Before the High Court

The Case of the Improbable Murderer: *De Gruchy v R*

JEREMY GANS*

---

1. An Improbable Appeal

At about 8.30 a.m. on 12 March 1996, 18-year old Matthew De Gruchy tearfully told a neighbour that there was 'something wrong' with his mother and sister.[1] Police soon discovered the bodies of his mother, Jennifer, and his two siblings, Sarah, 14, and Adrian, 15, in separate rooms of the family's Wollongong home. The three victims each had horrific head injuries. Adrian's body had been doused in petrol. Pieces of carpet from Jennifer's bedroom and a video-recorder were missing, but some of the household's valuables were left untouched. De Gruchy told police that he had last seen his family alive on the evening of the murders, before he had left to spend the night with his girlfriend.

Three months later, De Gruchy was charged with the murders. Three bags had been discovered submerged in a dam at a disused brickworks close to his girlfriend's house. The bags contained pieces of carpet, the video-recorder and other household items, some of which were identified as having disappeared from the De Gruchy home on the night of the murders. One bag also contained a torn-up note preserved in a zip-lock plastic bag. When police reconstructed the note, they found, in De Gruchy's handwriting, a list of instructions loosely resembling a checklist for faking an assault and burglary.[2] Chillingly, the list also contained (in different-coloured ink) the names 'Sarah', 'Mum' and 'Adrian'.

Despite covert surveillance, investigators never obtained any admissions of guilt from De Gruchy. Instead, they compiled an array of circumstantial evidence, including: the note; De Gruchy's opportunity and means to commit the murders and dump the items; inconsistencies in his remarks following the deaths; some forensic evidence linking De Gruchy to blood at the scene and items handled by the murderer; and the murderer's apparent faking of a burglary and destruction of forensic evidence.

At his 1998 trial, De Gruchy maintained his initial account and gave explanations for some of the prosecution evidence. De Gruchy's father, uncle and girlfriend testified that he had a gentle nature and that there was no discord in the

---

* Senior lecturer, University of Melbourne Law School. Denise van Dijk and Kirsten Edwards provided helpful comments.

1 The facts are set out in the judgment of the NSW Court of Criminal Appeal: *R v De Gruchy* (2000) 110 A Crim R 271 at 272–279 (Wood CJ at CL).

2 The full list (id at 277) is: 'open gate / throw bottle down back / throw things down wall in roof / track suit pants 1 / knife 1 / T shirts 2 / Shoes 2 / hanky / pole / towel / open blinds to see through / Sarah Mum / Adrian / head butt ~~mirror~~ bench / have shower / throw hi fi down back / hit arm with pole / hit leg pole / cut somewhere with knife'.

De Gruchy family. They also said that they did not observe any injuries or abnormal behaviour by De Gruchy at the time of the murders. The defence suggested that the murders were the work of a third party, adducing evidence of hairs found on Adrian's body; the defendant's account of prank phone calls predicting death for three family members on the night of the murder; and the suicide of a Wollongong man a week later, who had left a note saying that he feared being blamed for the murders.

Bizarrely, while De Gruchy's trial progressed, 19-year old Mark Valera, who lived in the same suburb and who had attended the same school as the De Gruchy children, entered a police station and confessed his involvement in two violent murders a few months earlier (ie, more than two years after the De Gruchy murders.) One of Valera's victims was Frank Arkell, the former mayor of Wollongong. The other victim had died a mere 600m cross-country (1.7km by road) from the De Gruchy house and was later found to have been selected at random by Valera.[3] However, De Gruchy's mid-trial requests to cross-examine police and access subpoenaed documents about the Valera case were denied.[4]

On 14 October 1998, a jury convicted De Gruchy of three counts of murder. On 3 March 2000, the NSW Court of Criminal Appeal dismissed his appeal from that verdict.[5] He is presently serving three concurrent 28 year terms of imprisonment and is not eligible for release until 2017.

