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CIRCUMSTANTIAL ASPECTS OF ARSON

WILLIAM H. HOPPER

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In order to have a basis for understanding the subject matter some definitions or at least some clarifications will first be considered. Black's Law Dictionary has, among other things, the following to say about circumstances: "The particulars which accompany an act. Facts or things standing around, or about, some central fact. The surroundings at the commission of an act." In the case of arson investigation the Circumstantial Aspects would be "facts or things standing around, or about, some central fact". The central fact being the fire itself. These circumstances may have occurred just prior to the fire, during the fire, after the fire, or perhaps months prior or subsequent to the fire. For this reason the circumstances surrounding any arson investigation are multitudinous. It is believed that in any one investigation the fact seekers never do determine all of the circumstances.

Because they are so related it is felt that Circumstantial Aspects and Circumstantial Evidence are practically synonymous. For this reason we shall emphasize circumstantial evidence and its varied ramifications. Of course there are many circumstances which do not amount to evidence. There are two general types of evidence: direct and circumstantial. Direct evidence, as its name implies, proves some point directly. An example would be where a witness sees a person commit a crime. There is no inference in direct evidence.

Circumstantial evidence is a more round-about way of proving a point. One or more facts are shown or proved, and then an inference is made from these facts. The reasoning is as follows: If fact A, B, and C are true, then it must follow that D is the only reasonable conclusion. Of course, we should always avoid jumping to any conclusion. This is particularly true when handling circumstantial evidence because the first few facts may indicate a certain conclusion; but if we continue the investigation and uncover additional facts our first conclusion may be altered radically. A good point to remember is that although some physical evidence may be direct evidence, the majority of physical evidence is actually circumstantial.

One of the Chief Justices of the United States Supreme Court once gave a very apt illustration of direct and circumstantial evidence. If you happen to see a person discharge a gun at another person, you see the flash, you hear the report, you see the second person fall dead, and you infer that the first person has killed the second one because you are inferring that a bullet was discharged from that particular gun

—the usual and natural cause of such an effect. However, you did not see the bullet leave the gun, pass through the air, and enter the body. Thus, your direct testimony is circumstantial. It is possible, even though improbable, that the gun held a blank, and the person died from a heart attack or was killed by a bullet from another gun which you did not see.

Unfortunately there is a strong bias against circumstantial evidence. This feeling of unreliability about circumstantial evidence has been fostered down through the years. No doubt we have all heard the remarks: "I wouldn't convict a person on circumstantial evidence", or "There are many innocent people in jail today because of circumstantial evidence". It is believed that such statements emanate from those individuals who do not have a clear understanding of circumstantial evidence. We, as arson investigators, can help this situation by continually trying to clarify and bring some understanding to this subject. Actually, there is a sound, logical basis for circumstantial evidence having sufficient probative value. Under direct evidence, one perjured witness might well be sufficient to convict the accused. While under circumstantial evidence a chain or rope of individual facts must be collected, woven together, and presented in court. Thus there might well be a half dozen or more witnesses, and it would be almost impossible for all of them to give perjured testimony. The above example is no reflection on direct evidence, and we should strive to obtain it when we are able to do so. The only real trouble with direct evidence when building an arson case is that we so seldom have any.

Circumstantial evidence may be divided into two general types:

1. A chain of circumstantial evidence (barely a sufficiency)—whereby if one link in the chain fails, the entire chain is broken. Each link must be proved beyond a reasonable doubt, because the strength of the whole chain depends on the strength of each individual link.
2. A rope or cable of circumstantial evidence (more than a sufficiency)—whereby one fact does not necessarily depend upon another. Thus, the whole rope may have probative value and sufficient strength even though one strand is weak. Therefore, one strand which was not proved beyond a reasonable doubt would not break the rope.

The second type, or a rope of circumstantial evidence, is believed to be a truer representation of Circumstantial Aspects when the investigator is constructing an arson case. Curtis on the Law of Arson, Section 491, states: "Each case necessarily depends upon its peculiar facts; and circumstantial evidence may be sufficient if it is consistent with guilt, inconsistent with innocence, and removes every reasonable hypothesis except the guilt of the accused". An explanation of this statement in connection with our rope of circumstantial evidence is as follows: Consistent with guilt means that the strands of circumstantial evidence, when woven together, show that the accused, beyond a reasonable doubt, is the perpetrator of the act of burning the structure. There is nothing left upon which to base a reasonable belief that he is innocent; and thus the rope of circumstances is inconsistent with his innocence. It is true that any individual strand of the rope might indicate either guilt or innocence, but when woven together with the other strands it proves only guilt. An hypothesis

is a tentative theory, supposition, or assumption which we adopt in order to explain certain known facts—a form of inductive reasoning. And thus, if the circumstantial evidence discards, as invalid, any reasonable assumption or supposition of the defendant's innocence, then it follows that the evidence is sufficient; and every reasonable hypothesis except the guilt of the accused has been removed.

