

Wrongful Convictions: Beyond Circumstantial Evidence and Psychological Bias towards Direct Evidence

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Abstract

The Indian Evidence Act, 1872, now replaced by the Bharatiya Sakshya Adhiniyam, 2023, is the result of centuries of debate on how evidence should be evaluated in legal proceedings. While some scholars, like Gilbert, insisted on a strict hierarchy where direct evidence held more weight, others, like Bentham, argued that logic and context should guide its assessment. James Stephen, the Act's drafter, took a middle path, focusing on relevancy without ranking different types of evidence. However, in practice, courts often favor direct evidence over circumstantial evidence, especially in criminal convictions, believing it to be more certain, while circumstantial evidence is seen as dealing with probabilities. This paper explores why this preference persists, even though neither the Act nor the Supreme Court explicitly endorses it. It argues that beyond legal principles, deeper judicial tendencies and structural factors influence how courts assess evidence and determine guilt.

Keywords: wrongful convictions, circumstantial evidence, direct evidence, psychological bias, Indian evidence act, last seen theory, miscarriage of justice

1. Introduction

The Indian Evidence Act, of 1872 or the new, Bharatiya Sakshya Adhiniyam, of 2023 ("the Act") is one of the final products of the long rationalist tradition of the Law of Evidence developed over centuries, which was debated vehemently amongst great scholars of the times.

Whereas scholars like Gilbert argued for subsuming the entire law of evidence under the principle of "best evidence rule", creating a formal hierarchy between various kinds of evidence, scholars like Jeremy Bentham, contesting such a rigid gradation between the different kinds of evidence, argued for "Anti-Nomian thesis." Bentham argued for logic and common sense as determining factors based on the facts of each case to decide the weight of evidence.

Nonetheless, James Stephen, drafter of the Act, while focusing on the doctrine of relevancy did venture into the territory of legal relevance (laying down relevant facts), but chose not to follow a priori rigid gradation of evidence. Thus, the Act neither creates any particular hierarchy between direct and circumstantial evidence nor can such hierarchy be said to be guided by the Rule of law, rather, the Supreme Court has time and again held, that weighing of evidence is the "Rule of Prudence."

However, the jurisprudential developments would show that whenever the question of conviction of the accused comes before the courts, the courts give preferential treatment to direct evidence over circumstantial evidence.

Such, preferential treatment of direct evidence comes from the presumption that it has "certainty", unlike circumstantial evidence which is concerned with "probability." However, it is pertinent to note that, neither the Act nor the Supreme Court itself has explicitly ever given differential treatment to direct over circumstantial evidence in matters of conviction i.e., both pieces of evidence can individually be the sole basis for the conviction of the accused. However, the burden of proving a wrongful act via circumstantial evidence is much higher, with a lower number of convictions.

This paper argues that something beyond the rule of prudence explains this preferential treatment by courts towards direct evidence over circumstantial evidence.

2. Scheme of the Paper

Thus, the scheme of this paper is divided into four parts. Part I shall look into the standard laid down by the Supreme Court to base convictions solely on circumstantial evidence. Part II shall look into preferential treatment

given to direct evidence over circumstantial evidence by courts and reasons for such preference, which cannot be explained by the rule of prudence, purporting that the reason for such biases is psychological. Part III will delve into how such treatment of circumstantial evidence helps serve the end of justice by looking at the “Last Seen theory” as circumstantial evidence, while also establishing that psychological bias towards directive evidence is the reason for more wrongful convictions. Concluding in Part IV, this paper will make a case for the recognition of such psychological bias, so that the focus of wrongful convictions can be shifted to the inherent flaws of direct forms of evidence.

Part I: Circumstantial Evidence as the Sole Basis for Convictions

It is the well-established position of law that whenever the conviction of an accused has to be based solely on circumstantial evidence, then: Firstly, the circumstances from which such a conclusion of guilt is to be drawn should be fully established. Secondly, the chain of facts or circumstances should be so complete as to exclude any other hypothesis except that one which needs to be proved.

In *Hanumat v. State of M.P.*, Justice Mahajan, laying down the rule on the “nature, character and essential proof” of circumstantial evidence to be the sole basis of conviction held that In cases relying on circumstantial evidence, the prosecution must first firmly establish the circumstances leading to the accused's guilt. The facts must point exclusively to the accused and be so strong and conclusive that no other explanation is possible. Thus, the circumstances should rule out every other hypothesis except that the accused is guilty. Simply put, the chain of evidence must be complete, leaving no reasonable doubt, and it should logically and convincingly show that, within human probability, the act was committed by the accused.

In *Sharad Birdichand Sarda*, referring to Justice Mahajan’s opinion in the *Hanumat* case, the Supreme Court laid “Panchsheel” i.e., five golden principles of proof of a case based on circumstantial evidence, as follows:

1. The circumstances leading to the conclusion of guilt must be fully established.
2. The established facts must align solely with the hypothesis of the accused’s guilt, meaning they should not support any other explanation except that the accused is guilty.
3. The circumstances must be definitive and conclusive in nature.
4. They must rule out every possible hypothesis except the one being proved.
5. The chain of evidence must be so complete that it leaves no reasonable ground for any conclusion consistent with the innocence of the accused and must demonstrate that, in all human probability, the act was committed by the accused.