At the High Court hearing on De Gruchy's application for special leave to appeal, Justices Gaudron, McHugh and Callinan canvassed the key strengths and weaknesses of the prosecution case.[6] However, doubts about the defendant's guilt are not, on present authority, a sufficient basis for a grant of special leave. Rather, the court has always followed the Privy Council's practice of refusing to review criminal proceedings, even where a miscarriage of justice is suspected, unless that miscarriage was brought about 'by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise.'[7] In short, special leave in criminal matters is only granted on questions of law, not fact.

In passing, it is worth noting that there is a case for reappraising the High Court's policy of mimicking the Privy Council's practice on special leave. The Privy Council's rationales for its approach are the 'inconvenience' of reviewing factual issues in criminal matters and the 'obstruction which it would offer to the administration of justice in the Colonies'.[8] These seem less applicable to the High

3 *R v Valera* [2000] NSWSC 1220 at 53 (Studdert J).

4 Above n1 at 280–282. At 282 the NSW CCA dismissed an argument that this refusal was an error.

5 Id at 293 (Wood CJ at CL), 293 (Sully J), 294 (Simpson J).

6 *De Gruchy v R, Transcript of Proceedings* 12 October 2001 (High Court of Australia, S196/2000): <http://www.austlii.edu.au/au/other/hca/transcripts/2000/S196/1.html> (19 October 2001).

7 *In Re Dillet* (1887) 12 AC 459 at 467 (Watson LJ) compare *The Falkland Islands Company v R* (1863) 15 ER 713. See *Bataillard v R* (1907) 4 CLR 1282; *Morris v R* (1987) 163 CLR 454 at 475–476 (Dawson J) and compare *Cutter v R* (1997) 143 ALR 498 at 514 (Kirby J).

8 Id, *Falkland Islands Company*, at 718–719 (Kingsdown LJ). Compare *R v Mookerjee* (1862) 15 ER 704.

Court, which is not as distant – geographically, at least – from the courts it reviews. In addition, the adoption of a 'self-denying ordinance'[9] is, arguably, contrary to 'the duty of any court... to conform to its own legislative charter'.[10] Section 35A(b) of the *Judiciary Act* 1903 (Cth) requires the High Court, when considering an application for special leave, to have regard to, not merely questions of law, but also 'the interests of the administration of justice... in the particular case'. Moreover, the court has recently criticised the use of English doctrines in construing local appeal statutes.[11]

Under existing practice, *De Gruchy v R* is an unlikely candidate for a grant of special leave. The defence's case of complete denial raises no issues relating to the substantive law of murder, and the major procedural point of interest – the admissibility of the Valera evidence – was not pressed.[12] Instead, the special leave application rested on a trial direction that may have detracted from part of the defence evidence, and an alleged error in the NSW Court of Criminal Appeal's treatment of another piece of evidence.[13] In past special leave rulings, the High Court has expressly rejected both of these appeal grounds as sufficient to warrant a grant of special leave.[14] In judgments attached to those rulings, the court explained that it will not grant leave to review 'assessments of the evidence and of the directions to the jury rather than differences of principle'[15] and it 'cannot and should not wish to undertake a general supervisory role of courts of criminal appeal on questions of fact.'[16] Nonetheless, De Gruchy's application was granted, albeit by majority and with the curious express rider that 'it is just a grant of special leave and nothing more.'[17] Parts 2 and 3 will discuss the two appeal grounds before the High Court.

While De Gruchy's concern is obviously with his own case, High Court appeals are an occasion to consider the administration of justice more generally.[18] Part 4 argues that, although the two appeal grounds before the High Court concern the presentation of the defence's evidence, the case is an appropriate vehicle to examine the need for trial and appellate judges in circumstantial evidence cases to ensure that adequate attention is given to weaknesses in the prosecution's case.

---

9 *Badry v DPP* [1983] 2 AC 297 at 305 (Hailsham LJ).

10 *Gipp v R* (1998) 194 CLR 106 at 149 (Kirby J); *Fleming v R* (1998) 197 CLR 250 at 256 (Gleeson CJ, McHugh, Gummow, Kirby & Callinan JJ).

