A case study on shortage of evidence in wrongful convictions in China

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Abstract
The judiciary can only get to know the facts of a case that occurred in the past through limited evidence, and even with the shortage of evidence, the facts are fuzzy just like the moon on water. Wrongful convictions are very often based on a shortage of evidence and an ambiguity of facts. In those cases, judges face a dilemma in finding facts and applying rules of law. In order to prevent wrongful convictions, it is important to clarify the standard of evidence, to promote the legality of criminal investigation and to improve the assessment of evidence.

Keywords
China, evidence, proof, shortage, wrongful conviction

Introduction
Criminal cases are events of the past, so judicial personnel cannot establish the facts directly and must use the indirect means of reviewing a range of evidence to do so. There are two types of evidence in criminal cases: the first, that which objectively exists when a case happens—for example, traces of physical evidence on the body and in the surrounding environment during a homicide, or the impressions created in the minds of the people involved in the case. Because this kind of evidence lies in the real, objective world, it is possible for it to be discovered by the people handling the case, and also possible for it to remain undiscovered. Therefore, it is called ‘potential evidence’. The second kind is evidence collated and used by either those handling the case or the parties involved in the case; in a murder, for example, this includes all the different types of evidence collected by the investigators, such as confessions, bloodstained clothes or the murder weapon. This kind of evidence can be discovered and used by the people handling the case, therefore it is called ‘real evidence’.

1. The term ‘judicial personnel’ includes judges and procurators in Chinese.
2. The terms of ‘potential evidence’ and ‘real evidence’ are created by this author to clarify the concept of evidence in Chinese.
In the criminal justice system, real evidence is the only resource which truly has the ability to develop into proof. There is always less ‘real evidence’ than ‘potential evidence’; that is, the evidence that the investigators or parties involved gather and use is less than the evidence which objectively exists. In most cases, it is not possible for these people to discover and use all of the evidence related to the case which objectively exists. To put it another way, the evidence which objectively exists is of a large quantity, and it is hard to avoid a situation where some of the potential evidence is not converted into real evidence – no matter whether that is because the people involved have not discovered the evidence or have not used it. This situation results in the shortage of evidence and a dilemma in judicial proof, which can be seen in the wrongful convictions in China.3

The wrongful conviction case of Nie Shubin

At around 5pm on 5 August 1994, a woman by the surname of Kang, who worked at a hydraulic parts factory in Shijiazhuang, Hebei province, was raped and murdered in a cornfield by the side of a road in the outskirts of the city. Based on tips from the public, police identified Nie Shubin as a suspect, and obtained a confession to the crime. On 15 March 1995, the Shijiazhuang Intermediate Court found the defendant Nie Shubin guilty of premeditated murder and sentenced him to death. They also found him guilty of rape and sentenced him to 15 years in prison for that crime, with the primary evidence being his confession. On 25 April the High Provincial People’s Court of Hebei released its final verdict approving the death sentence and two days later Nie Shubin was executed (see Zhao, 2007).

In March 2005, the alleged serial rapist, Wang Shujin, was arrested for other crimes, and while being interrogated confessed that he had raped and murdered a young woman in a cornfield by the side of the road in the outskirts of Shijiazhuang. His narration of the crime and knowledge of its location, which he identified, agreed with details of the rape-murder of the female Kang. Nie Shubin’s mother had never believed that her son, who had always been an honest and timid boy, could have committed rape and murder, and so upon hearing this news made even more insistent appeals on her son’s behalf, nevertheless to no avail (see Zhao, 2009). A police officer involved in the case said: ‘If this had happened ten years ago we might well have determined Wang to be the murderer with only his confession to go on, and no other corroborating evidence. But cases can no longer be made with confession alone, not to mention this case has already been closed, and one person has been executed’ (Zhou, 2005).

On 25 June 2013, the second-instance trial of Wang Shujin for rapes and murders finally began. Six years after Wang’s shocking confession, the Hebei High People’s Court tried the case again at the Handan Intermediate People’s Court.4 The event garnered much public attention. Arguments in the retrial instigated a very strange outlook: the defendant maintained that he was indeed the true culprit in Kang’s case, while the prosecution making the charges maintained that he was not. In fact, the public prosecutors’ attention focused not on whether Wang Shujin was guilty, but whether Nie Shubin was guilty. In other words, if Wang was the true culprit, the conviction of Nie was a big mistake!

In the courtroom on 25 June the prosecution supplied four reasons why Wang Shujin could not have raped and murdered the victim Kang. First, Wang Shujin’s testimony regarding the body did not correspond with the facts of the case. The corpse was clothed with a white undershirt; the neck had been obscured by corn stalks, which when removed, revealed a flower-printed shirt. Wang Shujin’s testimony lacked these details. Second, Wang’s testimony as to the method of the murder did not correspond with the facts. The cause of death was strangulation but Wang said he had first choked the victim, then stomped her on the chest until she died. But apart from the shirt wrapped around the victim’s

3. In this paper, the word ‘China’ is referred to ‘Mainland China’, not including Hong Kong, Macao and Taiwan.
4. In China, the courts are established at four levels: the basic people’s courts, the intermediate people’s courts, the high people’s courts, and the Supreme People’s Court. The system is a centralised model, in which the court at a lower level is under the leadership of the court at a higher level. Therefore, a higher court may use the courtroom of a lower court to try cases where the defendant is living or detained in the locality.
neck, there were no bone fractures found at the autopsy. Third, Wang’s testimony as to the time of the victim’s death did not accord with the facts. Fourth, Wang’s description of the victim’s height was incorrect. The prosecution also pointed out that, when the events occurred, Wang was at work at a factory nearby and familiar with the area around the crime scene, and when law enforcement authorities were examining the crime scene considerable numbers of public onlookers gathered around. In this way, Wang could have learned some of the details of the case in this way (see a news report by Hongtao, 2013).

So is Wang Shujin the true culprit, or not? Based on the case presented by the prosecution, there is insufficient evidence to prove him guilty, or not guilty, or innocent. It is possible that he is lying—if, indeed, Wang could be so conniving; however, it is common for the actual criminal to make some errors when recounting the events of the crime—and it should be remembered that Wang’s confession came more than ten years after the crime had been committed. Moreover, in the meantime he had committed rape and murder on three other occasions and rape on two other occasions. It would have been surprising if some of his testimony had not been confused, if some of the details had not been mistaken, in his memory. In sum, given the evidence at hand, it cannot be certain that Wang Shujin committed the murder and rape against the victim Kang, nor can it be certain that he did not. Roughly, let us assume that chance Wang did commit the crime was about 60 per cent. In other words, the chance that he is the true culprit is slightly higher than the chance he is not (see Jian, 2013).