It is pertinent to note that such a standard is not a creation of Indian jurisprudence, rather it is a mere restatement of the standard required across jurisdictions to base conviction solely on circumstantial evidence.

Sir William Wills, in his work on the law of evidence, has written that whenever the conviction has to be based solely on circumstantial evidence “*to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis [emphasis provided] than that of his guilt.*”

However, it is important to distinguish between the burden of standards mentioned above, In *Hanumat* and *Sharad Birdichand* “*every possible hypothesis*” is the operating principle, whereas in Sir Will’s work “*any other reasonable hypothesis.*”

Thus, circumstantial evidence is a game of probabilities, as there is no direct evidence to corroborate what happened at the time of the incident, nonetheless, the burden imposed on the prosecution to prove the guilt of an accused based solely on circumstantial evidence is not only high, but rather an impossible one. The operating principle “every other hypothesis” is more than a reasonable standard as in Sir Will’s “reasonable hypothesis.” This differs from direct evidence, which, unless its reliability is questioned, directly establishes guilt.

Therefore, Such a burden of proof on the prosecution, can thus only be justified if such evidence has a low probative value, but in actuality, it has been found even when the probative value between the direct and circumstantial evidence is the same, with an equal error rate, the courts have preferred direct over circumstantial evidence.

Part II: Beyond the Rule of Prudence and Psychological Biases

This part delves into the underlying reason behind such preferential treatment towards direct evidence.

Scholars like Richard Greenstein have argued that there is no real difference between direct and circumstantial evidence, with some creativity all evidence can be classified as circumstantial.

However, the distinction between direct and circumstantial evidence is not only well established in law but also in logic and common understanding. Thus, taking the difference between the two types of evidence as established, this paper shall delve into the reasoning behind the preference towards direct evidence.

Behavioural studies suggest that when conviction is to be solely based on circumstantial evidence, the decision-makers are hesitant to convict. Eyal Zamir highlights that such a finding is true even in cases where the probative value of circumstantial evidence is equal to or greater than direct evidence itself.

Binyamin Blum gives an example of such psychological bias in his work by referring to one such study, wherein participants were asked if they would convict someone of speeding using two different speed-camera technologies. One method recorded the car's speed in a single shot (direct evidence), while the other used a system of two cameras that captured the car's location with precise timestamps, requiring an inference of the car's average speed (circumstantial evidence). Both technologies had the same minimal error rate (2%), and the recorded speed was the same in both scenarios: 125 kilometres per hour (78 mph) in a 100 kilometres per hour (62 mph) zone. Despite no rational reason to prefer one technology over the other, 81.4% of participants were more likely to convict based on direct evidence, compared to 60% who would convict based on circumstantial evidence.

Furthermore, Eyal Zamir has also argued for "Gain-Framed Inferences" i.e., that bias towards gain is more acceptable than loss. Thus, a study examined how participants reacted to a dairy farmer supplying milk with an unusual protein percentage. Participants were divided into two groups: one said that high protein content indicated higher quality and a higher price ("gain condition"), and the other said that low protein content meant a price reduction ("loss condition"). Each group was further split based on the type of evidence provided regarding the milk's protein content—either direct or circumstantial. Despite the error rate being constant and minimal, indicating no rational basis for a distinction, participants exhibited a consistent bias towards the direct evidence. Furthermore, this bias was notably found stronger in the "loss condition" compared to the "gain condition."

Thus, scholars like Blum and Zamir, analysing the above study to criminal cases have well argued that the criminal justice systems are guided by the principle that no innocent person should be sent to jail, irrespective of hundreds of accused going scot-free. Thus, the greater willingness to rely on inferences that establish innocence is considered as the gain condition, which becomes another reason for lower convictions based on circumstantial evidence.

A third study, which proves psychological bias towards direct evidence, as John Turri calls it, is "Source-content Bias" study i.e. when considering circumstantial evidence, adjudicators imagine alternative possibilities or scenarios suggested by the defence lawyers. In an experiment examining this bias, participants were hesitant to draw negative conclusions from the circumstantial evidence given to them. That is to say, oftentimes fact-finders distrust circumstantial evidence to draw inferences and they rely on defence lawyers' imaginative scenarios, as there is always another possibility. However, this may seem irrational sometimes, because the probability of something happening may be higher as compared to the defence lawyer's alternative scenario.

Furthermore, the bias towards direct over circumstantial evidence was also well experimentally recorded by Gary Wells, i.e. a fictitious civil case involving a colour-blind elderly woman suing the Blue Bus Company (BBC) for running over her dog. Mock jurors, including judges, were given identical information: BBC and Grey Bus Company (GBC) had equal chances of hitting the dog. One group received direct evidence, while the other received circumstantial evidence.