11 Ibid.

12 Above n6.

13 Ibid.

14 In *Baraghith v R* (1991) 66 ALJR 212 (Deane J), the court refused special leave on an application complaining that the trial judge's directions on character had implied that the defence's character evidence was 'of little importance.' In *Warner v R* (1995) 69 ALJR 557 (Brennan J), the court refused special leave on an application complaining that the intermediate appeal court, when addressing whether the verdict was unsafe and unsatisfactory, had raised a new issue and had failed to give the accused the benefit of the doubt on an issue.

15 *Baraghith*, ibid.

16 *Warner*, above n14.

17 Above n6.

18 *Judiciary Act* 1903 (Cth) s35A(b).

2. *The Murderer's Mind*

De Gruchy's first complaint was about the trial judge's summing up to the jury concerning his directions on the subject of 'disturbed mind'.[19] It is important to recognise that the question of what was going on inside the murderer's mind was relevant as circumstantial evidence about the murderer's identity (rather than as direct evidence about the murderer's culpability.) There was no dispute at the trial about the murderer's intent to kill or any substantive defences to murder. However, the murderer's identity was hotly disputed. The contents of the murderer's mind, alongside other known or inferred facts about the murder, were relevant in narrowing the field of possible culprits, as someone who didn't fit the profile of the murderer was less likely to be the murderer. Of course, the evidence at the trial about the murderer's and the defendant's mental states was slight and the inferences that could be drawn were far from certain. However, this is typical in a trial turning on circumstantial evidence, where such speculative fact-finding has a legitimate – arguably, central – role to play in the jury's deliberations.

To understand the directions given by the trial judge, it is crucial to appreciate their background in the events of the trial. The starting point was a remark by the prosecutor, in his closing address, that the person who committed the murders 'must have had a disturbed mind.'[20] As an inference of fact from the victims' injuries, this comment is obviously compelling. Experienced observers initially likened the victims' injuries, inflicted by a blunt instrument, to gunshot wounds or the aftermath of a plane crash – indeed, one police sergeant who attended the scene never worked again.

Nonetheless, the mention of this inference by the prosecutor (in combination with his earlier suggestion that extreme violence can sometimes happen without a motive)[21] was contentious. His remark was criticised by the defence, who requested that it be withdrawn.[22] Justice Grove, the trial judge, instructed the jury that it was as 'an unfortunate expression for counsel to use in the flourish of advocacy'.[23] In the NSW Court of Criminal Appeal, Wood CJ at CL branded it as 'somewhat ill-advised and circular'.[24] Even counsel for the DPP at the special leave hearing deprecated it as incapable of logical use by the jury.[25]

With respect, the prosecutor's critics appear to have misunderstood his remark as a statement about the mind of the *defendant;*[26] however, it is clear that his comment was actually about the mind of the *murderer.* This is a critical distinction in a trial about disputed identity, where part of the fact-finder's task is to compare

19 The contentious directions are extracted at above n1 at 283–285.

20 Above n1 at 282.

21 Ibid.

22 Ibid.

23 Id at 283.

24 Id at 285.

25 Above n6.

26 In the appeal ground as set out by the NSW Court of Criminal Appeal, the remarks were described as concerning 'whether or not the *appellant* had a disturbed mind.' [Emphasis added]: above n1 at 282.

what is known or can be inferred about the offender with what is known or can be inferred about the defendant.[27] In the trial, the defence relied strongly on testimony that De Gruchy was a gentle man with no animosity towards his victims. Apparently in response, the prosecutor's remark was an invitation for the jury to infer, from the murders themselves, that the murderer's mind was disturbed, and, accordingly, that the defence's assertions about De Gruchy could co-exist with what was known about the murderer.

If accepted, the prosecutor's argument would only show that De Gruchy *could* be the murderer, not that he *was* the murderer. However, such an argument is relevant as a rebuttal the defence's argument that De Gruchy's apparent non-violent nature and absence of motive ruled him out as the murderer. Indeed, the prosecutor's argument is simply a fact-specific amplification of two hoary truisms that are often delivered as jury instructions in murder trials (including De Gruchy's): that motive is not an element of murder and that prior good character is not a defence. Of course, the jury might have reasoned contrary to the approach proposed by the prosecutor. However, given that the possibility that the murderer was disturbed would have been obvious to the jury, the prosecutor's candour on this issue seems apt, both tactically and ethically.