According to the provision in the Criminal Procedure Law (CPL), the standard for proving a defendant guilty of a crime is that ‘the facts of the case are clear, [and] the evidence is credible and sufficient’. In terms of probabilities, the chances that the defendant committed the crime must reach at least 90 per cent. According the principle of presumption of innocence, or ‘no conviction in a case of doubt’, whenever the chances that the defendant is guilty drop below 90 per cent the court should find the accused not guilty.

In the case at hand, and if it can be assumed that Wang Shujin’s chance of being the true culprit is only 60 per cent, the court should find Wang ‘not guilty’ in the case of the rape and murder of the victim Kang. However, the next question is, what to do in the case of Nie Shubin? Some people may think that Nie’s case cannot be overturned as long as Wang Shujin cannot be identified as the true culprit. But not being able to confirm Wang Shujin as the true culprit is not equivalent to confirming Nie Shubin as the true culprit. When using counter-evidence to give indirect proof of wrongful conviction, an increased chance of one suspects committing the crime corresponds to a decreased chance that the other suspect had committed the crime. In this case, if there were a 60 per cent chance that Wang Shujin committed the crime, and if this were not enough to determine his guilt, then Nie Shujin’s 40 per cent chance is also not enough to determine Nie’s guilt.

On 27 January 2013, the Hebei High People’s Court opened trial proceedings against Wang Shujin in the Handan Intermediate People’s Court for the crimes of rape and murder. The court ruled that the evidence was insufficient to prove that Wang Shujin committed rape and murder against the victim Kang, and so rejected the appeal and re-affirmed the original verdict convicting him for other five charges of rape and murder. Wang Shujin was sentenced to death (see Xianfeng, 2013).

On 12 December 2014, the Supreme People’s Court (SPC) of China made a decision to appoint the High People’s Court of Shandong Province to review the case of Nie Shubin. On 28 April 2015, the High Court held a special hearing on the case, for which the Court invited 15 representatives of the people including law professors, journalists, members of the people’s congress and local residents. It was the first time for Chinese courts to hold such a hearing in a criminal case, and it may illustrate the direction of the related judicial reform (see news report, China Daily, 2015).

On 11 June, the High Court decided to extend the review time for three months, till 15 September 2015. The extension was approved by SPC. Then the High Court asked for more extensions, and was approved by SPC. On 6 June 2016, the High Court concluded the review.

Based on the review conclusion, SPC decided to retry the case. After careful assessment of the evidence in the case, the Second Circuit Court of SPC declared innocence for Nie Shubin on 2 December
2016 (see Jiahong, 2017). It became a landmark case in the modern history of criminal justice in China, not just because of the tragedy of wrongful execution of a young man, but also because of the long and tortuous road for righting wrongs in the system.

**Empirical analysis of the evidence in wrongful convictions**

Wrongful convictions or misjudged criminal cases are, in essence, human mistakes. In cases where there are both a shortage of evidence and an ambiguity of facts, erroneous verdicts are reached when the people handling a case do not correctly identify this situation during the initial trial. It can therefore be said that there is always a shortage of evidence in misjudged cases.

There are two types of shortage of evidence in misjudged criminal cases: (1) a shortage of quantity, and (2) a shortage of quality. The quantity of evidence refers to the amount of evidence used to prove the facts of a case—including both the type and quantity of evidence as well as the number of factual elements in a case that it supports. The shortage of quantity indicates that the evidence in the case was not sufficient to prove all the elements of the crime or facts of the case, and therefore it was not possible to establish a complete chain of evidence. The quality of evidence refers to whether the substance of the evidence can correctly corroborate the facts of a case—including both the relevance and legitimacy of the evidence and, crucially, its true reliability. The shortage of quality indicates that certain pieces of evidence in the case possessed neither the capacity to act as evidence nor true reliability, and could not form the basis of a verdict or prove certain facts beyond reasonable doubt. In many misjudged criminal cases, both these situations exist at the same time.

In order to examine these types of shortage of evidence and explore the points of law therein, we have selected a sample of 45 misjudged criminal cases whose verdicts have now been corrected. To ensure the cases were analysed to the same standard, the charge in all the cases selected was intentional homicide.

According to Article 64 of ‘the Interpretation of the Supreme People’s Court concerning the Implementation of the Criminal Procedure Law of People’s Republic of China’ (hereafter referred to as ‘the Judicial Interpretation’), in cases of intentional homicide, the basic facts of a case that must be proven by the application of evidence include: (1) the identity of the defendant and victim; (2) whether the alleged crime in fact occurred; (3) whether the alleged crime was in fact committed by the defendant; (4) whether the defendant has the capacity for criminal responsibility, whether there is a culpable mens rea, or a motive or objective for the commission of the crime; (5) the time, place, manner, consequences and causes of the commission of the crime, etc.; (6) the defendant’s status and role in a jointly committed crime; (7) whether the defendant possesses...
evidenced and proved include: (1) the defendant’s identity and capacity for criminal responsibility; (2) the victim’s identity; (3) that the defendant carried out the alleged homicide; (4) the defendant’s motive for the homicide, that there existed the direct or indirect intention of committing a crime; (5) the time, place, manner, consequences and causes of the intentional homicide.

**A summary of the 45 wrongful conviction cases**

All 45 misjudged criminal cases found the defendant guilty of intentional homicide in a first trial; later, for differing reasons, each verdict was overturned. Within this sample, there are three cases where the verdict was corrected because the victim ‘came back from the dead’ (those of Teng Xingshan, She Xianglin and Zhao Zuohai) and 16 cases where ‘the true murderer came to light later’¹⁰ (those of Shi Dongyu, Du Peiwu, Li Jiuming, Sun Wangang, Zhang Gaoping and Zhang Hui, Huugjilt, Yang Yunzhong, Yang Liming and three others, Ding Zhiquan, Li Huawei, Tan Junhu and two others, Chen Jinchang and one other, Li Ritai, Qin Yanhong, Zhao Xinjian, and Li Jie and four others). In the remaining 26 cases, ‘the benefit of doubt went to the defendant’ because of a shortage of evidence. In 12 of these ‘benefit of the doubt’ cases, including that of Wang Xueyi, the defendant was acquitted by appeal at the high court after initially being found guilty at an intermediate court. In seven cases including that of Li Huailiang, the high court ordered a retrial which then overturned the original guilty verdict, issued by an intermediate court. In the two cases of Tan Fuyi and Fan Jiali and one other, the high court ordered a retrial after the intermediate court found the defendant’s guilty, and the procuratorate then withdrew charges. In the two cases of Huang Aibin and Li Zhiping, the defendant was found guilty by the intermediate court; when the high court later ordered a retrial, the defendant was released, despite the judicial bodies not legally declaring them innocent. In the three cases of Ai Xiaodong, Chen Shijiang and Yu Yingsheng, the verdict was overturned in a second retrial, after two initial trials found the defendant guilty.¹¹

Although the ‘defendants’¹² in each of these 45 cases were found guilty of intentional homicide, there were differences in the specifics of the crimes considered by the courts. Ten of the cases (i.e. 22.2 per cent) involved rape or necrophilia; three (i.e. 6.6 per cent) involved robbery; two involved the destruction of property; and one involved insurance fraud. All of these acts were found to be the motive for the homicide in the original trial. Analysis of the modus operandi¹³ reveals seven cases (i.e. 15.6 per cent) of strangulation causing death by suffocation; four cases (i.e. 8.8 per cent) of poisoning; one case each (i.e. each equating to 2.2 per cent) of death by arson, gas poisoning and drowning; and 31 cases (68.9 per cent) of using firearms, blades, sticks or other lethal weapons to commit murder. In the seven cases of death by strangulation, six also involved instances of rape or necrophilia.

