In January 2020, Johnny is tried by a judge sitting with a jury in the District Court of NSW on one count of Causing Grievous Bodily Harm (s 54 of the *Crimes Act 1900* (NSW) *–* Johnny has elected to have the matter heard by jury).

The prosecution’s case is that, at about 10.00 am on Saturday, 3 December 2019, Moira drove to the site of a coal seam gas mine in the New England region, near Armidale, owned by Rosebud Mining Ltd (**Rosebud**). Her six-year old daughter Alexis was in the back seat of the car (Moira is a single mum). Once there, and ignoring the sign saying that trespassing and filming were prohibited, she cut a hole in the fence, entered the property and began filming the mine site with her phone.

Johnny, an employee of Rosebud was picnicking at the site on a day off, with his aunt Jocelyn, who also works for Rosebud, and with whom he has lived for the last four years at company housing, and who has been partly supporting him throughout that time financially, and keeping house for him.

Upon seeing Moira filming the site, Johnny yelled, “*Oi, hippie. What are you doing here?! Get the f\*\*k out of here!*” Moira made a rude gesture at Johnny and he picked up a small, but sharp rock and threw it at her. The rock hit her in the left eye and she collapsed to the ground. An ambulance was called, but despite surgery Moira was permanently blinded in her left eye.

At the trial:

1. The prosecution calls Alexis, who says that she doesn’t want to give evidence. The judge disregards this, but prior to Alexis answering any questions, she asks her the following:

*Q: Do you understand that when you answer questions today, the good thing to do is to tell us the truth. But if you don’t know the answer to a question, or you can’t remember it, you can say that to us.*

*A: Yes. I see.*

*Q: Do you understand that if someone today says to you that something is true, but you don’t think so, then you can say that the person is wrong?*

*A: Yes.*

The judge determines that Alexis is not able to give sworn evidence, but that she can give unsworn evidence. She is not cross-examined.

1. The prosecution seeks to tender the video taken on Moira’s phone which shows the altercation, but cuts out just before Johnny bent down to pick up the stone. The video also briefly shows a security guard, David, wandering in the background, noticing the incident. David, was approached by Police at the scene, but reeked of alcohol, and looked sleepy, so he was left alone.
2. Jocelyn previously gave a statement to the police setting out the argument and that she saw Johnny throw the rock at Moira. However, when called to give evidence, she says, “*Do I have to do this?*” The prosecutor tells her she does, and continues on. When answering questions about the events of that day, Jocelyn begins to give very evasive answers. The prosecutor immediately begins cross-examining her about the incident. This includes:

*Q: You have previously given a statement that says that the defendant threw a rock at Moira, haven’t you?*

*A: No.*

Q: “*After the accident, the defendant paid off your substantial personal loans, didn’t he?*”

A: “*Maybe. I would have to check.*”

*Q: “You are lying, aren’t you? You are just covering up for the defendant, aren’t you? You are nothing but a liar.”*

*A: “No.”*

Over objection, the prosecutor then tenders the statement that Jocelyn gave to the police.

1. Moira gives evidence that Johnny threw the rock at her. She also gives evidence that he was wearing a T-shirt saying ‘Die, Greenie, Die!” (the camera did not capture this). Over objection this is allowed. She is not cross-examined.
2. Johnny began to give evidence that he didn’t throw a rock. The prosecution objected to this evidence and the judge disallowed the evidence.
3. During her summing up, the judge says to the jury:

“*Your task is to decide whether the Crown has established beyond reasonable doubt all of the facts alleged. This is different to there not being any doubt - a certain amount of doubt is okay. But not a reasonable doubt. Which is like saying that there you are very sure of guilt.”*

**Discuss the evidentiary issues that arise out of the above. In your analysis, you need only consider the topics taught up to, but not including hearsay.**

**Topics Covered so far:**

### ****1.     Introduction****

Further reading: Hunter et al, The Trial (2015)” Adversarialism, Advocacy, Proof and the Jury”

#### **1.1       The trial process**

EA, ss 11, 26-29.

