 A Crim R 344; (1992) 65 ALJR 416.

39 *Ghys v Crafter* [1934] SASR 28; *Dawson* [1964] SASR 256; *Buckingham*, unreported South Australian Court of Appeal, 12 February 1990. In the Court of Appeal in *Gilson* s 196 was itself relied upon as providing a statutory exception to the rule in *Woolmington*. And see *Harper* (1984) 14 A Crim R 414 at 417 in relation to s 181 of the *Criminal Law Consolidation Act 1935* (SA).

40 *Gilson* above n 39 at 356; 345.

41 *Ibid* at 367; 353.

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However, where the offences were governed by different statutory maxima, his Honour thought that different considerations applied. In that case, a verdict of guilty of the more serious offence had to be based on proof beyond reasonable doubt. Moreover, Brennan J rejected the notion accepted by the majority that offence seriousness could be determined as a preliminary exercise in the sentencing discretion by the trial judge.

McHugh J favoured a *Woolmington* approach. His Honour considered that once the jury had disposed of the stealing charge on the basis that D had not taken the property, the jury should consider the receiving charge on the assumption that some other person had stolen the property. It was then necessary to prove that D had received the stolen property knowing at the time that it was stolen. That issue had to be proved beyond reasonable doubt.⁴²

The majority view, contained in a joint judgment by Mason CJ, Deane, Dawson and Toohey JJ, was that the direction was wrong.⁴³ However, it was not wrong because of a failure to comply with *Woolmington*.

The trial judge, rather than directing the jury to return a verdict of guilty of the offence which they consider to have been the more probable, should direct them that, if they are satisfied beyond reasonable doubt that the accused either stole the property or received it knowing it to have been stolen, but they are unable to say which, then they should return a verdict of guilty of the less serious offence.⁴⁴

The majority indicated that *prima facie* the statutory maximum will indicate the seriousness of the offence but that presumption is liable to be displaced. Thus, the receiving of particular property may, in some circumstances, be more serious than stealing them. The trial judge was required to tell the jury which offence was more serious in the particular circumstances of the case. This would prevent the accused being convicted of the more serious offence on the balance of probabilities. Reference was made to *Thompson* where it was observed that:

42 Ibid at 364; 353; 424. Strangely, his Honour held that in the circumstances of the case there was no miscarriage of justice. His Honour reasoned that because the jury convicted on the receiving charge and acquitted on the stealing charge, they had to be satisfied beyond reasonable doubt on the receiving charge. This was because the direction required proof beyond reasonable doubt of one crime or the other. But if this is acceptable, why not in every case? His Honour's conclusion appears to give support to the reasoning of the majority.

43 Gaudron J concurred in a short separate judgment (at 370).

44 Above n 39 at 364; 351; 420. This is essentially the rule to be found in the *Griffith Code* (n 31 above). Note that the majority rejected the suggestion of the Privy Council in *Yip Kai-foon* (above n 32) that the jury should proceed to the handling charge only when the charge of theft had been excluded. This did not take account of the case in point where the Crown relies on evidence of recent possession which is consistent with both larceny and handling.

within the general principle laid down by Woolmington, it may be necessary to determine a particular issue in such a way as to ensure that an undoubted wrongdoer does not escape conviction entirely.⁴⁵

The majority's approach appears to be sensible. It adopts in essence the rule under the *Griffith Code*.⁴⁶ It applies without difficulty where there are statutory alternatives: for example, indecent assault and assault.⁴⁷ If the jury is satisfied beyond reasonable doubt that D either indecently assaulted V or assaulted him or her, but cannot say which, it seems sensible that a conviction for the less serious offence (assault) should be returned.⁴⁸ There is of course a difference between this case and the case of stealing or receiving. In the former, *ex hypothesi*, the only reason why doubt might exist would be as to the element of indecency. In the latter, it may be uncertain whether D was the thief or a receiver, and yet he may be convicted for the least serious offence, even though doubt exists as to his guilt for *that* offence. The difference is that while every case of indecent assault necessarily includes an assault, receiving and stealing are mutually exclusive.⁴⁹

The majority's approach is not without some difficulties. It requires the jury to approach the question of liability with one eye to the likely penalty. This may work for or against the accused, but in either case it is hardly desirable. A second, stronger objection, lies in the judge telling the jury which offence would attract the heaviest penalty. As Brennan J noted, it is