To rebut the prosecutor's point, it was only necessary for the defence to argue that the defendant lacked the particular mental disturbance that the prosecutor had attributed to the murderer. However, defence counsel, in his closing submissions, went further by arguing that the *defendant* did not have a disturbed mind. Obviously realising the limits of the good character evidence to support either claim, defence counsel dwelt on the absence of 'evidence here or anywhere else that the accused had a disturbed mind',[28] adding that if any evidence had existed, the prosecution would have called it. Justice Grove endorsed the defence's characterisation of the evidence 'here', but added that '[s]o far as anywhere else is concerned, neither you nor I know whether there is such evidence one way or the other'.[29]

It is submitted that Grove J's refusal to endorse defence counsel's claim about evidence 'anywhere else' was clearly correct; indeed, given that there was evidence at the trial of some quite peculiar behaviour by the defendant (eg the note from the dam and the defendant's account of it), even his approval of the remark about evidence 'here' may have been overly generous to the defence. The NSW Court of Criminal Appeal was also correct to note that the defence's claim about the prosecution's capacity to call 'any' evidence about De Gruchy's disturbed mind was 'too broad';[30] rather, the *Evidence Act* 1995 (NSW) would only have permitted evidence that De Gruchy was not gentle[31] (and, even then, only if the

27 Compare the concept of 'circumstantial identification evidence' discussed in *Festa v R* [2001] HCA 72.

28 Above n1 at 283.

29 Ibid.

30 Id at 285.

31 s110(3).

probative value of such evidence outweighed the danger of unfair prejudice to the defendant.)[32]

Unfortunately, Grove J, apparently accepting the defence's criticism of the prosecutor's remark about the murderer's mind, took the further step of withdrawing the 'issue' of disturbed mind from the jury altogether. He instructed the jury in very strong terms to ignore the prosecutor's remark about the murderer's mind, that there was no evidence as to De Gruchy's disturbed mind 'one way or the other' and that it was irrelevant whether or not that evidence might have existed elsewhere. With respect, these instructions were all serious errors.

As already discussed, the murderer's disturbed mind was relevant to the question of the murderer's identity. In addition, the different question of whether or not De Gruchy's mind was disturbed was also relevant, not just to that central issue, but also (potentially) to the interpretation of some of his behaviour that was adduced as evidence by the prosecution. Further, there *was* evidence in the trial, albeit slight, to support inferences both that De Gruchy's mind was disturbed (eg the note he wrote) and that it wasn't (eg his character evidence.) Moreover, speculation about whether there was other evidence about De Gruchy's mind that was not known or admitted by the witnesses was relevant to assess how confidently inferences could be drawn from those witnesses' evidence. Accordingly, it is submitted that, by telling the jury that '[t]his is not a case about disturbed mind',[33] Grove J threw out the baby with the bathwater.

Whether Grove J's directions deprived De Gruchy of a fair trial or a reasonably open chance of acquittal is another matter, depending on 'assessments of the evidence and of the directions to the jury rather than ... principle.'[34] In one respect, the directions were overly favourable to the defence because they may have discouraged the jury from either accepting the prosecutor's original point or from finding that De Gruchy's mind was sufficiently disturbed to compel him to murder his family.[35] However, on appeal, the defence canvassed the possibility that Grove J's directions may have prevented the jury from finding (or having a reasonable doubt) that De Gruchy's mind was not disturbed.

In particular, the defence suggested that the directions would have detracted from the trial evidence of De Gruchy's gentle character and cordial relationship with the victims, and may even have implied the existence of hidden evidence that De Gruchy was disturbed. The problem with the defence's argument is that the absence of a motive was prominent throughout the trial, while Grove J fully directed the jury on the support that the character evidence provided to the defence, mentioning its relevance to not only propensity but also (dubiously, but generously) credibility.[36] In addition, he expressly warned the jury not to speculate

32 s137.

33 Above n1 at 283.

34 *Baraghith*, above n14.