**Shortage in the quantity of evidence in the wrongful conviction cases**

Generally speaking, these 45 misjudged criminal cases show a shortage of evidence. Looking at the act of the crime, a shortage in the quantity of evidence in the misjudged criminal cases is concentrated in the circumstances permitting or requiring heavier or lighter punishment, mitigated (below-minimum) punishment, or exemption from punishment; (8) facts concerning the handling of property related to the case, where there is a collateral civil action; (9) procedural facts related to jurisdiction, recusal, postponement of adjudication, etc.; (10) Other facts related to conviction or sentencing. See Zhiwei et al. (2013: 90).

10. In the case of Yu Yingsheng, an initial decision to conduct a retrial was changed to overturning the original conviction. Later the real murderer came to light, and consequently this case is classified as ‘a further retrial found them innocent’.

11. The source of the 45 cases is as follows. Those of Ma Yanxin, Sun Xueshuang, Li Jie and four others and Yu Yingsheng came from the internet; and the others can be referenced in Xinyang (2011).

12. Among the 56 defendants in the 45 cases, there is only one female.

13. Statistics around modus operandi are collected from ‘cause of death’ details. For instance, in Gao Hongliang’s misjudged criminal case, the original verdict found that the defendant burnt the victim to death after hitting them with a wooden stick, consequently this case has been classified as arson.
proof ‘that the defendant carried out the alleged homicide’. There are two types of shortage: (1) insufficient evidence to connect the defendant with the act of murder; and (2) ambiguities or contradictions in the proof of the time, place, manner, consequences and causes of the intentional homicide.

The proof that a defendant has committed a particular crime relies either on direct evidence sufficient to prove the whole course of the crime (such as a confession by the defendant, witness statement/s, victim statement/s, surveillance footage etc.) or on circumstantial evidence linking the defendant to the act of murder (such as biological evidence or trace physical evidence of the defendant found on the scene or on the body or clothing of the victim, witness statement/s proving the defendant was on the scene before or during the crime etc). In the cases described above, there was not only no direct evidence capable of proving the defendant had in fact killed a person other than the defendant’s confession, there was also insufficient circumstantial evidence. Consider the murder weapon. Usually, it is highly likely that the suspect’s fingerprints, palm-prints or other biological traces will be found on the scene or on the murder weapon itself. Moreover, splashes of blood will often be found on the scene or on the suspect’s body if the victim has been attacked with a weapon such as a stick, blade or axe. Biological evidence or traces of physical evidence are fairly powerful indicators to help fix upon a suspect or eliminate a suspect from suspicion. But from our count of 33 cases involving use of a lethal weapon, in 13 there was no physical or biological evidence linking the suspect to the scene; in seven the physical evidence which could have linked the suspect to the scene was either not collected, not examined, or no appraisal opinion was completed, and there was also no biological evidence linking the defendant to the case; in another seven although blood was found on the defendant, no physical evidence linking the suspect to the scene was gathered; and in a further four, relevant physical evidence was found at the scene and blood was found on the defendant, but there was no way to match the two. Although relevant evidence existed in the latter two examples, it was of insufficient strength to act as proof. We will come back to this point about the quality of evidence later. As a whole, of the 33 cases, 20 (i.e. more than 60 per cent) contained no evidence to prove a link between the defendant and the act of intentional homicide. There is a similar picture when it comes to circumstantial evidence. For example, of our 45 cases, there are 16 (35.5 per cent of the total cases) where the evidence is unable to prove that the defendant had time to do the killing. It can be seen that, in the majority of misjudged cases, there is insufficient indicative evidence to link the defendant to the act of homicide.

Besides the direct evidence, judicial personnel would sometimes rely on a large quantity of circumstantial evidence (for instance crime scene investigation reports and autopsy reports) when identifying such facts as the time, place, method, consequences and reasons for intentional homicide. These pieces of circumstantial evidence which exist in almost every homicide case are provided by the investigators and take a fixed written format, which we call ‘evidence format’ and which, on the one hand, can prove that a crime took place, and on the other, can partially restore the process of a crime. Other circumstantial evidence includes physical evidence of the murder weapon, witness statements etc. The content of these pieces of evidence must be overlapped, and linked together in order to be able to prove the facts, therefore, the more circumstantial evidence there is, the easier it is for judicial personnel to restore the facts. Conversely, insufficient circumstantial evidence will lead to a shortage of linking proof and a collapse of the chain of evidence. A shortage in the quantity of evidence to prove a crime is on most prominent display when it comes to the murder weapon. Of the 17 correctly resolved cases involved a lethal weapon, 15 (i.e. 88.2 per cent) were able to determine both the weapon used and its origin. Compared with this, in 11 (33.3 per cent) of the 33 misjudged cases where a murder weapon was used,

14. In the case of Chen Jinchang, there was a victim statement which acted as direct evidence, but the time of the statement was found to contain errors, and it has been classified as a shortage of quality of evidence. See Xinyang (2011).
15. The results of a forensic appraisal opinion in a poisoning case play a similar role of proof to those of an autopsy report, and can be used to prove the cause of a victim’s death or injury.
16. For example, in a case of causing death by explosion, a witness confirms that when the crime took place they first heard the sound of a quarrel, and later heard the noise of an explosion.
the murder weapon could not be found, in three (9.1 per cent) cases the origin of the weapon was not
clear and in 10 (30.3 per cent) there was no way of determining the murder weapon.

In terms of responsibility for an offense, the evidence used to prove the defendant’s motive in our
sample of misjudged cases is often weak. Generally, investigating bodies will use knowledge of the
interpersonal relationships of the victim to search for and arrest a suspect for reasons including disputes
over relationships or property etc. The ‘evidence of motive’ collected during this process will, during the
fact-finding stage, be turned into evidence that proves the defendant’s motive. Take for example the case
of Li Huawei. The victim was his wife and so, after the killing, Mr Li was treated as the prime suspect.
But the only evidence provided by the prosecution of his motive was his confession that ‘after they were
married he had suspected the victim of having had sexual relations with another man. Having always felt
hatred and envy over this, he killed the victim after an altercation about family money’ (Xinyang, 2011:
243). This ‘motive’ was later found to be pure speculation. In our collection of misjudged criminal cases,
there are 16 (35.5 per cent) where, apart from confessions, there is no other evidence proving the
defendant’s motive, or the defendant’s direct or indirect intent. In truth, ‘motive’ is only able to act
as evidence to prove the defendant’s subjective intent, provided that the defendant did in fact commit the
crime; in situations where it is not clear whether or not the defendant is guilty, evidence of ‘motive’ does
not have the value of proof.