In *Smith v. State*¹, the court said: “. . . it does not follow that the criminal must go unwhipped of justice because absolute proof is not presented by the state. If there be enough shown to convince the jury beyond a reasonable doubt that the guilt of the accused has been established to the exclusion of every other reasonable hypothesis, and no other reasonable hypothesis is suggested by the evidence, and there is nothing to indicate that the jury failed to accord to the defendant every consideration to which he was entitled, a reviewing court will not arbitrarily say that the conviction should be set aside”.

Before proceeding further it may be well to briefly consider what is necessary for obtaining an arson conviction. Simply stated, it must be proved that a burning occurred; that it occurred as a result of a criminal agency; and that the defendant is the criminal agency. The first may be shown by direct and circumstantial evidence; usually from the testimony of firemen. The second step, or *corpus delicti*, may be shown by either direct or circumstantial evidence; and as we all know it is generally the latter which proves this step. The third step, or defendant's connection with the burning, is almost always shown by circumstantial evidence, with the few rare exceptions where we have an eye witness; and even in those cases we still employ circumstances to substantiate our case. In *Brower v. State*,² the court said:

It is well settled that the evidence in proof of the *corpus delicti* does not have to be entirely independent and exclusive of the confession. It is sufficient when the *corpus delicti* is established by other evidence and the confession taken together. . . .The evidence, aliunde the confession, was sufficient to show that a real crime had been committed; and this, together with the confession itself, was ample proof to sustain the verdict of the jury”.

The circumstances surrounding and connected with any arson case are far too numerous to list; and because of the nature of the crime new circumstances are continually arising while the old ones remain with us. Records are a valuable source of circumstances. Bank records and business records will often reveal the financial condition of the person. The deliberate act or acts of the accused may be used to infer intent. Thus, if property is insured and the accused set fire to it, a jury may infer intent—that the accused burned the property to defraud the insurance company. Of course, if the amount of the insurance is in excess of the value of the property this fact will receive greater weight. However, it should always be borne in mind that just because the insurance is equal to or less than the actual value of the property, it does not mean that the fire was not of incendiary origin. There have been some cases where the accused actually reduced the amount of insurance cover-

¹ 68 S.E.2d. 393 (1951).

² 64 So.2d. 576 (1953).

age prior to the fire in an attempt to throw the investigators off. This would be the unusual, which we must always watch for.

Although motives are not an essential element of the crime of arson, it may be worth our time to consider some of them briefly because they represent a general category under which many circumstances may fall. Actually, all phases of arson investigation are interrelated, and if we are to be successful in our endeavor we must correlate those relationships. There are few cases where the subject of motive does not arise. We, as investigators, are asked time and time again: What was the motive? The prosecuting attorney wishes to have this information, for although it is not essential, it is another circumstance which will aid in strengthening our rope of circumstantial evidence.

Briefly stated there are four main categories of motives: economic gain; personal satisfaction; concealment of another crime; and pyromania. The circumstances inherent in these four categories are manifold. Take, for instance, the economic gain motive. We might look for and ask for some of the following in the case of a commercial fire:

1. A check of the merchandise remaining to determine if the claimed value was present.
2. An audit of the books should certainly indicate the condition of the business.
3. Is the business making a profit? Is it losing money? Is bankruptcy imminent?
4. Have market conditions varied or changed in the last few months?
5. Are the owner's tax reports correct and truly stated?
6. Are there any shortages?
7. Has there been any change in the neighborhood which would affect this business?
8. Is there over-insurance?

The above questions are not all-inclusive, but merely indicative of what we should seek to determine as being circumstances surrounding the particular business.

In the case of a dwelling we might ask some of the following questions:

1. Has the owner been trying to sell or rent the property?
2. What degree of success had the owner had in selling or renting? What was the difference between his asking price and what he was offered?
3. Is there any structural defect which would be expensive to repair?
4. Does the owner or his family wish to move?
5. Does the owner need ready cash?
6. Is the owner or renter having domestic troubles?

