Judicial Commission of New South Wales

CRIMINAL TRIAL COURTS BENCH BOOK

Update 67

June 2021

SUMMARY OF CONTENTS OVERLEAF

Judicial Commission of New South Wales

Level 5, 60 Carrington Street, Sydney NSW 2000

GPO Box 3634, Sydney NSW 2001

SUMMARY OF CONTENTS

Update 67

Update 67, June 2021

Outline of trial procedure has been updated at **[1-005] Pre-trial procedures** to add reference to *Amagwula v R* [2019] NSWCCA 156 which confirms that generally when an accused is arraigned they should enter a plea personally.

Cross-examination — improper; of defendant has been rewritten at **[1-342] Cross-examination concerning complainant's prior sexual history**. There is discussion of the procedure for determining admissibility of evidence falling within the parameters of s 293 *Criminal Procedure Act* 1986 and the operation of the exclusions in s 293(4).

Jury has been updated at **[1-505] Discharging individual jurors** to include commentary on s 53A *Jury Act* 1977 which requires the mandatory discharge of a juror if they have become excluded or have engaged in misconduct relating to the trial. The heading at **[1-510]** has been re-named **Discretion to discharge whole jury or continue with remaining jurors**. *Zheng v R* [2021] NSWCCA 78, which discusses the discretion to discharge a whole jury has been added. *Trevascus v R* [2021] NSWCCA 104, which confirms the obligation of trial judges to give oral directions even when written directions have been provided, has been added at **[1-535] Written directions**.

Complaint evidence has been extensively revised and updated. At **[2-560] Evidence of complaint where witness available to give evidence — s 66(2**), the commentary concerning "fresh in the memory" has been revised and now includes additional discussion of *The Queen v Bauer (a pseudonym)* (2018) 266 CLR 56 and *R v XY* [2010] NSWCCA 181 and adds references to *R v Gregory-Roberts* [2016] NSWCCA 92 and *Kassab (a pseudonym) v R* [2021] NSWCCA 46. At **[2-570] Suggested direction — where complaint evidence admitted under s 66(2)**, the direction has been re-written. It now incorporates suggested directions previously appearing at **[2-580] Where complaint evidence is limited under s 136** and **[2-610] Evidence of complaint used to re-establish the complainant's credit**. At **[2-590] Evidence of complaint where witness not available under s 65(2)**, *Priday v R* [2019] NSWCCA 272 has been added regarding the test in subs 65(2)(b), (c) and (d) *Evidence Act* 1995.

Onus and standard of proof has been revised and updated at **[3-615] Notes**. *Gould v R* [2021] NSWCCA 92 and *Williams v R* [2021] NSWCCA 25, which discuss the circumstances in which a *Murray* direction may or may not be required have been added. There have been some editorial changes to **[3-600] Suggested direction — where the defence has no onus**.

Summing-up format has been updated at **[7-000] Suggested outline of summing-up (for use as an aide-memoire)**. *Trevascus v R* [2021] NSWCCA 104, which reiterates that written directions (including question trails) concerning the elements of the offence do not replace the need to give oral directions, has been added. *Alharbi v R* [2020] NSWCCA 130 has been added under *Section 161 Criminal Procedure Act* 1986 at **[7-040] Notes** concerning the judge's obligation to put the defence case to

the jury sufficiently to highlight evidence most relevant to the defence case. *DC v R* [2019] NSWCCA 234 has also been added at *Desirability of the judge raising the identification of the relevant legal issues with counsel at the conclusion of the evidence*. This reiterates that the obligation to ensure the accused receives a fair trial may require the judge to give directions notwithstanding counsel may request otherwise. Brief reference to *El-Jalkh v R* [2009] NSWCCA 139, *RR v R* [2011] NSWCCA 235, and *The Queen v Abdirahman-Khalid* [2020] HCA 36 has been added. Under Note 3, *Essential elements of a summing-up*, reference to *Alharbi v R* has been added, that is, that generally a summing-up should be concise to ensure the jury is not "wearied beyond the capacity of concentration". There have been some editorial changes to **[7-020] Suggested direction — summing-up (commencement)**.

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FILING INSTRUCTIONS

Update 67

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Outline of trial procedure

[1-000] Introduction

The following provides a brief overview of pre-trial and trial procedures with reference to sections of this Bench Book. It is intended to assist a judge conducting a criminal trial. There are suggestions included which might be followed as a matter of practice by the trial judge but are not required by law.

The procedure for offences dealt with on indictment in the Supreme and District Court is set out in Ch 3 (ss 45–169) *Criminal Procedure Act* 1986.

Unless otherwise stated the section numbers below refer to the provisions of the *Criminal Procedure Act*. Paragraph references are to sections of the Bench Book.

As to trial procedures generally, see *Criminal Practice and Procedure NSW*, Pt 7, Trial Procedure.

[1-005] Pre-trial procedures

Trial court's jurisdiction

The criminal jurisdiction of the District Court is contained in Pt 4 *District Court Act* 1973.

In the usual case the accused is committed for trial to the relevant trial court after a case conference certificate is filed or, if a case conference is not required to be held (because the accused is unrepresented or a question of fitness to be tried has been raised (s 93(1)) after a charge certificate is filed: s 95(1).

The indictment is to be presented to the trial court within a specified time after committal: s 129 and District Court Rules Pt 53. The trial court can make directions and orders even where the indictment has not been presented: s 129(4).