35 A finding that De Gruchy was disturbed might also, conceivably, have benefited the defence if the jury felt that mental disturbance provided an innocent explanation of the defendant's suspicious behaviour, especially the note and his explanation of it. However, the defence apparently never pursued this argument, undoubtedly for sound tactical reasons.

about the existence of other evidence on this topic. These features led the NSW Court of Criminal Appeal to conclude that the errors in Grove J's instructions were harmless, especially given their context in an explanation of the irrelevance of the defences of insanity and diminished responsibility to the jury's verdict.[37]

It is submitted that both the defence and the appeal court missed the real danger of Grove J's directions. Justice Grove withdrew from the jury's consideration, not only the issue of De Gruchy's disturbed mind, but also the issue of the *murderer's* disturbed mind. The prosecutor, of course, raised this issue with the jury in order to include the defendant (despite evidence that he was gentle and without malice towards the victims) in the class of persons who might have committed the murder. However, the inference that the murderer's mind was disturbed also includes anyone with a sufficient mental disturbance in that class, so this issue supports the defence's hypothesis that the murderer was a stranger whose mental disturbance led him to attack the De Gruchy family at random.

Hence, the danger of the trial judge's comments on disturbed mind is that the jury might have understood the instruction to ignore the prosecutor's comment as requiring them to refrain from inferring that the murders were the product of a disturbed mind. As a consequence, the jury might have felt compelled to disregard the possibility that the murderer was an unknown person with a mental disturbance.[38] Of course, Grove J did repeatedly remind the jury of the defence argument that a stranger was responsible for the crime; however, this could not cure a misdirection that withdrew the more specific – and, given the nature of the killings, more compelling – hypothesis that a *mentally disturbed* stranger committed the crime. Such a withdrawal of a hypothesis of innocence, even where the evidence supporting it is slight, is 'a fundamental misdirection'.[39]

3. *The Murderer's Body*

De Gruchy's second complaint was about the NSW Court of Criminal Appeal's discussion of the facts concerning the forensic evidence about the murderer's identity.[40] The meagre state of that evidence at De Gruchy's trial is a pertinent reminder that the state of a man's body (eg his digestion, his hair and his DNA) is, often, no less a matter for inference and speculation then the state of his mind.[41]

The forensic evidence adduced in De Gruchy's trial mostly favoured the prosecution. De Gruchy was linked (by DNA in one case and by a palm print in the other) to two smears of what appeared to be blood near the crime scene. He was also linked to a petrol can near Adrian's petrol-soaked body (by fingerprints) and

36 The High Court rejected an argument that such directions are mandatory in *Melbourne v R* (1999) 198 CLR 1.

37 Above n1 at 285–286.

38 The general direction that '[t]his is not a case about disturbed mind' (id at 283) may also have had that effect.

39 *Barca v R* (1975) 133 CLR 82 at 106 (Gibbs, Stephen & Mason JJ).

40 The contentious portion of the judgment is at above n1 at 291.

41 Compare *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483 (Bowen LJ): 'the state of a man's mind is as much a [question of] fact as the state of his digestion.'

to carpet fluff that may have come from the carpet removed on the night of the murder (by its presence in the car he drove that night and by DNA.) Of course, the relevance of these pieces of forensic evidence is not in their mere general location – after all, De Gruchy lived in the house and used the car regularly – but rather because their nature and precise position supported the inference that they were left at the time of the murders or their aftermath. Clearly, the various inferences that could be drawn from this evidence were not overwhelming, and their value was dependant on their combination with each other and with the non-forensic evidence.

Indeed, the forensic evidence that was absent was probably more important than the evidence that was present. The absence of evidence from De Gruchy's clothes or body linking him to the crime scene was a key part of the defence case. The prosecution's response was to note that De Gruchy had ample opportunity to destroy such evidence; indeed, the reference to 'hav[ing] a shower' in the handwritten note and the murderer's apparent removal of carpet from the crime scene were put to the jury as circumstantial evidence supporting De Gruchy's guilt. It does not appear that the prosecution explicitly addressed the overall lack of forensics linking a stranger to the crime scene. However, the defence case included harsh criticism of the investigators for ignoring several opportunities to uncover evidence that might have exonerated De Gruchy.[42]