It should be noted that, although the two basic facts ‘the defendant’s identity and capacity for criminal
responsibility’ and ‘the victim’s identity’ are fairly easy to prove compared with the other facts which
must be proved, in our sample of misjudged cases there are also situations where there is a shortage of
evidence around or no means of verifying the victim’s identity. Clearly, the strongest and most direct
evidence in establishing the identity of the victim is DNA identification, but there are four cases in the 45
cases where no DNA analysis of the victim was undertaken, or where the DNA analysis produced no
matches. I find the phenomenon of the victim ‘coming back from the dead’ in these sorts of misjudged
criminal cases alone precisely because the identity of the victim was not established. I will illustrate the
shortage of quantity of evidence in criminal misjudged cases.

In Li Chunxing’s first trial (Xinyang, 2011: 113–121), the proof of the crime provided by the public
prosecutors included: (1) the defendant’s confession proving he had a property dispute with the victim
over the felling of a tree; (2) the crime scene investigation report; (3) the first witness statement proving
how the victim was discovered and how the crime was reported; (4) the second witness statement
proving the defendant had, before the crime took place, expressed his desire to kill the victim; (5) the
autopsy report proving that the victim had been struck on the head by a blunt instrument and had died
from an internal brain haemorrhage; (6) the bloodstains on the physical evidence (wooden stick) found at
the scene, which were a match with the victim’s blood group, proving that it was the murder weapon; and
(7) an appraisal opinion proving that the paper found at the place of the tree-felling dispute had been
written by the defendant.

Apart from the defendant’s confession, there was no direct evidence in this case, and there was also an
insufficient quantity of circumstantial evidence. First, the crime scene was destroyed before the inves-
tigators had conducted their investigation, which resulted in an inability to recover clues of any worth
(such as biological or trace evidence), and there was therefore no circumstantial evidence which could
prove ‘the defendant had in fact committed homicide’. Second, the crime scene investigation report,
autopsy report, wooden stick and appraisal opinion on the bloodstains could only prove the victim had
received a blow from the stick and were not able to prove that the person who had used the stick was the
defendant, Li Chunxing. Last, although the witness statements and the piece of paper found at the scene
of the tree-felling proved the defendant had a motive for the crime, they were not sufficient to prove he
had in fact committed murder.

Having no means to determine or being unable to definitively determine that the defendant and
perpetrator are one and the same is a direct cause of misjudgments in criminal cases. And being unable
to definitively identify the perpetrator can confuse the understanding of the process of the crime. In our
example cases, where the only direct evidence is a confession, there are often questions over its veracity,
because of the possibility that a confession was obtained through use of torture. And, when the quantity of circumstantial evidence is insufficient, there is no means by which to strengthen the validity of the confession or to create a complete chain of evidence. In cases such as Li Chunxing’s, the majority of circumstantial evidence (e.g. crime scene investigation reports and appraisal opinions) can only prove that ‘a crime took place’ and cannot prove ‘the defendant carried out this particular crime’. That is, the evidence fails to build an adequate bridge linking ‘a crime took place’, ‘the defendant carried out a crime’ and ‘the defendant carried out this particular crime’. From this people can see that the misjudged criminal cases contain a shortage in the quantity of evidence used to prove ‘the defendant carried out the act of killing someone’ and ‘specifics of the course of this incident’ and, therefore, failed to reach the standard of evidence for conviction.

Shortage in the quality of evidence in the wrongful conviction cases

Just as there can be an insufficiency in the quantity of evidence, the quality of evidence in misjudged criminal cases can also fail to reach the standard of ‘authenticity’ and be insufficient to prove elements of a crime. This is mainly expressed as a shortage in the capacity of evidence and an insufficiency of true reliability. Deficiencies in the capacity of evidence commonly result from the source, content and form of the evidence being illegal, or a weakness in the relevance of the evidence. And insufficiencies of true reliability commonly result from contradictions inherent in the content of the evidence or a misreading of its value.

Rules surrounding the exclusion of illegal evidence in the CPL state that evidence which is unlawful in its origin, content or form must be excluded according to the law. However, in the original trials of our 45 misjudged cases, it was quite common for the legitimacy of the evidence to be suspect. Take, for instance, the case of Li Jiuming. During the first trial the lawyers raised that ‘the DNA identification results are not linked to any checks on the source material’s origins, acquisition, testing or appraisal process’ and, moreover, that there were no records confirming the extraction, storage and examination of the defendant’s hair (see Jiahong, 2014a: 109). To ensure the legitimacy of appraisal opinions (including the collection of evidence by the investigators and the examinations conducted by the appraisers), both the collection of evidence and the examinations must be legal. Since, in this case, there was no way to prove the legitimacy of either the origin of the physical evidence or of the content of the DNA appraisal opinion, the opinion in question should have either been subject to verification or excluded. Other misjudged cases from our sample contained ‘man-made’ or ‘fabricated’ evidence. In the case of Li Zhiping (Xinyang, 2011: 162–172), investigators found bloodstains, footprints and palm-prints on the scene. As previously discussed, biological and traces of physical evidence are fairly powerful indicators to help fix upon a suspect in a crime and, if lawful and regular processes are followed in the production of appraisal opinions, the evidence therein is able to basically ‘speak’ the facts of a case. However, here the investigators did not make good use of the evidence and, when the palm-prints were found to not be a match, went to great lengths to use the appraisal to fabricate evidence that could incriminate Li Zhiping. Evidence with zero legitimacy of this nature is, once submitted to court, not only useless in helping a judge determine the facts of a case, but can also become the precursor to an error of judgment.

Another issue around evidence which lacks capacity found in these misjudged criminal cases is a weakness in the relevance of the evidence. ‘Relevance’ demands that every individual piece of evidence must have substantive significance in proving the facts of a case. In other words, a piece of evidence must be of real use in proving the facts of a case or other disputed facts (Jiahong and Pinxin, 2013: 114). Empirical analysis shows that certain pieces of evidence in our misjudged cases did not necessarily have a connection with the unproven facts of the case, or the content of the evidence was not able to effectively prove them. In Li Chunxing’s case, one of the pieces of evidence supplied by the prosecution was the piece of paper discovered at the scene of the tree felling. After analysis, the paper was found to have been written by the defendant, so the prosecution accordingly believed the defendant had murdered the victim because of the dispute over the tree. However, careful analysis showed that the scene of the
tree felling was not the crime scene, so the piece of paper was only able to prove the defendant had once been to the tree-felling scene, and was not able to prove any connection between the defendant and the murder case.