The indictment

There can only be one operative indictment before the court: *Swansson v R* (2007) 69 NSWLR 406. However, the indictment can include multiple charges and multiple accused.

The DPP may present an ex officio indictment where the magistrate does not commit an accused for trial, where the charge in the indictment is different to the committal charge or even where there have been no committal proceedings: s 8(2). This is not a matter that will generally affect the course of the trial.

Generally it is sufficient if the charge in the indictment is set out in terms of the provision creating the offence: s 11. However, there is a common law requirement for particulars as to the place, time and manner of the commission of the offence to be included, see generally *Criminal Practice and Procedure NSW* [2-s 11.1].

After presentation, the court has general powers to conduct proceedings on that indictment, including the issuing of subpoenas: *KS v Veitch* [2012] NSWCCA 186.

The indictment can be amended at any time with leave of the court or the consent of the accused: s 20. The amendment can include the addition of further charges. Before trial the amendment can occur by the substitution of another indictment for that filed: s 20(3), see *Criminal Practice and Procedure NSW* [2-s 21.1]ff; *Criminal Law (NSW)* at [CPA.21.20]ff.

Arraignment

An arraignment occurs when the charge in the indictment is read to the accused who is asked to plead to the charge. The charge is usually read by the judge's associate as "clerk of arraigns" but some judges prefer to undertake this task. If the plea is "not guilty" the accused stands for trial: s 154.

The accused should enter the plea personally. See generally, *Amagwula v R* [2019] NSWCCA 156 at [26]–[41] (Basten JA; Lonergan J agreeing); [238]–[309] (Button J).

The accused may be represented by a legal practitioner or appear self-represented: s 36. The accused has no right to be assisted by a person known generally as a "McKenzie friend": *Smith v The Queen* (1985) 159 CLR 532. It is rare to permit a person other than a legal practitioner to play an active role in the trial.

Generally the accused is placed in the dock, but may be permitted to remain outside the dock, particularly where self-represented: s 34. The history of s 34 was considered in *R v Dirani (No 7)* [2018] NSWSC 945 and *R v Stephen (No 2)* [2018] NSWSC 167. It is not prejudicial to require an accused to sit in the dock: *R v Dirani (No 7)* at [56]; *R v Stephen* at [13]. The dock is the traditional symbol of what is at stake in a criminal trial and is a means of impressing on the community, and the jury, the gravity of the proceedings: *R v Dirani (No 7)* at [32]; *R v Stephen (No 2)* at [11].

If there is more than one charge, the accused is asked to plead to each individually as each charge is read out. Where there are multiple accused they can be arraigned on different occasions.

Where multiple accused are before the court, they can be arraigned individually or together depending upon what course is more convenient having regard to the nature of the charges.

There will be no arraignment where:

(a) a question has arisen as to the accused's fitness to stand trial, see [4-300]

(b) there is an application to stay the indictment, see *Criminal Practice and Procedure NSW* [2-s 19.5]ff; *Criminal Law (NSW)* at [CPA.19.60]ff

(c) there is an application to quash the indictment or to demur to the indictment: ss 17, 18, see *Criminal Practice and Procedure NSW* [2-s 17.1]ff; *Criminal Law (NSW)* at [CPA.17.20]

(d) the court permits time before requiring a plea to the indictment: s 19(2), see *Criminal Practice and Procedure NSW* [2-s 40]ff; *Criminal Law (NSW)* at [CPA.19.40]ff.

There is a general power to adjourn proceedings: s 40.

As to the necessity to re-arraign the accused after an amendment of the indictment see *Kamm v R* [2007] NSWCCA 201.

There are a number of special pleas that can be made to the indictment. These are rare but include a plea of autrefois: s 156. Such a plea is determined by a judge alone. The accused may plead not guilty to the charge stated in the indictment but plead guilty to an offence, not set out in the indictment, but included in the charge: eg plea of guilty to offence of robbery on charge of armed robbery. The Crown may accept the plea in discharge of the indictment or refuse to do so: s 153. If the Crown does not accept the plea, it is taken to have been withdrawn. If the accused pleads not guilty to the primary charge but guilty to an alternative count on the indictment and that plea is not accepted by the Crown in discharge of the indictment, the plea to the alternative count remains but the accused is placed in charge of the jury on the primary charge only, see *Criminal Practice and Procedure NSW* at [2-s 153.1]; *Criminal Law (NSW)* at [CPA.154.120].

Pre-trial rulings

Section 130 provides that, where the accused has been arraigned, the trial court may make orders for the conduct of the trial before the jury is empanelled. Chapter 3, Pt 3, Div 3 of the Act makes provision for the court to order pre-trial hearings, pre-trial conferences and further pre-trial disclosure. The purpose of these provisions is to reduce delay in the proceedings. It is for the court to determine which (if any) of those measures are suitable: s 134(2). The accused is required to give notice of alibi (s 150) and evidence of substantial mental impairment (s 151).

It is suggested that before the date of the trial the judge ask the defence whether there is a challenge to the admissibility of evidence in the Crown case and request the parties to define the issues to be placed before the jury. In particular the judge should identify whether evidence challenged will substantially weaken the Crown case and, therefore, may engage s 5F(3A) *Criminal Appeal Act* 1912 if the ruling is made against the Crown. Any such ruling should be made before the jury is empanelled in case the Crown appeals the ruling.