45 Ibid at 365; 352; 421.

46 Above n 37.

47 For example *Criminal Code* (Qld) s 575; *Crimes Act* 1900 (NSW) ss 34, 61Q, 425.

48 Admittedly, this is not always the case. For example, in *Saraswati* (1990) 172 CLR 1 a majority (Toohey, McHugh, Gaudron JJ) held that where charges of aggravated indecent assault (*Crimes Act* 1900 (NSW), s 61E(1), and carnal knowledge (s 72) are statute barred, a charge of indecency (s 61E(2)) will not lie if the evidence discloses an assault or sexual intercourse. The implication is that a charge of indecency may be defended by asserting or showing guilt of one of the more serious charges (per Dawson J at 15; McHugh J at 27). Interestingly, the same problem could arise under the *Criminal Code* (Qld) s 215 (2 year limitations period). A rigid application of *Woolmington* to this peculiar situation would imply that D is entitled to an acquittal on a charge of indecency unless P can prove *beyond reasonable doubt* that D had *not* assaulted her or had intercourse with her, even though the jury are satisfied that he acted indecently. Whether the majority intended to apply *Woolmington* in this way is not clear. Dawson J (at 15) and Deane J (at 9) do not address this point, although Deane J expressly refers to the anomalous cases (receiving, choice of forum) which oust *Woolmington* as a ground for rejecting the view adopted by the majority. His Honour clearly saw scope for the accused to escape by raising the possibility of the more serious offence on the balance of probabilities; unadulterated *Woolmington* would require (paradoxically) the Crown to prove beyond reasonable doubt that the accused was *not* guilty of the more serious offence. Only then would it be safe to convict (but of course, only on the lesser charge, the more serious charge being statute barred). See also *Cooling* (1989) 44 A Crim R 171; *Redgard* [1956] St R Qd 1.

49 Note that a person cannot be found guilty of receiving stolen goods if he was the actual thief: *Coggins* (1873) 12 Cox CC 577; *Lockett* [1914] 2 KB 720 (1914) 9 Cr App R 268

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contrary to principle and to practice to permit or require a trial judge to give a jury a direction, being a direction on a matter of fact, as to which offence is likely to be visited with a more severe or less severe sentence.⁵⁰

Some relevant sentencing facts may not be known to the judge, and may bear differently upon the separate offences of stealing and receiving. Moreover, there is authority for the proposition that sentencing should be based upon facts which are themselves established beyond reasonable doubt⁵¹ (or at the very least according to the sliding scale implied by *Briginshaw*).⁵²

Psychological blow automatism

The Queen v Falconer,⁵³ the last of our quartet, is a sad case arising out of domestic violence and psychological stress. The appellant, a 50-year-old woman, was charged with murdering her husband. She admitted shooting him. The main issue was whether she had the necessary intent. She had no recollection of fetching the shotgun or firing it. She claimed to have gone 'all funny' at some moment before the shooting. She remembered her husband pulling her hair and sexually assaulting her. In addition, there was a history of spousal abuse directed at her and at a foster child in her care.

The legal issues arising in *Falconer* traverse the muddy waters of the insanity defence. Two important rules of criminal law require consideration. The first is that a person is not criminally responsible if insane according to law at the time of the criminal act. The definition of insanity at law is, in most jurisdictions, given by the *M'Naghten Rules*,⁵⁴ or some modern variation thereof. Essentially, the Rules require the defendant to prove that at the time of doing the act she was afflicted by mental illness so that she did not know what she was doing or that it was wrong. The second rule is that a person is not criminally responsible for an act or omission which occurs independently of the will, that is, an *involuntary* act or omission. This rule is regarded as fundamental both at common law and under the Australian *Criminal Codes*.⁵⁵ A person who successfully pleads involuntariness is entitled to a complete acquittal, but a successful plea of insanity leads to indefinite detention during the Governor's pleasure. The issue of insanity is left to the jury if there is evidence of mental illness capable of causing one of

50 Above n 39 at 370; 355.

51 *Barbaro* (1993) 1 Qd R 502.

52 (1930) 60 CLR 336 at 361-2. The sliding scale implies that the more serious the consequences of an adverse finding, the more stringent the standard of proof required. In Victoria the somewhat lower *Briginshaw* standard has been applied: see *Chamberlain* [1983] 2 VR 511; (1982) 14 A Crim R 67.