Given this background, the sole piece of forensic evidence implicating a stranger in the murders – blood-soaked hairs found on the hand of Adrian, one of the young victims – obviously loomed large in the defence case. There was compelling evidence that the hair was not torn from Adrian's head when he was murdered, as it was 8 centimetres long while Adrian's longest hair at the time of his death was four centimetres. This fact, as well as the obvious signs of a struggle between the (strongly-built) Adrian and the murderer, led the defence to argue that the hair must have been the murderer's. This was significant because of the apparent acceptance, at the trial and on appeal, that the hair was not the defendant's.[43]

One of the appeal grounds before the NSW Court of Criminal Appeal was that the jury's conviction was 'unreasonable in that it could not be supported by the evidence.'[44] In dealing with the hair, which the court acknowledged was one of

42 For a recent instance of a wrongful conviction caused by investigators' failure to obtain forensic evidence from a crime scene because of its low probative value in incriminating a suspect who was a resident of the crime scene, see *R v Button* [2001] QCA 133.

43 The basis for this assumption is surprisingly unclear, given that the assumption is essential to the defence's argument that the hair is evidence in De Gruchy's favour. The most likely basis is the evidence that the defendant's DNA was not detected on the sample; however, this result does not exclude the possibility that the hair was the defendant's (as the DNA in the hair may have been swamped by the blood from the killings.) For an example of a court finding that a DNA exclusion from mixed samples was inadmissible due to insufficient probative value, see *R v Stokes* [2000] NTSC 12.

44 Above n1 at 287–293. For those unfamiliar with the High Court's recent imposition of a change in terminology on Australia's courts of criminal appeal, this is the ground formerly known as 'unsafe or unsatisfactory.'

'[t]he most significant factors in favour of the appellant',[45] the three judges noted two alternative scenarios to the one proposed by the defence. One, which two judges ruled '[couldn't] be dismissed as entirely improbable',[46] was that the hair was old hair that coincidentally came to rest on Adrian's hand during the bloody fight or when he fell. The other, not raised, let alone explored, at the original trial but endorsed as a 'possibility'[47] by all three judges, was that the hair was Sarah's, transferred between the two victims by the murder weapon.[48]

The question before the High Court is not whether these alternative scenarios were plausible, but rather whether the majority's treatment of the scenarios betrayed an error in its resolution of the appeal ground before it. The defence took issue with the majority's concluding comment that 'it could not be said with any certainty, that the hair inevitably must have come from an assailant who could not have been the appellant'.[49] The defence's argument is that the majority, in this statement, placed the onus on the defence to disprove the alternative scenarios.[50] The problem with this argument is that it has its own alternative scenario: that the majority's statement was merely a consideration of whether the evidence about the hair, *on its own*, was necessarily inconsistent with De Gruchy's guilt.

It is submitted that a more likely complaint than the reversal of onus is that the majority, when it made its requisite independent analysis of the whole of the evidence[51], simply ignored the possibility that the hair came from a stranger present at the murders. In this regard, it is notable that the majority's final statement on the hair was the following: '[i]n the end, the evidence concerning the strands [of hair] was equivocal'.[52] If, by this statement, the majority was implying that the hair could be discarded from further consideration because of the alternative scenarios, then this is a clear misunderstanding of the nature of circumstantial evidence, which can be probative even when it supports more than one inference.[53] Equivocality does not imply irrelevance.

The correct approach to the consideration of a piece of circumstantial evidence is for the fact-finder (and the appeal court reviewing that fact-finding) to consider the likelihood of *all* alternative inferences when assessing the central question of whether the defendant's guilt was established beyond reasonable doubt.[54] If the

45 Id at 290–291.

46 Id at 291, contrast 293 (Simpson J).

47 Ibid.

48 A difficulty for the judges in assessing the likelihood of these scenarios was the lack of evidence about the order of the killings or the nature of Adrian's battle with his murderer, not to mention the absence of an in situ photo of the hair. In argument on appeal, the parties each made assertions about whether or not the hair was grasped in Adrian's hand or was merely resting between his fingers. Presumably, if the hair had been positively identified as the defendant's, then the parties would simply have swapped their stances on this issue.

49 Above n1 at 291.

50 Justice Gaudron appeared to agree with this argument at the special leave hearing: above n6.

51 *M v R* (1994) 181 CLR 487 at 493 (Mason CJ, Deane, Dawson & Toohey JJ).

