INTRODUCTION

In The Accused, the viewer is escorted through an actual courtroom drama. The accused is a middle-aged man charged with the importation of drugs—a crime that carries a penalty of more than 20 years imprisonment. The film is structured so that we see the trial mainly from the point of view of the defence barristers—Philip Dunn QC and Laurie Levy (filmmakers note—this is because the defence team offered the most access to the filmmaker in terms of how much they were prepared to be filmed, had the prosecution made a similar decision then a lot more of their “behind-the-scenes deliberations
The Accused would have also been able to be shown – in their passionate efforts to have their client acquitted. We witness their emotional vagaries not only in court, but also before and after their courtroom theatrics as the plot of the trial unfolds. The film-maker invites us to ponder the guilt or innocence of the accused as we watch the defence and the prosecution – Hilton Dembo - make their cases. We also consider the trial from the perspective of the trial judge – Justice Christine Wheeler – and from the point of view of a layman – Brian Duke – a retired accountant who watches the trial from the gallery. This documentary is the product of the first ever criminal trial in Australia to be filmed from beginning to end. It provides fascinating insights into the pathos of the courtroom and the thinking of criminal barristers as they plan their strategies (and as they deal as human beings with the gravity and human consequence of their work).

The Accused is both a documentary and a drama, as the viewer sees and hears the workings of the criminal justice system, and watches the courtroom drama which - as the trial judge puts it – ‘is more interesting than Reality TV because it’s actually real’.

CURRICULUM LINKS

The Accused will have relevance and interest for students from middle to senior secondary levels studying Legal Studies, English and Media Studies.

BEFORE WATCHING THE FILM

The following trial procedure occurs when an accused pleads not guilty:

- The case is called and appearances are entered (who is acting on behalf of whom).
- The accused is arraigned (the name of the accused is called out and the charges are read to the court).
- A jury is empanelled
- Opening addresses are made – the prosecutor gives an opening address telling the jurors what the case is about, and refers to important witnesses and evidence. The defence replies to the prosecutor’s opening address.
- The judge addresses the jury – on the issues in the trial.
- The prosecutor calls the crown witnesses – each witness is sworn in, then examined-in-chief (by the prosecutor), cross-examined (by the defence counsel), then re-examined (by the prosecutor).
- Defence council calls witnesses – each witness is sworn in, then examined-in-chief (by the defence counsel), cross-examined (by the prosecutor), and re-examined (by defence counsel). The accused can choose to give evidence and be cross-examined, or remain silent.
- Closing addresses are made - the prosecutor and the defence counsel address the court with closing speeches. The prosecutor addresses the court first. Both counsels explain to the jury the important parts of the evidence that support their case. They also address the judge on the relevant points of law.
- The judge sums up and directs the jury – the trial judge sums up, explaining the relevant points of law to the jurors. This explanation includes the burden of proof, the standard of proof and the main points relating to the offence.
- The jury retires to consider its verdict – the jurors go into the jury room.
- The jury gives its verdict – if the accused is found not guilty, he or she is free to leave the court, and cannot be tried again for the same offence. If the accused is found guilty, prior convictions are heard. If the jury cannot reach a verdict, there is a ‘hung jury’ (i.e. the accused has not been found either guilty or not guilty), and the accused can be tried again on the same matter at a later date.
- Sentencing – the trial judge passes sentence.

What is the purpose of:
- a   examination-in-chief
- b   cross-examination
- c   re-examination?

AFTER WATCHING THE FILM

EXPLORING THE START

What is the intention of the film-maker in the opening of the film? The opening of a documentary film, or “set-up”, is usually designed to perform specific tasks. How are these tasks performed,
and what are the implications for the audience?

- What is the ‘mood’ of the opening of *The Accused*?
- Make a list of the techniques used by the film-maker that add to the drama of the story; eg what kind of music is used, when is it employed in the film and why? What editing techniques are used, and why?

THE TRIAL

In the film we are gradually made familiar with the ‘actors’ to the trial. The accused is a middle-aged Indonesian businessman who is married with children. The Crown alleged that he knowingly imported 13 kg of narcotics worth 7 ½ million dollars. The man was arrested at Perth Airport 18 months earlier along with three companions who carried the drugs in body packs and food packaging. The three companions pleaded guilty and were convicted. The accused pleaded not guilty to the charges of knowingly being involved in drug importation, on the ground that none of the drugs were found in his luggage or on his person.