Before embarking upon any pre-trial application the trial judge should ensure the accused has been arraigned.

Orders or directions made after arraignment but before empanelment of a jury include:

(a) order for a separate trial of offences or offenders: s 21, see [3-360]

(b) (for State offences only) an order for trial by judge alone: ss 131-132A and see *R v Belghar* [2012] NSWCCA 86. The provisions do not apply to Commonwealth offences: *Alqudsi v The Queen* (2016) 258 CLR 203 at [115].

(c) evidentiary rulings including those where the leave of the court is required: s 192A *Evidence Act* 1995

(d) orders for closed court, suppression and non-publication of evidence. See general discussion of *Court Suppression and Non-publication Orders Act* 2010 at [1-349]ff. As to other statutory provisions empowering non-publication or suppression, or self-executing prohibition of publication provisions, see [1-356]ff

(e) change of venue: s 30, see *Criminal Practice and Procedure NSW* at [2-s 30.5]; *Criminal Law (NSW)* at [CPA.30.20].

Any orders made by the court before a jury is empanelled are taken to be part of the trial: s 130(2). Pre-trial orders made by a judge in proceedings on indictment are binding on a trial judge unless it would not be in the interests of justice: s 130A. Section 130A orders extend to a ruling given on the admissibility of evidence: s 130A(5) (inserted by the *Statute Law (Miscellaneous Provisions) Act (No 2)* 2014).

Section 306I *Criminal Procedure Act* 1986 provides for the admission of evidence of a complainant in new trial proceedings. Under s 306I(5), the court hearing the subsequent trial may decline to admit the record of evidence if the accused "would be unfairly disadvantaged". Section 306I(5) is directed to the position *after* specific questions of admissibility, determined under the *Evidence Act* 1995, have been addressed and permits the court to have regard to the effect of any edits to the record of evidence: *Pasoski v R* [2014] NSWCCA 309 at [29].

Sexual assault communications privilege

In sexual assault trials, there are special provisions associated with the production, and admissibility, of counselling communications involving alleged victims of sexual assault. These are in Ch 6, Pt 5, Div 2 of the *Criminal Procedure Act* "Sexual assault communications privilege" (SACP).

As a general rule, a person in possession of such material cannot be compelled to produce it in trials, sentence proceedings, committal proceedings or proceedings relating to bail: ss 297, 298. The relevant definitions are found in ss 295 and 296.

See further [1-895] Sexual assault communications privilege.

[1-010] The trial process

If the accused is self-represented, the judge is obliged to explain the trial process to the accused before the jury is empanelled. See generally [1-800]ff and [1-820].

Any interpreter who is present to assist the accused need not be sworn. The interpreter should be placed so that he or she may communicate with the accused.

Generally all proceedings in connection with a criminal trial should be heard in open court. There are statutory provisions restricting publication of evidence, for example where children are involved either as an accused or a witness. The court also has power to have a witness referred to by a pseudonym. There are provisions relating to witnesses giving evidence by alternative means, as to which see below.

Empanelling the jury

Provisions concerning the jury are found in the *Jury Act* 1977.

A jury panel is summoned by the sheriff and brought into court when required. Practice varies as to whether the judge is on the Bench when the panel is brought into court.

It is suggested that before the panel is brought into court the judge discusses with counsel matters that should be raised with the panel at the outset because they may impact upon a juror's willingness to perform his or her duty, such as the length of the trial, pre-trial publicity and the particular nature of the charge.

The judge can determine whether to excuse any person in the panel: s 38 *Jury Act*. Generally the sheriff's officer will bring written applications for excusal to the judge for approval. The judge can determine to have the prospective juror make the application in person after the panel is brought into court.

It is suggested that the trial judge inquire of the panel whether any person wishes to be excused for some reason, even though an application may have been refused by the sheriff, based on any matter raised with counsel or otherwise. For example, the jury should be informed that the proceedings will be in English, the sitting times of the court and the need for attendance every day. It is a matter for the judge whether the prospective juror should be sworn or not when seeking to be excused.

It is possible to challenge the array before empanelment but this is very rarely done: s 41 *Jury Act*. This is a challenge against the processes of the sheriff in selecting the panel.

If pre-trial rulings have been made pursuant to s 130(2) the accused is to be arraigned again on the indictment before the jury panel: s 130(3); *DS v R* [2012] NSWCCA 159 at [63]. Otherwise, although it may not be strictly necessary for the accused to be re-arraigned before the jury panel (*R v Janceski* (2005) 64 NSWLR 10), it is good practice to do so.

After the accused is arraigned before the panel but before the selection of jurors, the judge requests the Crown to inform the jury panel members of the nature of the charge, the identity of the accused and of the principal witnesses to be called for the prosecution: s 38 *Jury Act*, see [1-455]. The defence counsel should be asked whether there is any matter that should be raised with the jury, such as the names of defence witnesses. It is suggested that the Crown and defence counsel should also be invited to provide the names of persons who will be mentioned during the trial, even though they are not, or may not be, witnesses.

See s 38(1) *Jury Act* and cl 5 Jury Regulation 2015 in relation to the non-disclosure of the identity of certain officers and protected witnesses.