The direct evidence showed the weigh-station attendant's logbook, was accurate 80% of the time. The circumstantial evidence involved tire-track analysis, with a 20% match to GBC and 80% to BBC. Both scenarios had an 80% probability of guilt, meeting the "*beyond a reasonable doubt*" standard. However, Judges were four times more likely to convict BBC with direct evidence than with circumstantial evidence. This indicates that judges perceive an 80% chance of truth differently based on the type of evidence, highlighting a fundamental psychological distinction between direct and circumstantial evidence.

Hence, all these studies backed by behavioural and psychological research show that irrespective of no legal gradation of evidence and lack of prudential differences, there exists a psychological bias among decision-makers to favour direct evidence over circumstantial evidence.

Part III: Preventing Miscarriage of Justice

This part would look into why such psychological bias helps prevent miscarriage of justice, by relying upon the example of the last seen theory.

The "last seen" theory is a form of circumstantial evidence that is highly regarded in the Indian legal system. While Indian law incorporates many principles from common law, the "last seen" theory has become particularly significant in India. This theory is closely related to Section 109 of the Act, which states that if a fact is known

only to a particular person, that person must prove it. This provision creates exceptions, especially in cases where the accused was last seen with the victim, placing the burden on the accused to explain the victim's subsequent condition or disappearance.

Like any other circumstantial evidence, the Last Seen evidence is also required to be looked at along with other circumstances, thus independently and conclusively it cannot be the premise on which liability can be established. However, the courts have noted that it raises suspicion and establishes a link between the accused and the victim in their last moments. When corroborated with other evidence, it can be used to convict the accused.

As evidence, the Supreme Court has categorized last seen as a weak form of evidence. Nonetheless, the courts have often used last seen as the primary tool to establish the guilt of the accused. Out of many, one such example is the Ganpat Singh v State of Madhya Pradesh case.

In Ganpat Singh, the "last seen" principle was crucial in securing the conviction of the accused, even without any major corroborating circumstantial evidence. The accused was convicted of murdering a woman mainly because he was the last person seen with her and had lied to her son. Both the trial court and the High Court heavily relied on the "last seen" evidence for the conviction.

The Supreme Court, reversing the orders of the High Court of Madhya Pradesh, held:

"the mere circumstance that the Appellant was last seen with the deceased is an unsafe hypothesis to found a conviction on a charge of murder in this case. The lapse of time between the point when the Appellant was last seen with the deceased and the time of death is not minimal. The time of death was estimated to be between two to four weeks prior to the recovery of the body."

Thus, this case is just one of the many examples, wherein circumstantial evidence of last seen was technically given equal place to direct evidence by the trial court and the High Court to base the conviction of the accused. However, if one were to go back to the psychological biases, it is the same biases that favour direct over circumstantial evidence, that prompted the Supreme Court to emphasise a higher burden to convict solely based on circumstantial evidence, that indeed prevented any miscarriage of justice in this case.

Thus, this case is one of the many examples, wherein psychological biases towards direct over circumstantial, actually prevented a miscarriage of justice. The tendency of the court, to be against any negative inference against the accused, coupled with the underlying principle of the criminal justice system to protect innocents from going to jail, and the possibility of an alternative hypothesis prevents many wrongful convictions.

This brings this paper to the larger point of wrongful convictions. A study conducted by Hugo Adam Bedau & Michael L. Radelet, shows that 68% of known wrongful convictions stemmed from direct evidence, whereas only 9% relied on circumstantial evidence. Such a study highlights that psychological biases of favouring direct over circumstantial evidence indeed prevent any miscarriage of justice as decision makers are more cautious to convict the accused based on circumstantial evidence, thus the rate of wrongful convictions is lower. However, reversely it also shows that this favour of direct evidence leads to more wrongful convictions and miscarriage of justice. Thus, it is pertinent to note that the focus on dealing with wrongful convictions can be shifted to the inherent flaws of direct forms of evidence, rather than always putting conviction-based circumstantial evidence in the spotlight for miscarriage of justice.

Part IV: Conclusion

The peaceful coexistence of individuals and communities in any society is fundamentally dependent upon the efficient functioning of a justice delivery system. Whenever such a system is defaulted, the stability of the state is compromised and consequently, society erupts like a volcano. Thus, finding the truth becomes extremely paramount in cases of criminal wrong, as any lack in such cases, leads to injustice and consequently social furor. As Professor Thomas Weigend argues, understanding precisely what occurred, identifying the perpetrator, and uncovering the motive behind the crime is essential for any effort to restore social harmony through justice. Moreover, establishing the truth is crucial for another reason: criminal penalties represent society's strongest expression of moral condemnation. Consequently, it is vital that these penalties be applied solely to those who are truly guilty. Thus, whenever an innocent is wrongfully convicted, it becomes and should become a matter of grave concern for any state and society.

Hence, this paper, while making a case for acknowledging that the preferential treatment of direct over circumstantial evidence is not merely because of prudence, but rather a strong psychological bias, purports to make a case for dealing with inherent flaws of direct forms of evidence. Neither the scope of this paper is to analyze any specific flaws of direct forms of evidence, nor does it deal with any normative analysis of such psychological biases against circumstantial evidence.

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