52 Above n1 at 291.

53 *Morin v R* [1988] 2 SCR 345 at 358 (Sopinka J).

54 Ibid.

majority of the Court of Criminal Appeal failed to perform that task with respect to one of 'the most significant factors in favour of the appellant',[55] then De Gruchy has strong cause for complaint.

4. *Sherlock Holmes's Dictum*

Both the appeal grounds before the High Court in *De Gruchy v R* are complaints that inadequate attention was given to parts of the defence case in a circumstantial evidence trial. This concern is a familiar one in High Court judgments on circumstantial evidence,[56] which have regularly endorsed the sentiments set out in the famous direction delivered in *R v Hodge*,[57] an 1838 Liverpool murder trial. There, Alderson B instructed the jury to scrutinise 'any other rational conclusion than that the prisoner was the guilty person' and warned them of the significance of a single circumstance which is inconsistent with guilt and of the proneness of the human mind to distort the facts in order to establish guilt.[58]

This case is *not* an occasion for a further High Court reaffirmation of *Hodge*. Rather, despite the errors outlined above, the case is a disturbing instance of the *Hodge* approach being taken to extremes. Both trial and appellate judges ensured that the defence's evidence and arguments were given maximum exposure, especially in comparison to the prosecution's case. Notably, Grove J's summary of the evidence to the jury completely reversed the order of the cases presented in the trial.[59] That is, his summary first outlined all the evidence and arguments supporting the hypothesis that a stranger committed the murders, before addressing the prosecution's circumstantial case that De Gruchy was the murderer. Similarly, the NSW Court of Criminal Appeal's judgment also reversed the traditional order when making its independent analysis of the evidence and was, indeed, devoted largely to (criticism of) the defence's arguments.[60] However, as Wood CJ at CL's summary of the defence case makes clear, the majority of the defence's arguments were a criticism of the prosecution case.[61]

The danger of the approach of the various judges in the *De Gruchy* case is that, by focusing first and foremost on the defence case, attention may be deflected from weaknesses in the prosecution's case. Indeed, when the defence's evidence and theories are weak, *Hodge's* rule, taken to extremes, may become Holmes's:[62]

> "You will not apply my precept," he said, shaking his head. "How often have I said to you that when you have eliminated the impossible, whatever remains, *however improbable*, must be the truth?" [Emphasis in original]

55 Above n1 at 290–291.

56 *Peacock v R* (1911) 13 CLR 619; *Plomp v R* (1963) 110 CLR 234; above n37; *Chamberlain v R [No. 2]* (1984) 153 CLR 521; *Knight v R* (1992) 175 CLR 495; above n7, *Cutter*. Contrast *Grant v R* (1975) 11 ALR 503, where the court held that there is no mandatory formula for directing jurors in circumstantial evidence cases.

57 (1838) 168 ER 1136.

58 Id at 1137.

59 See above n1 at 286–287.

60 Id at 290–293.

61 Id at 289–290.

62 Arthur Conan Doyle, *The Sign of Four* (1917) at 51.

Sherlock Holmes's famous precept mandates that seekers of the truth should be *exclusively* concerned with inconsistencies between the evidence and the possible factual scenarios, rather than the probability of the various scenarios. Thus, in *The Sign of Four*, Arthur Conan Doyle's detective was able, from an examination of the locked room where a murder occurred, to deduce the surprising conclusion that the culprits were a one-legged man and a pygmy cannibal.[63]

In 1985, the House of Lords recognised that, whatever its utility in detective work, engaging in a process of elimination is a dangerous temptation for legal fact-finders. In *The Popi M*,[64] a trial judge, faced with the question of whether a ship's sudden sinking was caused by the 'perils of the sea', reasoned that, because no other explanations were open on the facts, the ship must have collided with a mystery submarine.[65] Lord Brandon, after characterising the trial judge's reasoning as an application of Sherlock Holmes's 'unjudicial dictum', declared its use inappropriate in legal settings because of the burden of proof, the incompleteness of trial evidence and the need for judicial findings to reflect common sense.[66] Courts, unlike (fictional) detectives, must always consider the possibility that the truth will never be known.