The judge calls on the jury panel members to apply to be excused if they consider that they are not able to give impartial consideration to the case in light of what the prosecutor has said, and in particular whether a potential juror may know a witness personally: s 37(8) *Jury Act*. The judge should also invite excusal applications to be made for other reasons that may impact upon a person's ability to participate as a juror (e.g. because of the awareness of pre-trial publicity, oral and written English language skills, sitting times and the estimated duration of the trial).

In a trial where it is anticipated there will be a large number of witnesses, it may be desirable that the panel members be provided with a list of witnesses (and other people who may be mentioned). The jury panel may be sent to the jury assembly area for members to have an opportunity to consider the list. They should be directed not to have discussions with other panel members. Those wishing to make an application to be excused may then be returned to the court room for it to be considered by the judge.

There are various ways in which applications to be excused may be received and considered. The person may be asked to come forward and inform the judge of the basis of the application. It is preferable that they do not speak in a manner audible

to the balance of the jury panel. The person may make the request in writing if the circumstances relate to the person's health or may cause embarrassment or distress (s 38(3) *Jury Act*). Another option for the making of excusal applications is for writing material to be made available in the body of the court where the panel members are located for all applications to be made by way of a note. The sheriff or court officer can then provide the note, and the panel member's card, to the judge to consider the application. However the application is made, the judge may clarify with counsel whether the matter raised should warrant the person being excused (eg. in the case of the person knowing a witness).

There is no requirement for excusal applications to be made by way of oath or affirmation.

After the excusal applications have been determined and before proceeding with the empanelment it is wise to reiterate to the jury panel members the importance of raising any matter of concern at this time rather than thinking that the matter may not cause a problem but then to find out sometime during the trial that it is.

The jurors are selected by ballot in open court: s 48 *Jury Act*. The selection of the potential jurors is performed by the judge's associate withdrawing cards from the box provided. The jurors are referred to only by numbers given to them by the sheriff. The parties have no right to the names or any other personal information of prospective jurors: *R v Ronen* [2004] NSWCCA 176. As to the selection of the jury generally and challenges, see Pt 7 *Jury Act* and [1-460]ff. See also *Criminal Practice and Procedure NSW* at [7-450], [29-50,725].

As to the number of jurors and the selection of additional jurors where necessary, see s 19 *Jury Act* and [1-440].

A challenge can be made by the accused or the legal representative: s 44 *Jury Act*. Defence counsel will usually ask to be permitted to assist the accused, and permission is inevitably given. The challenges are made before the juror is sworn. There is some opportunity to inspect the prospective juror before a challenge is made under s 44. See the discussion in *Theodoropoulos v R* (2015) 51 VR 1 at [49].

Practices as to empanelling can vary. One method is that the jury be advised that they will be permitted to take an oath or an affirmation as to the conduct of his or her duties as a juror. They should also be advised as to the right of the parties to challenge particular jurors. The twelve prospective jurors are called into the box. The accused is informed of the right to challenge by the clerk of arraigns. There is a pause as the prospective juror stands so as to allow time for a challenge to be made. If challenged, the juror is asked to leave the jury box. Further jurors are called and challenges taken until the required number of jurors is obtained.

After members of the jury have been chosen, the jury is sworn by oath or affirmation: s 72A *Jury Act*. It is a matter for the practice of the individual judge whether the jury is sworn as a group or individually and also as to whether a religious text is to be held by those taking an oath: s 72A(5) *Jury Act*. It is not necessary for the accused to be arraigned again after the jury is selected: *DS v R* [2012] NSWCCA 159 at [64]. After the jurors are sworn the balance of the panel is returned to the sheriff and leaves the courtroom.

After the jury is sworn, the accused is given or placed into the charge of the jury by the judge's associate. This is in effect indicating to the jury the charges in the indictment and the jury's duty to act according to the evidence.

It is suggested that where the indictment contains a number of counts or multiple accused the Crown be requested to provide the jury with a copy of the indictment at this time or shortly thereafter. It can be helpful for the judge in opening for the jury to have a copy of the indictment where there are numerous or complicated charges.

It is suggested that after the jury has been charged, the judge tells the jury that it does not have to elect a foreperson immediately, it can change the foreperson at any time, the major function of the foreperson is to deliver the verdict but he or she can be the person who communicates between the jury and the judge, but the foreperson has not more rights in respect of the conduct of the jury or the determination of the verdict than any other member of the jury.

Where at any time during the trial the accused wishes to plead guilty, he or she should be arraigned again. If there is a plea of guilty to the charge or an included charge and the plea is accepted by the Crown, the jury is to be discharged without giving a verdict: s 157.

After empanelment some judges think it appropriate for the court attendant to give a direction that potential witnesses leave the court and the hearing of the court.

Adjournment after empanelling

It is suggested that immediately after the jury has been empanelled and charged, that they are given a short break in order to orientate themselves as a group, familiarise themselves with the surroundings and overcome any nervousness that may have been occasioned by the procedure of empanelling. They might be informed that, when they return to the courtroom, an explanation of their role and function as jurors and an outline of the trial procedure will be given to them before the trial proper commences.

Judge's opening

See generally [1-470], [1-480] and [1-490] for the suggested contents of the opening.

The trial judge should briefly describe to the jury the trial process, the role and obligations of jurors, the onus and standard of proof, the duties and functions of counsel and, where known, the issues to be raised in the trial. If appropriate, the judge can briefly explain the nature of the charge or charges in the indictment. These remarks should be tailored to the particular case that the jury is to try. For example, the trial judge may consider what, if anything, needs to be said about pre-trial publicity.

