

Episode Summary

Episode number: 115
Episode name: *Missing, Presumed Dead: The Case for Strong Circumstantial Evidence*
Guest(s): Mark Tedeschi

What area(s) of law does this episode consider? Evidence and the role of the prosecution.

Why is this topic relevant? How do you secure a murder conviction when there is no direct or physical evidence of the victim's death? The difficulty in successfully proving the elements of a murder charge beyond reasonable doubt in the absence of a body has led to the common misconception that it is impossible.

The disappearance of Dorothy Davis and Kerry Wheelan in the 1990s resulted in two extraordinary criminal cases on circumstantial evidence which led to the successful prosecution of Bruce Burrell for the murder of both women - though no bodies were ever found.

What legislation is considered in this episode? *Evidence Act 1995 (NSW), s 138*

What cases are considered in this episode? *Shepherd v The Queen (1990) 170 CLR 573*

- Shepherd was convicted of conspiring to import heroin into Australia. Special leave to appeal to the High Court was granted on one ground, and refused upon a number of others. The decision stands for the proposition that "*if it is appropriate to identify an intermediate fact as indispensable it may well be appropriate to tell the jury that that fact must be found beyond reasonable doubt*".

Nguyen v The Queen (2020) 269 CLR 299

- Nguyen was charged with one count of unlawfully causing serious harm to another and one count of assault aggravated by the use of an offensive weapon. He was video interviewed by police before being charged. This interview contained both admissions and exculpatory statements. It was not tendered. The decision stands for the proposition that "*[t]he prosecution may not "pick and choose" between statements which it says bear out its case and those which do not*".

What are the main points?

- A prosecutor's duty is not to represent police; they must present all relevant evidence, even if unfavorable to their case, and ensure the accused receives a fair trial.
- Judges have discretion to admit improperly obtained evidence, and in doing so must balance procedural fairness with the probative value of the evidence.
- Mark gives the example of a week-long search warrant that was slightly - but not intentionally - overstayed by police. In that circumstance, the value of the evidence outweighed the technical breach.

- Bruce Burrell was successfully prosecuted for the murders of Dorothy Davis and Kerry Whelan, despite their bodies never being found.
- The convictions were based on strong circumstantial evidence rather than direct evidence.
- Mark discusses the challenges of prosecuting without a body and the importance of assembling a compelling circumstantial case to prove murder beyond reasonable doubt.
- Mark's book "*Missing, Presumed Dead*" outlines the cases against Bruce Burrell in depth, highlighting the strength of building a wholistic circumstantial case and dispelling myths around them.
- Mark notes the ongoing debate about the "*no body, no parole*" laws and the potential impact on prisoners' behavior and rehabilitation opportunities.
- There are basically two types of circumstantial case.
 - There's what is loosely called the "*strands in a cable*" type of circumstantial case, in which each of the strands, when it's added to the cable, makes that cable that much stronger. And if you lose one or two or even a number of strands, you still might have a cable that has enough strands in it to withstand being stretched and to maintain its integrity.
 - The second kind, is what's loosely called "*links in a chain*". Where you have a links in a chain type of case, if you break one of those links, the whole chain is broken and the prosecution must fail.
- Mark stresses the importance of having a balanced life and himself engages in various hobbies like photography, writing, bushwalking, and native Australian bonsai cultivation to maintain this balance.
- For aspiring criminal lawyers, Mark recommends gaining practical experience through placements in Legal Aid, DPP offices, or doing Local Court work, and emphasizes that starting with even minor cases can build towards a career in criminal law.

What are the practical takeaways?