As another example, consider the use of a criminal record as in establishing a motive, and on the basis of this finding someone guilty. A criminal record is merely a judgment of past behaviour. In the investigation stage it can be used to decide the direction of the investigation, and it can also be used during a trial to decide the severity of a sentence, but it cannot be used as the basis of conviction. Just as once having committed a theft is not the same as always being a thief, so too once having committed a crime is not the same as continuing to commit that same crime. In the absence of adequate investigation, it is arbitrary and blind to use assessments of character and morals as the basis for motive in a case. In our sample of 45 misjudged criminal cases, there are six which draw on evidence of character and morals to prove criminal intent.

Comparative analysis is used to establish whether two or more pieces of evidence, when taken together, may reasonably prove the facts of a case—and this can help decide the true reliability of the evidence. If there are irrational and unexplainable contradictions between the evidence and the facts and between individual pieces of evidence, then the true reliability of the evidence is weak and a judge must be cautious when deciding the facts of a case. In our sample of misjudged criminal cases, the most common contradictions seen are in: the defendant’s confession of guilt or innocence, including confessions in cases involving multiple defendants; confessions of guilt determined by judicial personnel; and witness statements, crime scene investigation reports, appraisal opinions and other evidence. There are many such situations over 23 cases in total, constituting over half of the total sample of misjudged criminal cases. I have also found cases where there are contradictions between witness statements, in appraisal opinions and in other evidence, as well as other problems which are more difficult to confirm. These also constitute a definite proportion of the misjudged criminal cases.

Another manifestation of the insufficiency of the true reliability of evidence is the misreading of the value of evidence. Here I mean the judge in the original trial mistaking evidence of lesser value for evidence of greater value and, as a result, making a mistake when ruling on the facts of a case. In the case of Teng Xingshan (see Jiahong, 2014a: 2–34), the investigating body identified the murder weapon on two grounds: first, that hair and blood of a group identical to that of the victim were found on the axe and, second, that the shape of the axe was identical to the shape of the wound on the victim. But the characteristics of blood groups and wound marks are not unique; they may match many objects or type of object, so one cannot on these grounds be certain that any particular axe is the murder weapon.

In the case of Xu Dongchen, the defendant was identified as the key suspect by the police because his blood was of the same group as that found in the victim’s vagina. Police DNA identification could not rule out that the fine spots found on the toilet paper and on the gauze used to wipe clean the victim’s vagina were left by Xu Dongchen’. It is clear that this appraisal opinion was not conclusive, and provided neither unique nor exclusive evidence. However, this very appraisal opinion became the major evidence which found Xu Dongchen guilty (see Sina, 2016). Of our 45 misjudged criminal cases, there are ten where there is no proof that the defendant was the perpetrator because the evidence was neither exclusive nor unique. In addition, whilst there is a certain science behind the use of polygraph tests or identifications based on matching the gait of a person to the indentations on the soles of a shoe, the practices have failed to gain full verification and peer recognition (Jiahong, 2014b), therefore their value of proof in personal identification is relatively weak.

It is worth noting that shortages of quantity and quality of evidence often appear at the same time in our misjudged cases, creating situations where ‘not credible’ and ‘not sufficient’ evidence fails to create a complete system of proof and leaves the facts of a case confused and not clear. Take as an example the

17. We speak here of a typical situation. If the features of a murder weapon such as its shape or wear are distinguishing in any way, such as the existence of uneven gaps, then it can be treated as characteristic for matching and identification.
case of Du Peiwu. In this case, the proof of guilt supplied by the prosecution included: (1) the defendant’s confession; (2) the crime scene investigation report and photographs from the scene; (3) the autopsy report; (4) the polygraph test report; (5) the ballistics report; (6) evidence collection records and reports on the investigation of physical evidence, namely, the examination of footprints found at the scene, dirt found on the clutch of the vehicle at the scene, dirt on the defendant’s clothes and traces of gunpowder; (7) results of police dog sniff tests; and (8) non-eyewitness testimony.

In the first instance trial, the defence raised certain doubts, including the fact that the firearm used to commit the crime had never been found; that there was no dirt found on the brake pedal or the accelerator but the investigation report still took it as a comparative sample; the existence of inconsistencies between the forensic appraisal and the crime scene investigation report; and the fact that the defendant’s confession was conducted repeatedly.

Analysis of the evidence shows that since there were shortages in the quantity of evidence in the case, there were also shortages in its quality. First, the case lacked any direct evidence apart from the defendant’s confession and the critical piece of circumstantial evidence that was the murder weapon; moreover the defendant’s confession was conducted repeatedly and there were inconsistencies within it. Second, there are scientific doubts around the use of evidence point (4), so it should only have been used as circumstantial evidence, and should not have been deemed to be conclusive. Third, the examination of bullet traces in point (5) was only able to identify the type and not any specifics, and was also not able to prove that the traces of gunpowder left on the defendant’s body had come from the same pistol as that which had killed the victim. Fourth, the appraisal opinion in point (6) contained no blank control samples and, also, the origin of the mud was not clear, so that it was not possible to eliminate the chance that the evidence had been faked or that there had been a mix-up during testing, thus its true reliability was not sufficient to prove the defendant had been on the scene while the crime was taking place. Fifth, there is no way to resolve the contradictions between the two identification conclusions in point (7); moreover, as the defendant and victim were husband and wife, the possibility that they smelled alike cannot be ruled out. Consequently, the evidence in this case was not only unable to prove that ‘the defendant carried out the alleged homicide’ or ‘the time, place, method, consequences and reasons for intentional homicide’, but the ‘authenticity’ of the evidence was also insufficient, and there were gaps in the chain of evidence. Although there was proof that Du Peiwu had fired a gun, given his history of firearm training there was no way to be certain that it was he who fired the gun which killed the two victims.

Regular patterns of evidence shortage in wrongful convictions

With the analysis of the misjudged criminal cases, the author discovered a pattern surrounding the shortage of evidence in misjudgments, connected to the subjective and objective factors. This identification is valuable in preventing the miscarriage of justice that such shortages can cause. As mentioned at the beginning of this article, the indirect, reverse-engineered finding of the facts in a case can only be achieved through evidence, and the ‘real evidence’ is often less than the ‘potential evidence’. It is, in this sense, almost an objective fact that there will be a shortage of evidence. Some scholars say that ‘a shortage of evidence is a prerequisite of a misjudged criminal case. A shortage of evidence does not necessarily result in a misjudged criminal case, but all misjudged criminal cases undeniably contain a shortage of evidence’ (Kai and Zhaofeng, 2014: 105). Whether or not a shortage of evidence ultimately affects the verdict in a case is determined by the nature of the shortage.