It is suggested that each member of the jury be provided with a written document which can be referred to in the course of the opening and left with the jury during the trial (see the suggested written directions at [1-480]). It is a matter for the judge what issues should be addressed in the written document but it is suggested that it should at least include a brief explanation of the following:

- the respective role of a judge and a jury
- the nature of a criminal trial

- the onus and standard of proof
- the imperative of not discussing the trial with any person outside the jury room
- the duty of jurors to bring irregularities in the conduct of the trial to the judge's attention and report any juror misconduct
- the prohibition against making inquiries outside the courtroom including using the Internet or visiting the scene of the crime and indicating that such conduct is a criminal offence
- that they should discuss the matter only in the jury room and when they are all assembled
- that they should ignore any media reporting of the trial
- the principal issues in the case if they are known.

The judge should make some oral reference in opening to the following practical matters:

- sitting hours
- breaks and refreshments
- selecting a foreperson
- introducing counsel
- the jury can request transcript at any time and in respect of any witness, although they should also be informed that this does not apply to evidence which is pre-recorded.

It should be made clear to the jury that any concern about the evidence or the conduct of the trial should be raised by a note with the judge and not with a court attendant.

[1-015] The course of the evidence

Opening addresses

The opening address of the Crown is a succinct statement of the nature of the charge and a brief outline of the Crown case. The Crown may refer to the witnesses it intends to call and what evidence it is anticipated that a particular witness will give: see *Criminal Practice and Procedure NSW* at [7-475]; *Criminal Law (NSW*) at [CLP.1780]. The Crown should indicate in opening whether it relies upon any statutory or common law alternatives to the offence charged in the indictment. The Crown can be asked not to open on evidence to which objection will be taken but where admissibility has not been determined.

Counsel for the accused can open but it should only be to indicate the issues in contention and not be a wide ranging discussion of the law: s 159(2) and *R v MM* (unrep, 9/11/2004, NSWCCA) at [50], [139], [188].

Witnesses in the Crown case

It is a matter for the Crown how it structures its case, what witnesses to call and the order of calling witnesses.

In a joint trial it is suggested that the judge ask the Crown Prosecutor to identify evidence which is admissible against one accused but not against another (or others) at the time the evidence is led. The judge should make clear to the jury how the evidence can be used or not used against each accused.

Procedures can be adopted to preserve the anonymity of witnesses where necessary: see *BUSB v R* (2011) 80 NSWLR 170. Generally the judge has no role to play in the calling of witnesses.

There are several statutory provisions that permit witnesses to give evidence by alternative means. See generally [1-360]ff . When these provisions are utilised, the judge is required by statute to explain the procedure to the jury. There are suggested warnings and directions contained in the chapter. In particular where the evidence of a witness is given by way of a recording, it is important to impress on the jury before they watch the recording, that evidence given in this way is evidence like that of any other witness so they should concentrate while the recording is being played as they should not assume they will have the opportunity to watch the evidence again.

It is suggested that these explanations and directions are given at the time the witness is to be called and before the witness is called. They may be given again in the summing up, if it appears necessary to do so to ensure the jury is aware of these matters before deliberating.

As to giving evidence by the use of a video recording, see [1-372]ff.

As to evidence by audio-visual link, see [1-380].

If a witness is unfavourable within the terms of s 38 *Evidence Act* 1995 specific directions may be required, see [4-250]ff. Directions may be necessary if a relevant witness is not called by the Crown, see **Witnesses — not called** at [4-370].

If a witness objects to giving particular evidence or evidence on a particular matter under cross-examination, the judge is required to explain to the witness in the absence of the jury the privilege against self-incrimination, see [1-700]ff.

As to the power to give the witness a certificate, see s 128 *Evidence Act* and [1-710].

As to expert evidence see [2-1100]ff.

Where there is some complexity in the expert evidence it is suggested that the jury be given the opportunity to raise any matter they would like to be further explained or clarified. The jury could be asked to retire to the jury room to consider whether there is anything they wish to raise before the expert is excused and to send a note which the judge will then discuss with counsel.

As to jury questions generally, see **Jury questions for witnesses** at [1-492] and **Expert evidence** at [1-494].

Directions and warnings

During the course of the Crown case a witness or a particular type of evidence may be called in respect of which it may be necessary to give a direction or warning to the jury, generally see s 165 *Evidence Act*. A direction is "something which the law requires the trial judge to give to the jury and which they must heed": *Mahmood v State of WA* (2008) 232 CLR 397 at [16]. A direction may contain warnings or caution the jury about the care needed in assessing evidence or about how it can be used: *Mahmood* at [16].

The usual instance where a warning is required is the categories of evidence found in s 165(1). These are addressed in the following sections of this Book:

(a) hearsay evidence, see [2-570] or admissions see [2-000]ff

(b) identification evidence including visual, see [3-000]ff, or voice, see [3-110]

(c) evidence which may be affected by age, see [1-130]ff

(d) evidence given by a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceeding, see [4-380]ff

(e) evidence given by a witness who is a prison informer, see [3-750]ff

(f) oral evidence of questioning by an investigating official of a defendant that is questioning recorded in writing that has not been signed, or otherwise acknowledged in writing, by the defendant, see [2-120].