The danger of applying Sherlock Holmes's dictum in a criminal trial can be illustrated by considering the treatment of the most crucial piece of evidence in De Gruchy's trial: the reconstructed note in De Gruchy's handwriting found at the dam.[67] Justice Grove's summary and the appeal court's judgment dealt with this issue primarily by considering the defence's argument that the note was a description of a birthday party that the murderers took to the dam by accident.[68] The majority of the NSW Court of Criminal Appeal regarded this explanation as 'absurd',[69] because of inconsistencies between the list and De Gruchy's account, the improbability that he would have written down such a mundane list and that the murderers might have torn it up and taken it to the dam. Following this finding, they concluded that the note was 'powerful evidence for the Crown', given De Gruchy's 'extraordinary' explanation, the listing of items taken from the house by the murderer and the torn-up note's appearance alongside those items at their hiding place. These conclusions are very compelling: indeed, it is likely that the jury would have reasoned similarly if it had considered the defence's explanation first, as suggested by Grove J's summary.

The above reasoning largely – if not completely – neglects a consideration of whether the evidence concerning the note is compatible with the prosecution's hypothesis of guilt. If it was carried out, such a consideration would have exposed important weaknesses in the prosecution's case. Notably, like the 'birthday list' explanation, the 'murder list' explanation is not supported by all the items on the

---

63 Id at 58, 86–87.

64 *Rhesa Shipping Co SA v Edmunds and another [The Popi M]* [1985] 2 All ER 712.

65 Id at 716–717.

66 Id at 718.

67 See above n2.

68 Above n1 at 288–289, 292.

69 Id at 292.

note, and much of the list seems too mundane to be plausibly written down by a murderer. Moreover, as the prosecution conceded, key parts of the list (apparently describing a faked assault and the hiding of household items) were obviously not actually carried out by De Gruchy. Also, the form in which the note was found complicates the prosecution's case that De Gruchy was the murderer, as it suggests that he was simultaneously devious enough to plan a faked cover story for the murders but stupid enough to write the plan down and then, despite tearing the note into pieces, place it alongside the items from the household in a zip-lock plastic bag that preserved it from water damage.

In short, the note, which is supposedly the key piece of evidence in the prosecution's case, renders the theory that De Gruchy was the murderer, 'in its own... spectacular way, almost as unlikely as'[70] De Gruchy's claim that the note was innocent. This is not to suggest that the note was inconsistent with De Gruchy's guilt or that the jury, considering all the evidence, ought not to have convicted him of the murders. Rather, the purpose of this illustration is to demonstrate that fairness to an accused in a circumstantial case requires ensuring that fact-finders give full consideration, not just to defence evidence and hypotheses of innocence, but also any independent weaknesses in the prosecution's case.

Given the High Court's historical concern about the fair treatment of defence evidence in circumstantial evidence trials, it is understandable that De Gruchy, in his final appeal, focused on such errors in his trial. It would be unfortunate – not least for De Gruchy himself in any possible re-trial – if this limited the court's willingness to warn against the error of Sherlock Holmes's dictum. Rather, De Gruchy's complaints about the judicial treatment of the defence case in his trial should be recognised as supporting a broader lesson: that proper legal proof requires a consideration of the likelihood of all factual scenarios, rather than a narrower consideration of the consistency of the evidence with some of those scenarios. Accordingly, rather than reaffirming *Hodge*, the court should instead extend Alderson B's approach to the need to emphasise the weaknesses of the prosecution case that are not addressed by the defence's case for innocence.[71]

70 *Chamberlain*, above n56 at 628 (Deane J).

71 Indeed, the present High Court is especially well qualified to guide lower courts on this topic, given its repeated and emphatic insistence in recent years that trial and appellate judges pay utmost attention to every possible infirmity in the prosecution's case in sexual assault and child sexual assault trials. Arguably, circumstantial cases – including any possible re-trial for De Gruchy – provide a more apt instance for applying the court's judgments on forensic disadvantage (*Dogget v R* [2001] HCA 46) than the direct evidence cases where those judgments were originally formulated.