- Defence counsel remarked that he could see what the jury’s first impressions of the accused were: ‘Here we go again...a Chinese man bringing drugs into our country’, and he lamented that the starting point for the defence was therefore not a level playing field.
- What was your first impression of the accused? Did the fact of his ethnicity influence your perception? Do you agree with defence counsel’s view that the jury probably made racist assumptions about the accused? What implications does this view of the jury have for the way in which barristers conduct their cases? What does this suggest about the fairness of the jury system? How impartial and objective do you think twelve ordinary citizens can ever be? Did the fact that the accused was having an illicit affair with the younger woman affect your view of him? Should it?

Acting for the accused are the Rumpolesque Philip Dunn QC, and junior counsel Laurie Levy. Philip Dunn in particular seems to thrive on the theatrical cut and thrust of the courtroom, on the backroom strategising and on the thrill of ‘the hunt’. He is a man who clearly has a passion for defending (whom he believes to be) the innocent. In this case he sees his client as a victim of ‘not only his own stupidity, but the middle-aged male thing...he was used by a younger woman as cover...he was a patsy’... ‘that’s the line we are going to run anyway’.

- Later in the film Philip Dunn and Laurie Levy describes barristers as ‘hired guns, prostitutes, if you like’. What is Dunn implying by describing barristers as prostitutes? Is it necessary that a defence barrister actually believe that his or her client is innocent? What should happen if a defence barrister knows or discovers that his or her client is actually guilty as accused? Most people who go to trial pleading not guilty are actually guilty – why is it important that accused persons (most of whom are guilty) receive a vigorous defence?

Outside the courtroom and across prison bars we witness the defence team consulting with the accused. Dunn remarks that ‘it’s easier to represent someone you feel detached from...there’s nothing worse than actually liking your client...it’s very easy to let those feelings sway your better judgement’.

- Defence barristers must often
suspect that their client is guilty. Perhaps what would be worse than a barrister liking his or her client would be disliking the client, especially when the accused is charged with morally repugnant crimes (eg rape or murder). Discuss.

Much of the role of the defence team is devising strategies ‘on the run’ - working out ways to ‘out-fox’ the prosecution, and to present their client to the jury in the best possible light. We learn that the barristers must revise their strategies as the trial unfolds, especially when witnesses give unexpected testimony. Regarding the key witness, Lim (the ‘younger woman’ with whom the accused was having an affair), Dunn tells us that they intend to portray her as a ‘hussy and schemer’. When Dunn cross-examines a woman whom the accused was trying to protect somebody’. Dunn is suggesting that Lim has used the accused not only as a cover (it may be easier for her to pass customs unchallenged if she entered the country as a couple), but that by implicating the accused she does not need to reveal the identities of the real masterminds behind the importation scheme. If you were a juror in this case, would you agree with Dunn’s assessment of Lim? Why or why not.

• When Dunn cross-examines Lim, how successful was he in discrediting the witness? What techniques does he use in his attempt to do this - how does he use his voice, what language does he employ, what is the tone of his voice? What is Dunn’s body language during cross-examination?

• After the prosecution examines Lim, he asks to speak to the judge without the jury present. This is called a voir dire. What do you think is the purpose of a voir dire? In this case, what did the prosecution say to the judge about the witness?

• During the voir dire, defence counsel made an objection to the submission made by the prosecution and asked the judge for the jury to be discharged. Why did he do this?

• The film-maker uses an editing technique for the examination of Lim. What is this technique, and why do you think the film-maker did this - what effect does it have?

• Dunn says of Lim after cross-examination, ‘it must have been abundantly clear (to the jury) that she was trying to protect somebody’. Dunn is suggesting that Lim has used the accused not as a cover (it may be easier for her to pass customs unchallenged if she entered the country as a couple), but that by implicating the accused she does not need to reveal the identities of the real masterminds behind the importation scheme. If you were a juror in this case, would you agree with Dunn’s assessment of Lim? Why or why not.

• Later in the film, the defence barristers plead with the accused not to smile when in court. Why did they do this? The jury must make a verdict based on the evidence (the facts) only. Should the jury take into account the demeanour of the accused sitting in the dock? Is it too much to expect that a jury ignore their (superficial) impressions of a person sitting silently in the dock?

• The defence team advise the accused not to give evidence in court if invited to do so. An accused has the right not to give evidence in court - why? - what principle of the adversarial system of justice does this right protect?

Why do you think the defence team advised the accused not to give evidence in this case? If an accused refuses to give evidence, what impression might that lend to the jury?