The matters referred to in s 165(1) above are not exhaustive. A warning may be given (where there is a jury and a party so requests) in relation to evidence "of a kind that may be unreliable" (s 165(1)) ie evidence of a kind that the courts have acquired a special knowledge about: *R v Stewart* (2001) 52 NSWLR 301 at [86]. A warning under s 165 is not required for evidence which relates to the truthfulness of a witness such as evidence of a motive to lie, bias, concoction, or a prior inconsistent statement. Such matters are within the common experience of the community and thus capable of being understood by the jury: *R v Fowler* [2003] NSWCCA 321. This proposition does not of course apply to a witness who falls into one of the categories mentioned in s 165.

Section 165(5) preserves the power of a judge to give a warning or to inform the jury about a matter arising from the evidence, whether or not a warning is requested under s 165(2): *R v Stewart* at [86].

Warnings and exculpatory evidence

A warning under s 165 will rarely be applicable to a witness who does not give evidence implicating the accused: *R v Ayoub* [2004] NSWCCA 209 at [15]. A warning is not appropriate or required if the evidence is favourable to the accused because "the aspect of the witness's status that gives rise to the possibility of unreliability is no longer relevant": *R v Ayoub* at [16].

However there are some types of evidence, such as identification evidence and hearsay evidence, that are potentially unreliable no matter whether they exculpate or

inculpate an accused: *R v Rose* (2002) 55 NSWLR 701 at [297]. Some warning is required about the potential unreliability of the evidence: *R v Rose* at [297].The judge should exercise care before giving a s 165 warning to evidence led by the defence.

Section 165A *Evidence Act* also addresses judicial warnings in relation to the evidence of children, see [1-130]ff. Section 165B *Evidence Act* provides for a warning where there is a delay in prosecution, see [2-640]ff.

A direction is usually required in relation to:

(a) visual identification: s 116 *Evidence Act*, see at [3-000]ff

(b) the right to silence where the accused refuses to answer questions of police, see [4-110]

(c) the impermissible use of evidence as tendency, see [4-200]ff.

A direction or warning is not the same as a comment and generally a comment will be inadequate if a warning or direction is required.

It is suggested that directions and warnings about particular types of evidence or witnesses be given at the time the evidence is called before the jury. If the evidence is very prominent in the trial it may be appropriate to give the direction or warning immediately after the opening addresses, for example where the Crown case is solely or substantially based upon visual identification. Directions and warnings should also be repeated in the summing up. It may be appropriate to give a direction or warning in writing at the time it is given orally to the jury, or for it to be included in the written directions in the summing up depending upon the significance of the evidence to the Crown case.

The trial judge should be seen as impartial and must take care not to become too involved in the conduct of the trial, in particular in questioning witnesses: *Tootle v R* (2017) 94 NSWLR 430 at [46]. It is for the parties to define the issues to be determined by the jury. A cardinal principle of criminal litigation is that the parties are bound by the conduct of their counsel: *Patel v The Queen* (2012) 247 CLR 531 at [114].

A judge should generally not reject evidence unless objection is taken to it: *FDP v R* (2009) 74 NSWLR 645. However a judge is required to reject a question asked in cross-examination that is improper within the terms of s 41 *Evidence Act* even where there is no objection taken to the question, see [1-340].

The Crown must call all its evidence in the Crown case and cannot split its case by calling evidence in reply where it could have anticipated the evidence to be called by the defence: *Shaw v R* (1952) 85 CLR 365. The Crown may be permitted to reopen its case in order to supplement a deficiency in its case that was overlooked or is merely technical: *Wasow v R* (unrep, 27/6/85, NSWCCA). This can occur at any time provided it does not result in unfairness: *Pham v R* [2008] NSWCCA 194 (after the Crown had started to address); *Morris v R* [2010] NSWCCA 152 at [26].

Where there is more than one accused cross-examination occurs in the order in which the accused are named in the indictment unless counsel come to some other arrangement.

Views

As to the procedure in respect of carrying out a view, see [4-335]ff. It is usual to appoint a "shower" being a person who will indicate various aspects of the scene to the jury in accordance with the evidence. This is often the police officer in charge of the investigation. The accused does not have to be present at the view but he or she has the right to attend: *Jamal v R* [2012] NSWCCA 198 at [41]. It often occurs that the accused chooses not to because of the prejudicial effect if the accused is in custody.

It is suggested that the police be asked to take a video recording of the view so that it can later be tendered in evidence. The recording should be made so as not to disclose members of the jury, but to record what is said by the shower and, if possible any questions asked by the jury and the answers given by the shower.

Transcript

The jury may be supplied with the transcript or part of it, including addresses and, if available, the summing up or part of it: s 55C *Jury Act*: *R v Ronald Edward Medich (No 24)* [2017] NSWSC 293. The provision of transcript is a discretion exercised by the trial judge, but there may be cases where the nature of the charges, the volume of evidence and the fragmented nature of the hearing require that the jury be provided with the transcript where they request it: *R v Bartle* (2003) 181 FLR 1 at [670]-[672], [687].

It is suggested where a daily transcript service is being provided, that a clean copy of the transcript on which agreed corrections are recorded should be kept in a folder by the judge's associate in case the jury later request the transcript or part of it. It is helpful to have the transcript tabbed according to the name of witnesses.