The shortage of evidence in critical links of judicial proof

Analysis of misjudged criminal cases reveals that the shortage of evidence that leads to miscarriages of justice is often a shortage in the critical links of judicial proof, that is, a shortage of evidence to prove the main facts of a case—either a lack of evidence to prove certain facts, or the content of the evidence is unreliable, causing uncertainty over whether the facts are true or false.
Analysis of the misjudged criminal cases has demonstrated a particularly acute shortage of evidence capable of proving the basic facts of a case. For example, lack of proof of the identity of the victim, lack of proof the defendant carried out the alleged crime, the only evidence capable of proving the defendant carried out the alleged crime (i.e. the confession) being unreliable, and so on. If the basic facts of a case are unclear, then the whole framework of facts constructed by the people handling the case falls apart.

Of course, proving the basic facts of a case requires not only reliable evidence, but also the support of logic and experience. In our misjudged cases, all contained only one item of direct evidence—the defendant’s confession—about which there were doubts as to its true reliability, and whose ability to prove critical links in the case was weak. Article 105 of the ‘the Judicial Interpretation’ states:

If there is no direct evidence, but circumstantial evidence simultaneously satisfies all the conditions below, the defendant may be found guilty: (1) the evidence has been investigated and verified; (2) various items of evidence mutually corroborate one another, and there are no contradictions that cannot be eliminated or doubts that cannot be explained; (3) the totality of the evidence in the case already constitutes a complete set of proof; (4) the determination of the facts in the case by the evidence is sufficient to eliminate reasonable doubt, and there can be only one conclusion; (5) the inferences drawn from the application of evidence satisfy logic and experience. (Zhiwei et al., 2013: 111)

This shows that proof of the main facts of a case can be refined and deconstructed based on circumstantial evidence. For example, in the intentional homicide case involving a defendant surnamed Wang, although there were no eyewitnesses, the victim’s spouse was just outside the crime scene when the killing happened, and confirmed that the defendant had entered the scene during the crime and that no other person had gone in. Where a witness statement of this nature can be verified, logic and experience dictates that people can conclude the defendant killed the victim. It is evident from this that logic and experience are important component parts in proving the essential facts of a crime, such as the fact that the defendant was present at the scene, had time to commit the crime and so on. But judicial proof cannot rely on logic and experience alone. In a situation where there is a shortage of evidence, logic and experience are no more than ‘castles in the air’ and cannot provide a factual framework. Consequently, a shortage of circumstantial evidence can break the chain of evidence and lead to an inability to prove the basic facts of a case.

In the case of Nie Shubin, the medical examiner concluded that the victim, Kang Juhua, had been raped, but no semen or other bodily fluids had been found in the deceased’s body. In fact, the examiner did not gather the biological evidence, because the corpse was highly decomposed. This ‘missing link’ in the chain of judicial proof became the critical shortage of evidence and led to the miscarriage of justice in the case.

The shortage of quality in testimonial evidence

During the analysis of misjudged cases, I discovered that it is easy for there to be a shortage in the quality of oral evidence and a shortage in the quantity of physical evidence. An insufficiency in the true reliability of oral evidence is a widespread ‘chronic virus disease’ in misjudged cases. In the sample of 45 misjudged criminal cases, eight contained fabricated witness statements, and one had a mistake in the defendant’s confession. These points of evidence were not subjected to rigorous review during the original trial, and eventually became the evidence that decided guilt, leading to wrongful convictions. Of course, the true reliability of oral evidence is nowhere more questionable than when it comes to a defendant’s confession.

Looking at only objective circumstances, I find that in misjudged criminal cases there are often no eyewitness statements, and the defendant’s confession is almost the only piece of oral evidence capable

18. For details of the case see Shandong High People’s Court, 2014, Written Judgment on 16 Criminal 2 Final.
of proving the essential facts of the case. It is, however, precisely because of this ‘uniqueness’ that it is very easy for a confession to become a ‘hollow shell’ where truth and fiction are inseparable. In the 19 cases where either the victim came ‘back from the dead’ or ‘the real murderer came to light later’, the defendant’s ‘confession of guilt’ was found to be false and in the other 26 cases, most of the defendants revealed under questioning in court that the confession had been extracted under torture. There was also one case where the defence submitted proof of evidence handling, but did not succeed in getting the court in the original trial to attach important to this. These confessions are false instances of the principle of ‘going from evidence to confession’—‘man-made evidence’ that provides the corroboration it seeks. Instances in the misjudged criminal cases where a defendant’s confession was overturned, where there were contradictions in a confession, or contradictions in witness statements add further question marks as to their true reliability. Questionable witness statements, victim statements, accomplice confessions, and defendant confessions not only make a case complicated and confusing, but also impede the ability of the judge to correctly determine the facts of a case.

In the case of Nie Shubin, the main evidence to prove the guilt of the defendant Nie was his confession, so the reliability of the confession was crucial for the judicial proof. According to the case file of the investigation, Nie was detained by the police on 23 September 1994, and made the first confession on the 28 September. However, the interrogation records between 23 and 28 September was missing. Nie alleged that he had been tortured by the investigators, but the police denied. With the possibility of torture, the reliability of Nie’s confession became questionable. In fact, it was a primary reason for the Second Circuit Court of SPC to declare innocence for Nie Shubin in December 2016.

The shortage of quantity in physical evidence

In misjudged cases, physical evidence is startling in its scarcity. Physical evidence ‘speaks the truth’ far more readily than oral evidence. Although easily destroyed or lost, as long as it can be properly and promptly gathered, stored and used, it can fully develop the value of proof. Physical evidence is, however, generally insufficient in misjudged criminal cases, because of both objective and subjective constraints. In the case of Du Peiwu, because the police were unable to find the firearm used in the killing, they forced Du to falsely confess ‘the gun was broken up and thrown into Dian Lake . . .’ (Xinyang, 2011: 142). It is also common for biological evidence to be not collected because of the condition of the crime scene, or to be not gathered even when conditions mean it could have been, or, having been collected, for it to be stored and used improperly.

As in the case of Nie Shubin, the biological evidence was the ‘missing link’ in the chain of evidence. Furthermore, the investigators discovered a flower-printed shirt on the neck of the victim Kang, and inferred that it had been used to strangle the victim. With the identification by the members of Kang’s family, the shirt did not belong to the victim, so it must have been taken to the crime scene by the murderer. However, the investigators did not find any evidence to link the shirt with the defendant Nie. Therefore, the chain of the physical evidence was still in a shortage.