#### **1.2       Background to the** Evidence Act 1995 **(NSW)**

**(You should be aware of the law reform reports giving rise to the original legislation and the more recent amendments. These reports are sometimes referred to in interpreting the legislation.)**

Evidence(Interim Report), Australian Law Reform Commission, (ALRC Report 26, 1985)

Evidence, Australian Law Reform Commission, (ALRC Report 38, 1987)

Uniform Evidence Law, Australian Law Reform Commission, NSW Law Reform Commission, Victorian Law Reform Commission, (ALRC Report 102, NSWLRC Report 112, VLRC Final Report, 2005)

Evidence Act 1995 (Cth) (‘EA’)

Evidence Act 1995 (NSW) (‘EA’)

Odgers, Stephen --- "Uniform Evidence Law at 21" [2017] CICrimJust 4; (2017) 28(3) Current Issues in Criminal Justice 311

#### **1.3        Relationship between the** Evidence Acts**, the common law and other statues**

EA, ss 8, 9

#### **1.4        Taking Objections**

Criminal Appeal Rules, r 4 (made under the Supreme Court Act 1970 (NSW))

#### **1.5        Dispensing with the Rules of Evidence**

EA, s 190

#### **1.6       Voir dire**

EA, s 189

**1.7**       **Leave given by the Court**

            EA, s 192

**1.8**       **Preliminary hearings**

            EA, s 190A

1. **Proof - Part 1**

**2.1       Burden of Proof**

*Apollo Shower Screens Pty Ltd v Building and Construction Industry Long Service Payments Corporation*(1985) 1 NSWLR 561 (KOP [15.30])

**2.2       Standard of Proof**

EA ss 140-142

*Qantas Airways Ltd v Gama*(2008) 167 FCR 537 (KOP [15.50])

*Green v The Queen*(1971) 126 CLR 28; (KOP [15.70])

*Shepherd v The Queen*(1990) 170 CLR 573; (KOP [15.80])

*R v Dookheea*(2017) 91 ALJR 960; 347 ALR 529; [2017] ALMD 4770;

*Jury Directions Act 2015*(Vic) Part 7

**2.3       Prima Facie Case**

*May v O’Sullivan*(1955) 92 CLR 654; (KOP [19.20])

*Doney v The Queen* (1990) 171 CLR 207; 96 ALR 539; (KOP [19.30])

### ****(3) Testimonial evidence****

**3.1       Calling a witness**

EA ss 11, 26

Clark Equipment Credit of Australia Ltd v Como Factors Pty Ltd(1988) 14 NSWLR 552 (KOP [2.40])

R v Kneebone(1999) 47 NSWLR 450; (KOP [2.50])

Velevski v The Queen(2002) 76 ALJR 402; (KOP [2.60])

**3.2       Competence and compellability**

EA ss 12-20

CPA s 279

ALRC 102 (KOP [2.80])

SH v The Queen(2012) 83 NSWLR 258; 222 A Crim R 43; (KOP [2.110])

R v GW (2016) 258 CLR 108; (KOP [2.130])

R v Khan (Unreported, Supreme Court of New South Wales, Hidden J, 22 November 1995) (KOP [2.150])

Kirk v Industrial Relations Commission of NSW(2010) 239 CLR 531;

Criminal Procedure Act 1986(NSW) s 279

**3.3       Sworn and unsworn evidence**

EA ss 21-25

**3.4       Examination of witnesses**

**(a)        Examination-in-chief**

EA ss 26-29, 37

GPI Leisure Corp Ltd v Herdman Investments (1990) 20 NSWLR 15 (KOP [2.180])

Ryland v QBE Insurance (Australia) Ltd

Tootle v The Queen(2017) 94 NSWLR 430; (KOP [2.220]

 **(b)       Reviving memory**

EA ss 32-34

Dodds v The Queen (2009) 194 A Crim R 408; (KOP [2.270])

**(c)        Calling for a document**

EA s 35

**(d)       Unfavourable witnesses**

EA s 38

R v Hogan [2001] NSWCCA 292; (KOP [2.290])

R v Le (2002) 130 A Crim R 44; (KOP [2.300])

DPP v Garrett (a Pseudonym) [2016] VSCA 31

Odisho v The Queen [2018] NSWCCA 19, [1]-[78], [155]-[189]

**3.5       Cross-examination of witnesses**

**(a)        Form of questioning**

EA ss 40-42, 38

Libke v The Queen(2007) 230 CLR 559; (KOP [2.320])