Practices differ as to whether the jury is provided with the transcript daily as a matter of course or only when the jury requests the transcript. It can be provided at any time, even during deliberations. Where the jury is provided with part of the transcript, fairness may require that they be provided with some other part of the transcript. A suggested direction in regard to the use of transcripts is given at [1-530].

It is suggested that before transcript is given to the jury, counsel should be requested to ensure that the copy to be handed to them does not contain any material arising from applications or discussion that took place in the absence of the jury.

Close of Crown case

At the conclusion of the Crown case, if the evidence taken at its highest is defective such that the Crown cannot prove the charge to the requisite degree, the judge has a duty to direct an acquittal, see [2-050]ff. For a recommended direction to the jury, see [2-060]. The judge has no power to direct an acquittal because he or she forms the view that a conviction would be unsafe: *R v R* (1989) 18 NSWLR 74; *Doney v R* (1990) 171 CLR 207.

As the Crown has the right of an appeal against an acquittal by direction full reasons should be given at the time of the acquittal or immediately thereafter.

In *Director of Public Prosecutions Reference No 1 of 2017* [2019] HCA 9, the High Court held that a "Prasad direction" (so named from *R v Prasad* (1979) 23 SASR 161) should never be given. The direction, which it was intended would be sparingly given, was that a jury could acquit at any time without hearing any more evidence or the addresses. A Prasad direction should not be given in any case.

Defence case

Where the accused intends to give or tender evidence or call witnesses, defence counsel may open the accused's case to the jury: s 159.

The accused may call evidence as to character generally or in a particular aspect, see s 110 *Evidence Act*, the discussion and suggested directions at [2-350]ff. The Crown can adduce evidence to rebut the accused's claim that he or she is a person of good character either generally or in a particular respect: ss 110(2), 110(3). Cross-examination on character can only be with leave: s 112 *Evidence Act*. As to cross-examination of the accused generally, see [1-343].

The accused should not be prevented from giving evidence on a particular topic simply because the matter was not raised with the Crown witnesses in cross-examination: *Khamis v R* [2010] NSWCCA 179. A non-exhaustive list of possible responses by a court to a breach of the rule in *Browne v Dunn* appears in *R v Khamis* at [43]-[46]. If the accused's evidence is allowed and there has been a breach of the rule the trial judge may fashion appropriate and careful directions to the jury: see also *RWB v R* [2010] NSWCCA 147 at [101], [116]. See further commentary at [7-040] at [7].

There is no requirement that the accused give evidence before calling other witnesses although there is a general practice to that effect: *RPS v The Queen* (2000) 199 CLR 620 at [8]-[9] and see the discussion in *R v RPS* (unrep, 13/8/97, NSWCCA).

See defences from [6-050]ff.

As to intoxication, see [3-250]ff.

Case in reply

Because of the rule against the Crown splitting its case, the circumstances in which the Crown will be permitted to call evidence in reply must be very special or exceptional having regard to all the circumstances including whether the Crown could reasonably have foreseen the issue before the close of its case: *Morris v R* [2010] NSWCCA 152.

The Crown can call evidence in reply to evidence given by the accused of alibi or substantial impairment: ss 150(5), 151(3). However, in practice the Crown calls rebuttal evidence in the Crown case. The judge can direct the Crown to call the evidence in its case: *R v Fraser* [2003] NSWSC 965.

Discharge of the jury

Part 7A of the *Jury Act* deals with the discharge of jurors. The trial judge has a discretion to discharge a juror and, if the juror is discharged, a separate and distinct discretion whether to continue with the trial with less than twelve jurors (s 53C): *BG v R* [2012] NSWCCA 139 at [91]. These discretions should be exercised independently. As to the discharge of individual jurors, see [1-505], and a suggested direction following a

discharge, see [1-515]. For further information in relation to the discharge of the whole jury, see [1-520]. As to questioning jurors in relation to prejudicial material, see s 55D *Jury Act*. If the judge is required to examine a juror in respect of alleged misconduct, see s 55DA *Jury Act*.

It may be necessary to question a juror or jurors about the matter giving rise to the issue of discharge. It is suggested that this should be carried out by the judge after consultation with counsel, but counsel not be permitted to question the juror. Any questioning should not enter into the area of the jury's deliberations.

[1-020] Addresses

It is suggested that before addresses the judge should discuss with counsel the issues that have been raised and what warnings or directions will be sought in the summing up. In particular, the Crown should indicate whether it relies upon any alternative counts in light of the evidence given during the trial.

It is suggested that unless the case is a legally simple one, written directions be given to the jury before counsel addresses as to the elements of the offence and any relevant legal issues with some short oral directions explaining these matters without reference to the evidence. This course relieves counsel from having to deal with the law, and gives the jury written guidance on the legal issues to which counsel can refer when addressing. The written directions should be shown to counsel before being given to the jury.

It is suggested that counsel be asked to break up their addresses into sections lasting no more than 40 minutes and that the jury be given a short break at the end of each section.

Crown address

The Crown addresses first and may be permitted a further address where factual matters have been misstated in the defence address: s 160. This is rarely permitted having regard to counsel having an opportunity to correct errors and/or the judge doing so.

There is a practice that the Crown will not address where the accused is unrepresented, but there is no rule that prohibits the Crown from doing so, see [1-835]. The accused should not be able to achieve a tactical advantage by dismissing defence counsel before addresses.