Sitting in the public gallery is Brian Duke, a retired accountant who watches criminal trials for a hobby. Duke provides a running commentary on the progress of the trial and through him we gain the perspective of the ‘reasonable’ layman. He reminds us, for example, that if the accused does not appear credible then he will provide the prosecution with a ‘free kick’ if he gives evidence. The judge, he says, will tell the jury that if the accused refuses to give evidence that they are not to hold this against him – ‘which is unlikely’, he says, fallible and impressionable as people are. Later in the film, Duke makes the observation that regardless of the arguments and evidence made in court, the ‘wild card’ is the jury - one can never be sure how the jury may decide a case.

• Early in the film, Duke says that the prosecution’s case is founded on ‘guilt by association’…‘you see a person with a criminal and you think that person is somehow tainted too’. He points out that it is very hard for an ordinary person to disregard guilt by association. Logically what exactly is wrong with ‘guilt by association’? Does the evidence of the travel companions against the accused prove that the accused was the mastermind?

Representing the Crown is veteran prosecutor Hilton Dembo. His smooth, cool and seamless demeanour contrasts to that of the rough and passionate Dunn.

• We do not see a lot of Dembo as the viewer is mainly the companion of the defence team. Why do you think the film-maker decided to focus principally on the defence barristers? Are we more sympathetic with the accused from this perspective than if the film shared time equally between

L-R: The Accused in Dock; Philip Dun QC - Defence
Before and after sessions in court the viewer is treated to the friendly banter between the prosecution and the defence. It is clear that each team are familiar with each other socially, and their rapport highlights the artifice of courtroom theatrics when moments later or before they verbally brawl.

At the conclusion of the trial, each party sums up their case. The prosecution’s case is based simply on the testimony of each of the travel companions who claim that the accused was the mastermind of the importation scheme. Throughout the trial, the defence did their best to discredit each of these testimonies – at one point exposing in one a contradiction (a lie?). The defence also relied on the supposition that the credibility of the witnesses, who are convicted criminals, is therefore of itself dubious. At the end of his summing-up, Dunn says to the jury ‘[you may think] where there is smoke there is fire…[that] it’s possible he was involved’. If it is possible the accused was involved, he continues, then a verdict of not guilty must be found.

- Here Dunn is expressing the principle of guilt beyond reasonable doubt (which applies to all criminal cases). Thus if it is merely possible or probable that an accused person committed a crime, as opposed to necessarily (undoubtedly), then the accused must be found not guilty. Why is this ‘quantum of proof’ so high in criminal cases, whereas the judge or jury in a civil case may find a defendant in the wrong merely ‘on the balance of probabilities’?

After five hours of deliberation the jury was unable to come to a verdict; it was a ‘hung jury’. For all parties concerned this was a disappointing and frustrating result. For the prosecution it meant that they ‘lived to fight another day’. For the defence there was still the possibility of acquittal at a retrial, but their position was diminished since they had ‘exposed their hand’ at this trial, leaving the prosecution plenty of time to fine tune its strategies against them.

Seven months later, the accused was retried and found guilty as charged. He was sentenced to 20 years imprisonment.

- Your verdict. Consider the facts presented in court in the film. Consider the testimonies of the witnesses and their performance under cross-examination. On the basis of what you have seen, do you consider the accused guilty or not guilty? Write down every facet of the case that contributed to your verdict (including your impression of the accused). Do you think the prosecution proved guilt in this case beyond reasonable doubt?
- Permission for the filming of this case was granted on the condition that the film crew was screened from view at all times to remove any possibility of distraction or pressure on witnesses or jury. Participants in the trial were nevertheless aware that the trial was being filmed. What impact, if any, do you think the fact of the trial being filmed would have had on the parties involved? – how ‘authentic’ is this film as documentation of courtroom drama? – is it a form of Reality TV? What would make such a documentation thoroughly authentic? What problems do documentary filmmakers face when attempting to record things and events ‘as they are’?

SIGNIFICANCE OF THE FILM

The Accused is an invaluable documentary about the workings of the criminal justice system. As an anatomy of a jury trial, the first ever to be filmed in Australia, it provides a rare insight into the psychological, emotional and moral human realities of crime, punishment, and the legal profession. It is particularly valuable as an education aid for students of Legal Studies – indeed, my VCE Legal Studies students found it engaging, and I found it very useful as an illustration of many of the concepts studied, and as a stimulus for discussion and debate.