Under the category of personal satisfaction we might run into sabotage; strikes, intimidation; and hatred because of revenge or spite. Under such a situation we would want to determine if the accused had made any threats prior to the fire; and if there are any ill feelings between any of the parties involved.

Where a fire has been set to conceal another crime it is of the utmost importance to determine the nature of the other crime. This determination would certainly be a circumstance that might well lead to the discovery of additional facts and ultimately to a conviction of the accused.

Under the category of pyromania the same general rules and ideas are apropos in the gathering of circumstantial evidence. And remember this, even if there is direct evidence it is always wise to go on the assumption that we have no direct evidence. By following this line of preparation we will not be left holding the proverbial bag if our direct evidence does not materialize at the trial. All investigators have had the sad experience of the prosecuting witness failing to appear, or changing his testimony if he does appear.

Circumstances, which may or may not amount to evidence, surround each and every fire. It is up to us, as arson investigators, to gather these circumstances and attempt to weave our rope of evidence. Following this, or better yet, during the weaving process it is generally wise to consult with the prosecuting attorney. We are not the final arbitrators of what is and what is not evidence. A close cooperation between the investigator and the prosecuting attorney will pay big dividends.

There are certain reminders or points which we should always keep in the back of our minds while conducting an investigation. One of these would be access to the dwelling or building. We should determine who had keys and how long they had had them. There have been some cases where the owner gave keys to all employees shortly before the fire in order to avoid having sole access. We should determine who was the last person to leave the premises, and what were the circumstances at that time. Were all of the doors and windows secured? Were the lights cut off? What system of heating was used, and was it off? From these and other questions we may be able to determine if the suspect had access, or even sole access to the building. The question of access may loom very large in the investigation of some fires; and it may be sufficient to form one of the stronger threads of our rope of circumstantial evidence.

The firemen are valuable sources for information appertaining to the fire itself. Often they are able to give a clear picture of how the fire was burning when they arrived, and how it burned thereafter. They may be able to answer such questions as:

1. Was there more than one fire—separate fires?
2. What was the color and density of the smoke?
3. Was there much heat in connection with the burning?
4. Were there any flashbacks? Was there any difficulty in extinguishing the blaze?
5. Did the fire originate inside or outside of the structure?
6. Were the doors and windows secured upon their arrival?
7. Were the window blinds drawn?
8. Was there anything on the inside which impeded the progress of the firemen into the building?
9. Were there any unusual odors?
10. Was there any unusual or peculiar behavior on the part of any of the spectators?
11. Did they notice anything which, when considered with other circumstantial facts, might be of a suspicious nature?

The firemen can be of assistance on practically any fire which they have helped extinguish. The important point is to secure all details from the firemen even though

some of the circumstantial facts do not seem to be related. It is our duty as arson investigators to elicit this information from the firemen. However, remember that if we do not ask the direct question to a specific point, we may not receive the answer to all of the details. An example of the effective use of firemen's testimony is shown in *Boroquez v. State*,³ in which the court said:

"The conclusion that the house was incendiarily set afire is authorized by the presence of kerosene in various places and on different objects of the room. Appellant's immediate presence there, as well as his acts and conduct at the time of the fire, warrant the conclusion that he was criminally connected therewith".

Investigators of automobile fires use circumstantial evidence on a large percent of their cases. It is used even if you have direct evidence in the form of a witness who saw the fire set. The list of probable motives is gone over, and many of them eliminated at the start. The salvage is inspected for telltale signs of an incendiary fire. Some of these signs would be a loose drain plug or no plug at all; indications that the gas line has been tampered with; the kind and type of burning; whether any items have been removed from the vehicle; and the surrounding area is inspected for a container, syphon hose, or a tool which might have been used. Thus, the investigator is building his circumstantial case by collecting many, apparently unrelated facts. But when he compiles these facts, correlates them, and weaves his rope he may well have sufficient evidence upon which to base a conviction.

In arson investigation we must always look for both the usual and the unusual. And as we pick up the individual strands of circumstances and start to weave them into our rope of evidence, we should check each strand for its strength. We want to weave a pattern around the defendant to such an extent he will have the utter feeling of hopelessness. It is not easy to fashion a circumstantial case of arson. Circumstances are a part and parcel of every facet of life, including an arson investigation; and we should strive to know, understand, and utilize the circumstances which will furnish evidence of probative value.

³ 258 S.W.2d. 318 (1953).