Conclusion and suggestion

In 2005, the dramatic wrongful conviction of She Xianglin was discovered and corrected. It was a wife-murder case in 1994, but, 11 years later, the victim’s wife came back alive! The ‘Back from the Dead’ case attracted people’s attention nationwide. Since then, this author led a group of researchers to conduct empirical study of wrongful convictions in China. With some surveys and case analysis, we summarised the 10 factors to give rise to wrongful convictions in Chinese criminal justice system. They are: (1) the ‘from confession to evidence’ model of criminal investigation; (2) the setting of improper deadlines for solving a criminal case; (3) the one-sided, prejudicial collection of evidence; (4) the misinterpretation of scientific evidence; (5) the continued use of torture to extract confessions; (6) the bowing to public opinion in contradiction to legal principle; (7) the nominal checks among police, procuratorates, and
courts; (8) the de-functionalisation of courtroom trials; (9) the unlawfully extended custody with tunnel vision; (10) the reducing of punishment in a case of doubt.19

As mentioned above, judges often face a dilemma over how to handle shortages of evidence. And, when shortages of evidence exist, the question of how to ensure the impartiality of judicial rulings becomes exceptionally important. There are two fundamental responsibilities of a judicial ruling: one, to determine the facts of a case and two, to apply the relevant laws and regulations. What I call here laws and regulations includes both substantive and procedural laws and regulations as well as ones governing evidence (known as ‘the rules of evidence’). When determining the facts of a case, judicial personnel must primarily use the rules of evidence, which are of critical importance in guiding and regulating the use of evidence. For thousands of years, those who set society’s laws have sought to perfect the rules of evidence so as to make it possible for those administering the law to correctly decide difficult questions of proof, but the results to date are still only passable, and sometimes even the complete opposite of what was intended.

It is not possible for judicial personnel to reach 100 per cent accuracy in their findings of the facts in a criminal case, because they could not see the facts with their own eyes, but would have to make the findings based on limited evidence. In cases with evidence shortage, the facts are not in black or white, but in ‘grey’. In other words, the defendant may be guilty, and may not be. However, although a judge’s knowledge of the facts is ambiguous, his or her rulings must be definite. For each charge in a criminal proceeding, the judge will have to find the defendant guilty or not guilty, and cannot rule that a defendant is 80 per cent likely to be guilty, even if he or she believes so. In those cases, judges would face a dilemma in finding facts: guilty or not guilty. In order to prevent wrongful convictions, it is important to clarify the standard of evidence, to promote the legality of criminal investigation, and to improve the assessment of evidence by judges.

**Clarifying the standard of evidence**

The standard of evidence is a concept closely relating to the standard of proof in criminal proceedings. The standard of proof refers to the level that judicial proof must reach and is the criterion for evaluation of the results of judicial proof. The standard of evidence refers to the specific requirements for assessing and evaluating evidence in a case to enable a verdict to be reached. Generally, the standard of proof includes the standard of evidence, but it places emphasis on the degree to which the facts have been proved in a case, or on the degree to which judicial personnel have understood and used the evidence to determine the facts of a case. Therefore, in some countries’ legal provisions, the description of the standard of proof focuses only on the standard of subjective knowledge that judicial personnel should have, and contains no description of objective standards of evidence—for example, the standards of ‘proof beyond reasonable doubt’ and ‘proof with intimate conviction’. The standard of proof stipulated in the CPL clearly includes the standard of evidence. Article 195 therein states that the standard of proof required for a court to find a defendant guilty is that ‘the facts of the case are clear [and] the evidence is credible and sufficient’. Here, the phrase ‘evidence is credible and sufficient’ is the standard of evidence.

The standard of proof directs the facts of the case, and the standard of evidence directs the evidence that can be used to reach a verdict. From the point of view of judicial personnel, the latter has more operability. To ensure the facts of a case are correctly established, both the quality and quantity of evidence in the judgment must reach a certain standard. In other words, the evidence must be qualified, regarding the legality and authenticity of evidence, and be sufficient, regarding the value or weight of evidence.

The standard of evidence referred to above (‘the evidence is reliable and sufficient’) contains the requirements for both the quality and quantity of evidence. ‘The authenticity of evidence used for

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deciding the case has all been confirmed in accordance with statutory procedures’ is the quality requirement, and ‘There is evidence for each fact that serves as the basis for conviction and sentencing’ is the quantity requirement. Some scholars argue that ‘sufficient’ is the quantity requirement and ‘reliable’ is the quality requirement (Huiqun, 2013: 48–54). Although such division is a little simplistic, it does fundamentally communicate the requirements of the standard of evidence. Of course, in terms of standards of evidence in individual cases, the totality of the evidence in a case must be enough to form a complete, harmonious system of proof sufficient to obtain a single, definite verdict to the exclusion of all other possibilities.

With the use of the new technology of big data and AI, some judicial agencies in China have done experiments for establishing more clear standards of evidence in certain type of criminal cases. Since 2016, for example, the courts, the procuratorates, and the police departments of Guizhou province started the experiment to establish the ‘Guiding System of Evidence Standards’ for convictions in the offenses of intentional injury, intentional homicide, robbery, and larceny. The Basic Requirements for Evidence in Criminal Cases of Guizhou were promulgated later in the same year. This experiment is an interesting step towards the regulated proof in criminal proceedings (see Jiahong, 2020).

**Promoting the legality of criminal investigation**

In criminal cases, the majority of evidence is found and collected by the criminal investigators. In order to change the situation of evidence shortage in the courtroom trials, the investigators should collect more qualified evidence, i.e. legal and reliable evidence, for the prosecution. For many years in China, the criminal justice system was an ‘investigation-centred’ system, in which the adjudication was ancillary to investigation. In October 2014, the Fourth Plenum of the CPC Central Committee made a decision to promote the rule of law in China. The decision called for the reform of the criminal procedure system towards the model of trial-centeredness. Since then, the direction of reform has been from ‘investigation-centredness’ to ‘trial-centredness’.

Under the trial-centred system, the criminal investigators should raise their awareness of the correct means of colleting evidence, and change from a fact-finding mindset to one that focuses on proving the facts. In reality, the concepts of finding facts and proving facts are often confused. Finding and proving are correlated, but also distinct: finding is the basis of proving; proving is the purpose of finding. However, proving is not the same as finding, and finding cannot replace proving. To put it another way: finding is to make oneself understand while proving is to make others understand. Only when one understands can one make others understand. However, what one understands does not mean that others will understand. These two cannot be mixed up, and their relationships cannot be reversed.

The criminal investigators shall not only thoroughly investigate the case and find the facts, but also prove the facts by evidence recognised and accepted by the court according to the requirements of the law. Some experienced investigators memorise or simply write a few words in a notebook to describe what they have discovered, including the interviewees’ narrations related to the case and the details of discovering physical evidence. If the aim is to find the facts, then this may be a convenient and effective method. If the aim is to prove the facts, then such a method is inappropriate, for what is in the mind of the investigative officer and in his notebook may not have the competence of evidence. Of course, it is a more difficult work for the investigators to prove the facts than to find the facts. Therefore the efficiency and legality of criminal investigation should be promoted. Changing the focus of criminal investigation from ‘finding’ to ‘proving’ will promote the quality and quantity of evidence for trial, and be important for the rule of law in China.