**(b)       Cross examination on documents**

EA ss 43-45

**(c)        The Rule in Browne v Dunn**

EA s 46

Browne v Dunn (1894) 6 Reports 67 (KOP [2.350])

Precision Plastics Pty Ltd v Demir(1975) 132 CLR 362; (KOP [2.360])

Payless Superbarn Pty Ltd v O’Gara (1990) 19 NSWLR (KOP [2.370])

R v Birks (1990) 19 NSWLR 677 (KOP [2.380])

Khamis v The Queen(2010) 203 A Crim R 121; (KOP [2.400])

R v SWC (2007) 175 A Crim R 71; (KOP [2.410])

Ward v The Queen [2017] VSCA 37*;* (KOP [2.420])

*Kadir v The Queen; Grech v The Queen*[2020] HCA 1

**3.6       Re-examination**

EA s 39

Drabsch v Switzerland General Insurance Co Ltd [1999] NSWSC 765; (KOP [2.440])

**3.7      Re-opening a Case**

R v Chin (1985) 157 CLR 671; (KOP [2.460])

Morris v The Queen [2010] NSWCCA 152

Urban Transport Authority of NSW v Nweiser(1992) 28 NSWLR 471 (KOP [2.470])

**3.8     Vulnerable witnesses**

Criminal Procedure Act 1986 (NSW), ss 291-291C, 294A-294C, 306M-306P, 306ZA, 306ZB, 306ZC, 306ZI, 306ZL.  Schedule 2, Part 29, particularly cll 82, 84, 85, 87, 88, 89, 90, 91.

### ****4       Documents****

EA, ss 47-51

Butera v DPP (1987) 164 CLR 180; (KOP [3.50])

Foreign Media v Konstantinidis [2003] NSWCA 161; (KOP [3.60])

Wade (A pseudonym) v The Queen (2014) 41 VR 434; (KOP [3.70])

NAB v Rusu (1999) 47 NSWLR 309; (KOP [3.80])

Australian Competition and Consumer Commission v Air New Zealand Ltd(No 1) (2012) 207 FCR 448; 301 ALR 326 (KOP [3.90])

Re Idyllic Solutions Pty Ltd[2012] NSWSC 568 (KOP [3.120])

### ****5       Real evidence****

EA, ss 52-54

R v Milat(Unreported, Supreme Court of New South Wales, Hunt CJ, 12 April 1996) (KOP [4.40])

Evans v The Queen(2007) 235 CLR 521; (KOP [4.50])

R v Skaf(2004) 60 NSWLR 86; (KOP [4.60])

Kozul v The Queen(1981) 147 CLR 221; (KOP [4.80])

### ****(6)   Relevance****

Further reading: Hunter et al, The Trial(2015), “Introducing the Law of Evidence: Relevance, Discretions and Fairness”

EA ss 55-58

Smith v The Queen(2001) 206 CLR 650; (KOP [5.40])

Evans v The Queen(2007) 235 CLR 521; (KOP [5.60])

### ****(7)   Discretionary exclusions****

**7.1       Probative value**

EA ss 135-137

IMM v The Queen(2016) 257 CLR 300; (KOP [6.40])

R v Dickman (2017) 344 ALR 474; (KOP [6.50])

R v Sood [2007] NSWCCA 214*;* (KOP [6.60])

**7.2       Unfair prejudice**

EA  ss 135-137

Ordukaya v Hicks[2000] NSWCA 180*;* (KOP [6.80])

Ainsworth v Burden [2005] NSWCA 174 (KOP [6.90])

La Trobe Capital & Mortgage Corporation Limited v Hay Property Consultants Pty Ltd(2011) 190 FCR 299; (KOP [6.100])

**7.3       Prosecution evidence in criminal proceedings**

EA s 137

R v Sood [2007] NSWCCA 214*;* (KOP [6.120])

R v Dann (2000) 123 A Crim R 506; (KOP [6.130])

Aytugrul v The Queen(2012) 247 CLR 170; (KOP [6.140])

**7.4       General power to limit use**

EA s 136

**7.5       Improperly obtained evidence**

EA ss 138, 139

Robinson v Woolworths(2005) 64 NSWLR 612; 227 ALR 353; (KOP [6.170])

DPP v Marijancevic(2011) 33 VR 440; 219 A Crim R 344; (KOP [6.180])

*Kadir v The Queen; Grech v The Queen*[2020] HCA 1