53 (1990) 171 CLR 30; (1990) 50 A Crim R 244.

54 (1843) 10 Cl & Fin 200 at 210; 8 ER 718 at 722; [1843-60] All ER 229.

55 Section 23 of the *Griffith Code* in force in Queensland and Western Australia declares '...[A] person is not responsible for an act or omission which occurs independently of the exercise of the will, or for an event which occurs by accident'. See also s 13 of the *Tasmanian Criminal Code*.

the required incapacities, whether or not insanity is relied on by the defence. Moreover, insanity must be proved on the balance of probabilities. By contrast, where there is evidence fit to be considered by the jury on the issue of involuntariness the jury is directed that it is for the Crown to disprove involuntariness beyond reasonable doubt.⁵⁶

The term *automatism* is sometimes encountered in this context. Automatism refers to the performance of complex behaviour in a state of diminished or excluded consciousness. Automatism is not a legal term as such. The concept of automatism merely invokes the basic legal principle of involuntariness. In other words, there is no *separate* defence of automatism apart from a denial of voluntariness. Some forms of insanity are capable of causing involuntary conduct. Conversely, involuntary conduct such as sleepwalking or reflex muscular movements may occur apart from mental illness. Thus arises a distinction between *sane automatism* (sometimes inelegantly called *non-insane automatism*) and *insane automatism*. One test for distinguishing between sane and insane automatism is whether automatism was caused by factors external to the accused. On this approach, external factors points to *sane automatism*; internal factors points to *insane automatism*.⁵⁷

In *Falconer's* case, the defence relied upon section 23 of the *Criminal Code* and sought to tender evidence of extreme shock causing 'psychological blow' automatism. Two psychiatrists were called. Both testified that the appellant was sane at the time of the killing, although subject to a profound mental disturbance produced by psychological shock. The court ruled that the evidence was insufficient to raise an issue of involuntariness under section 23 of the Code. The evidence did not disclose any external factor at the time of the killing leading to a psychological conflict and causing the accused to dissociate.⁵⁸ The medical evidence was therefore not considered by the jury. The Full Court of Western Australia allowed an appeal. The refusal to allow the psychiatric evidence to be considered by the jury on the question of voluntariness and intent was in error.⁵⁹ The High Court unanimously confirmed that psychological blow automatism could be relied upon as a basis for negating intent and voluntariness independently of the insanity defence.

56 *Ryan v The Queen* (1967) 121 CLR 205.

57 The external factors test was criticised by Toohey J in *The Queen v Falconer* (1990) 171 CLR 30 at 75.

58 The learned trial Commissioner relied on a number of authorities for the proposition that evidence of stress, anxiety and depression were not capable in law of causing or contributing to a state of automatism: *Tsigos* [1964] NSW 1607; *Joyce* [1970] SASR 184; *Isüt* (1978) Cr App R 44; *Sullivan* [1984] AC 156; *Hennessy* [1989] 2 WLR 287; [1989] 2 All ER 9. He declined to rely upon the briefly reported decision of *Wiseman* (1972) 46 ALJ 412 in which automatism was left to the jury where the evidence was of a series of shattering emotional experiences.

59 (1989) 46 A Crim R 83.

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The case is significant in the present context because of the detailed consideration given to issues relating to onus and burden of proof. All members of the Court agreed that where a defence of involuntariness was raised under section 23 of the *Criminal Code*, the burden of disproving the claim beyond reasonable doubt lay upon the Crown. However, Mason CJ, Brennan and McHugh JJ, in a joint judgment, held that a defence of automatism could not be relied upon for the purpose of raising a reasonable doubt with respect to intent or voluntariness unless the *defence* proved (on the balance of probabilities) that a state of automatism existed at the relevant time, and was also able to prove (again, on the balance of probabilities) each of three exempting conditions (namely, that the automatism was transient, caused by trauma and not likely to recur).⁶⁰ It was said that:

To cast this onus on the accused does no violence to the principle in *Woolmington v Director of Public Prosecutions*, for the issue is not one of criminal responsibility but the cause of the condition which deprived the accused of criminal responsibility.⁶¹

This disclaimer is hardly convincing. If this view is correct, then a failure to prove automatism on the civil standard will lead to the rejection of any defence of psychological blow automatism under section 23, which in turn may lead to a conviction, even though there is a reasonable possibility that D was in a state of automatism at the relevant time. This is surely incompatible with *Woolmington*.⁶² The views expressed by Deane and Dawson JJ (in a joint judgment)⁶³ and by Gaudron J⁶⁴ do not support this approach. It is harder to pin down Toohey J's view on the point, although there is no evidence that his Honour favoured applying the civil standard to the threshold question regarding the existence of automatism.