**Improving the assessment of evidence by judges**

Assessment of evidence refers to the activities in which a judge conducts review and judgment on the evidence, collected and submitted by the two parties, to confirm the competence and validity of evidence during the trial. The assessment of evidence is to review and affirm evidence rather than to establish facts
in a case. In other words, the object of assessment is evidence, not the facts in a case. Assessment of evidence and establishment of facts in a case are two concepts that are closely interrelated but different. Assessment of evidence is the basis as well as the means for establishment of facts of a case, and establishment of facts is the end and result of assessment of evidence.

The assessment of evidence includes two aspects: (1) to assess the admissibility or the competence of evidence; and (2) to assess the authenticity and the value of evidence. The admissibility or competence of evidence means whether a piece of evidence can satisfy the basic requirements of litigation for evidence, which is mainly about the relevancy and legitimacy of evidence. The authenticity and the value of evidence are interrelated. Since the value of evidence is based on the premise of the authenticity of evidence, the evaluation of evidence cannot be isolated from the assessment of authenticity of evidence. In this sense, authenticity is a central element for evidential assessment, and the main job for a judge is to make sure that each piece of evidence used as the basis for judgment is authentic and reliable. In other words, the assessment of evidence is mainly regarding the quality of evidence.

As mentioned above, the quality of evidence is the essential component when judges find the facts of a case. Even if the quantity of evidence in a case meets the required standard, if its quality falls short, judicial personnel have no way of confirming the facts of the case. Article 48 of the CPL clearly states that ‘the authenticity of evidence shall be confirmed before it can be admitted as the basis for making a decision on a verdict’. Here, ‘authenticity’ indicates the true reliability of the evidence. In the ‘Opinions on Strengthening the Handling of Cases According to the Law and Guaranteeing the Quality of Handling of Death Penalty Cases’, jointly issued in 2007 by the Supreme People’s Court, Supreme People’s Procuratorate, the Ministry of Public Security and the Ministry of Justice, there was an analysis of the term ‘insufficient evidence’:

(1) There are doubts about the evidence on which the conviction is based, and there is no way of verifying it; (2) There is a shortage of the evidence necessary to prove the essential facts of the case; (3) It is not possible to reasonably remove all contradictions in the evidence on which the conviction is based; (4) Other possible conclusions can be drawn from the evidence.20

In this analysis, points (1), (3) and (4) touch upon the deficiency in the quality of evidence.

The standard of conviction for the quality of evidence is that evidence used as the basis for a conviction must be credible or reliable. When assessing evidence, judges often face the difficulty of how to be sure of its true reliability. Evidence assessment include both individual assessment and comparative assessment. The former checks the origin, content and form of each piece of evidence, and assesses whether or not it has true reliability. The latter compares and contrasts two or more pieces of evidence that together support the proof of the same fact in a case, and ascertains whether they contain an identical reflection of the situation, and whether they can be used together to reasonably prove the facts of a case. Generally speaking, when the content of different pieces of evidence is identical it tends to be reliable, and when evidence contains contradictions, its truth can be questioned. Of course, one cannot blindly accept mutually consistent evidence as true, because a false consistency can be created through collusion in statements, perjury, and the extortion of confessions through torture etc. Moreover, one must also not automatically rule out the validity of mutually contradictory or differing evidence, and must take pains to examine the form, cause and nature of the contradictions and differences, because discrepancies can arise which in no way affect the true reliability of the evidence. For instance, it is very difficult for different witnesses to describe the same fact identically, because their perceptiveness, memory and ability to express themselves are by no means alike, and the subjective and objective ways in which

20. Clause 25 of the original text of this opinion states: ‘If one of the following circumstances exist, it shall not be possible to determine that the criminal suspect has committed a crime and the responsibility for the crime must be investigated, if evidence is insufficient it shall not satisfy the conditions for prosecution …’ Although this clause is guidance for prosecuting bodies issuing indictments, it can also be used as a reference for the standard of judicial judgments.
they perceive a fact also differ. Consequently, the key to comparing investigations does not lie in identifying the points of unanimity and divergence in differing pieces of evidence, but rather in analysing these points to see whether or not they are reasonable, and whether or not they conform to a pattern.

China’s courts often use the ‘corroboration’ method to make a ruling on evidence. If the content of many pieces of evidence can be mutually corroborated, this raises the level of confidence afforded the evidence. For example, in the charge of intentional homicide against the defendant surnamed Li,21 the criminal forensic authentication clearly showed that the victim had been hit on the head repeatedly with a blunt instrument leading to craniocerebral trauma and death; both the flat-head hammer and round-head hammer recovered from the scene by the police were found to contain traces of the victim’s blood; the defendant confessed to using first the round-head and then the flat-head hammer during the crime and also identified that the two hammers recovered from the scene were of the same type as that used to commit the crime; and a witness testified that the two hammers were ordinarily to be found in the victim’s residence. Taken together, the defendant’s confession, the authentication findings, the witness statement and the official appraisal documents were all substantively identical and mutually corroborative. The judicial personnel could, therefore, be certain of the true reliability of the evidence. In other words, the evidence reached the standard of conviction for quality of evidence.

The primary principle in criminal proceedings is the presumption of innocence. Article 12 of CPL stipulates: ‘No one shall be considered as guilty unless the people’s court makes such judgment according to law.’ Although people have different opinions towards the interpretation of this provision, it does reflect the fundamental spirit of the presumption of innocence. Article 50 of CPL as revised in 2012 added a provision that ‘No one shall be compelled to prove himself to be guilty’. This is also a reflection of the presumption of innocence.

The presumption of innocence includes three meanings: first, any person shall be first presumed as innocent before the court makes its judgment as guilty; secondly, in the trial of a criminal case, the public prosecutor shall bear the burden of proof, and the defendant generally does not bear the burden of proof, to be specific, the defendant has no obligation to prove himself to be guilty or innocent; thirdly, in case of the prosecution evidence cannot reach the proof standard as required by law, the court shall pronounce that the defendant is innocent. In other words, the adjudication of the court shall abide by the principle of ‘in dubio, pro reo’. The presumption of innocence is a criminal procedure principle established on certain value orientation. The purpose of presumption of innocence is to protect the legitimate right of the defendant and guarantee the justification of judicial practice, and lower the possibility of wrongful conviction.22

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21. For details of the case see: Heilongjiang High People’s Court, 2011, Written Judgment on 63 Criminal Three Final.
22. An article was published in The Economist (2020) in which this author’s words about reducing the weight of confessions and changing the judicial mentalities were mentioned.
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