

THE GOLDEN THREAD

By
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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 a prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. 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.

[1935] AC 462, 481-2; [1935] All ER Rep 1,8; per Lord Sankey LC.

When Mortimer's **Rumpole** addressed the Chief Justice of the imaginary Neranga, he said:-

It (his client's guilty or innocence) is a matter for our Common Law! And when London is but a memory and the Old Bailey has sunk back into the primeval mud, my country will be remembered for three things; the British Breakfast, the Oxford Book of English Verse and the Presumption of Innocence! The presumption is the Golden Thread which runs through the whole history of our Criminal Law - so, whether a murder has been committed in the Old Kent Road or on the way to Nova Lombaro, no man shall be convicted if there is a reasonable doubt as to his guilt.

(**Rumpole and the Golden Thread, Pg 90**)

Being a lawyer (and therefore necessarily somewhat of a pendant), and familiar as I was with the pronouncements of Lord Sankey and Rumpole, it was with some surprise that I read the editorial in the *Northern Territory News* of 28 October 1994. It dealt with a report into allegations of sexual harassment and sexual discrimination against a former NSW Police Minister. It read in part:-

This (the investigation and report) has been done and the whole thing may yet end up in court where, given the nature of the claims it would appear (the former

Minister) *might have a fighting chance.*

Let us not forget that old adage that someone is innocent until found guilty beyond doubt.

What was this? The *golden thread* was said to be an *old adage*! It might as well have been described as *old baggage*!

ADAGE [16C: through French from Latin *adagium* saying] *A usually traditional saying that sums up an aspect of common experience or observation as a capsule-like piece of advice or admonition, such as the more hurry, the less speed.* [See **PROVERB, SAYING**].

The **Penguin English Dictionary** (2nd Ed., 1969), being the one most accessible to me in Chambers at the time of writing this note, defines *adage* as:-

An old saying, a proverb.

The presumption of innocence should not be regarded as merely an *old adage*. This is particularly so in the Northern Territory where Section 5 of the Criminal Code provides:-

Every accused person is presumed to be innocent until the contrary is proved.

In every jury trial in the Northern Territory those words, and the concept implicit in them, is hammered into the jury. The jury is told of them either in the judge's initial remarks or the prosecution's opening address. They are reminded of them, possibly *ad nauseam*, during the final addresses and the summing up.

That the rule laid down in **Woolmington**, and accepted as applying in Mortimer's Neranga in the case of **Mazenze**, applies in Australia is clear (see, from example, **DPP -v- United Telecasters** (1989) 91 ALR 1, 5). It is also recognised in the model Criminal Code a bill in respect of which, in Commonwealth terms at least, is presently before Parliament in Canberra. The Final Report of CLOC (The Criminal Law Officers Committee of the Standing Committee of Attorneys-General) recommends the following clauses in the Code which deal with the prosecution's burden of proof:-

601. Burden of proof - prosecution

The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged. The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on him or her.

601.1 *In this Code "legal burden", in relation to a matter, is the burden of proving the existence of the matter.*

601.2 *A legal burden of proof on the prosecution must be discharged beyond reasonable doubt unless the contrary intention expressly appears.*

In this commentary on these proposals, the Committee said:-

*One of the most hallowed and respected statements in the law is the description in **Woolmington -v- Director of Public Prosecutions** [1935] AC 462 by Lord Sankey of the duty of the prosecution to prove the prisoner's guilty as "the golden thread always to be seen throughout the web of the English Criminal Law".*

It is interesting, despite my dismay at the editorial's description of the presumption (one of the most hallowed and respected statements in law), to note that it was necessary for the House of Lords to pronounce on the issue in **Woolmington** as recently as 1935. We often hear proud declarations of the great traditions of the English Criminal Law (and, particularly, the safeguards provided for the accused to prevent injustices) but many of them have only become *traditions* during the last hundred years or so; (the right to defence counsel, to cross-examine witnesses and to give evidence on his own behalf have only emerged or been confirmed during that period). And, of course, it is known, despite all the supposed safe-guards, that miscarriages of justice can and do still occur. Nevertheless, the **Golden Thread** itself does have a real tradition and is not to be regarded with the scant respect shown by the Editor of the Northern Territory News. It must always be accorded its proper significance in our legal system.

As a postscript, those who are interested in the due and prompt administration of the criminal justice system might be interested in the course which Mr **Woolmington's** case took. His wife died on 10 December 1934. He was tried for murder at the Somerset Assizes on 23 January 1935. The jury disagreed and he was re-tried at the Bristol Assizes on 14 February 1935. He was found guilty, convicted and sentenced to death. He appealed to the Court of Criminal Appeal. This was heard and dismissed on 8 March 1935. An appeal to the House of Lords was initiated and heard on 4 and 5 April 1935. The decision as reserved and then delivered on 13 May 1935. The conviction was quashed. In six months there was a death, two murder trials and two appeals (not to mention an inquest or committal). The Australian justice system in the nineties hardly matches this dispatch of business.