Summary

Thompson and *Gilson* are both sensible decisions. In *Thompson* the resort to *Woolmington* as a pre-trial issue going to jurisdiction was rightly rejected. The application was merely obstructive, and had no merit in terms of preserving the presumption of innocence. *Gilson* implies that where stealing and receiving are alternative charges and P relies on the doctrine of recent possession, then D is not entitled to an acquittal on the basis of reasonable doubt where the jury is satisfied beyond reasonable doubt that D committed

60 'Exempting' because unless the conditions are found to exist the automatism, if it existed, will be treated as having been caused by mental disease and will lead to a special verdict of not guilty by reason of insanity.

61 Above n 54 at 56.

62 I have argued elsewhere that this view is untenable. See Fairall, 'Voluntariness, Automatism and Insanity: Reflections on Falconer' (1993) 17 Crim LJ 81.

63 Above n 54 at 61-2.

64 Ibid at 86.

one offence or the other but cannot be satisfied (beyond reasonable doubt) as to which. Under these circumstances *Woolmington* should not provide the basis for a wholly unmeritorious acquittal; the holding that in such circumstances D should be convicted of the less serious offence is quite defensible. Indeed, it is probably fair to say that in either case (*Thompson* and *Gilson*) the rigid application of *Woolmington* could bring the principle itself into disrepute, by allowing a wholly unmeritorious acquittal.⁶⁵

Shepherd has its problems. Interestingly, of the four High Court cases discussed, only in *Shepherd* was *Woolmington* not mentioned by name, although its shadow and influence is of course apparent. In the area of circumstantial evidence, as *Chamberlain* shows all too well, there is a need for more, not less, protection to prevent wrongful convictions. Admittedly, there is a theoretical distinction between the chain and rope cases involving circumstantial evidence which is defensible, despite McHugh J's misgivings.⁶⁶ However, in practice, it may be difficult to identify facts as 'primary', 'intermediate' or 'indispensable'. Moreover, these terms and concepts are not self-evident and may cause some difficulty for the jury.

Furthermore, the views expressed in the joint judgment in *Falconer* are much more worrying and do not sit comfortably with *Woolmington*, despite the disclaimer that *Woolmington* is unaffected by what is essentially a dispositional issue in choosing between sane and insane automatism. However, as noted above, it appears that the joint judgment does not convey the view of the majority of the High Court.

Conclusion

The cases discussed above yield something of a mixed message. There is no evidence of a rejection of *Woolmington* in its primary area of operation, although the High Court has shown a willingness to examine the basis of the golden rule, and to qualify it where necessary. The Court has identified, and therefore arguably strengthened, areas of the criminal trial which are properly protected by the rule. The Court's approach has been pragmatic rather than doctrinaire.

In terms of body count, we could say that *Woolmington* was discharged unconditionally in *Thompson* and *Shepherd*; posted missing in *Gilson* and survived the conflict (albeit wounded in action) in *Falconer*. During the same period *Woolmington* was affirmed in relation to the defence of provocation under section 160 of the Tasmanian *Criminal Code*.⁶⁷

65 This argument will only go so far. The acquittal in *Saraswati's* case (1991) 172 CLR 1 could hardly be less meritorious.

66 (1990) 170 CLR at 592.

67 *Stingel* (1990) 171 CLR 312.

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Furthermore, in striking down provisions permitting majority verdicts in federal matters, the High Court recently affirmed that the requirement of proof beyond reasonable doubt was strengthened by a requirement of jury unanimity.⁶⁸

My subjective impression after perusing these cases is that the earth has moved - perhaps only slightly, but perceptibly. My conclusion is that the dyke has a small leak. There is no cause for panic. But the little Dutch boy should stand by, lest the trickle becomes a flood.

68 *Cheatle* (1993) 116 ALR 1 at 7; and see *Thatcher* [1987] 1 SCR at 698.