As to the contents of the Crown address, see *Criminal Practice and Procedure NSW* at [7-600]; *Criminal Law (NSW)* at [CLP.1780].

[1-025] Summing up

As to summing up the case to the jury, see [7-000]ff. As to the provision of written directions, see [1-535]. The summing up should be concerned only with issues actually raised at the trial. The jury should be directed on only so much of the law that is necessary to determine the charge or charges before them: *Huynh v The Queen* [2013] HCA 6 at [31].

Suggested directions are contained in the Bench Book under particular topics. They should be adapted where necessary to deal with particular factual situations arising in the trial. A trial judge is not required to give directions in accordance with those contained in the Bench Book: *Ith v R* [2012] NSWCCA 70 at [48].

It is suggested that the summing up be delivered in sections of no more than 40 minutes and the jury be given a short break between each section. It is suggested that when the jury retires for a break that counsel be asked whether there is anything they wish to say about the section of the summing up that has just been given.

Before the jury are sent out to deliberate, the judge should ask both counsel (and in the absence of the jury if necessary) whether there are any errors or omissions to be corrected. If counsel wish to have a particular direction given, counsel should frame the direction sought.

Where there are multiple accused and/or multiple counts it may be desirable for a "verdict sheet" to be provided to the jury upon which the verdicts may be recorded to assist the foreperson in announcing each of them.

When the jury retires to deliberate, exhibits should be sent to the jury room. Where the evidence of a child has been given by a video recording, the recording is not an exhibit and should not be sent to the jury room, see a discussion of *R v NZ* (2005) 63 NSWLR 628 at [1-378]. The judge has a discretion to withhold an exhibit from the jury room.

It is suggested that counsel should check the exhibits being sent to the jury to ensure that only exhibits find their way into the jury room and not extraneous material that has inadvertently found its way into the exhibits.

[1-030] Jury deliberations

As to jury questions during deliberations, see [8-000]. It is imperative that a verdict not be taken until the judge has addressed all the questions from the jury: *R v McCormack* (unrep, 22/4/96, NSWCCA). Where a question manifests confusion, it is important that this be removed by answering the question even where the jury has apparently resolved the issue: *R v Salama* [1999] NSWCCA 105 at [71].

It is normal practice to re-assemble the court shortly before 4 pm in order to inquire of the jury whether they wish to continue to sit or to retire for the day and return the following morning. The jury should indicate the time at which they wish to recommence their deliberations.

An order should be made permitting the jury to separate if the jury wish to return the next day: s 54 *Jury Act*.

It is suggested that it be stressed to the jury that, although they are being permitted to separate, they should not discuss the matter with any other person nor with fellow jurors until after they have all reassembled in the jury room the next day.

Where the jury indicates it is unable to agree it may be necessary to give a “Black direction”, see [8-050]ff.

Return of the jury

As to taking the verdict of the jury, see [8-020] for Commonwealth offences and [8-030] for State offences.

A jury should not be questioned as to the basis of its guilty verdict, for example where manslaughter has been left on different bases, see [8-020] at [4].

As to prospects of disagreement and the taking of majority verdicts, see [8-050].

The jury is to be discharged immediately after delivering its verdict: s 55E *Jury Act*.

It is suggested that the jury be advised as to the existence of the offence under s 68A of the *Jury Act* in relation to soliciting information from or harassing a juror. It should also be warned of the offences under s 68B as to the disclosure of information as to the deliberations of the jury.

The verdict should be entered by the judge's associate on the back of the indictment noting the date and time of the verdict.

Some judges have the allocutus given to the accused by the associate after a verdict of guilty, see [8-020] at [7]. This is not essential. The trial judge will usually formally convict the accused where a guilty verdict has been returned and before adjourning the matter for sentencing proceedings, if such an adjournment is sought.

The exhibits and MFI's should be returned to the relevant party.

[The next page is 19]

Cross-examination — improper; of defendant

[1-340] Improper questions put to witness in cross-examination

Section 41 *Evidence Act* 1995 empowers the court to disallow improper questions put to a witness in cross-examination. The *Evidence Amendment Act* 2007 (which applies to proceedings commenced on or after 1 January 2009) repealed s 275A *Criminal Procedure Act* 1986 and re-enacted s 41 in the terms quoted below. Section 41 applies to criminal and civil proceedings and is not restricted to sexual assault matters. Section 41 provides:

> (1) The court must disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the court is of the opinion that the question (referred to as a "***disallowable question***"):
>
> (a) is misleading or confusing, or
>
> (b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or
>
> (c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or
>
> (d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).
>
> (2) Without limiting the matters the court may take into account for the purposes of subsection (1), it is to take into account:
>
> (a) any relevant condition or characteristic of the witness of which the court is, or is made, aware, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality, and
>
> (b) any mental, intellectual or physical disability of which the court is, or is made, aware and to which the witness is, or appears to be, subject, and
>
> (c) the context in which the question is put, including:
>
> (i) the nature of the proceeding, and
>
> (ii) in a criminal proceeding—the nature of the offence to which the proceeding relates, and
>
> (iii) the relationship (if any) between the witness and any other party to the proceeding
>
> …
>
> (5) However, the duty imposed on the court by this section applies whether or not an objection is raised to a particular question.
>
> (6) A failure by the court to disallow a question under this section, or to inform the witness that it need not be answered, does not affect the admissibility in evidence of any answer given by the witness in response to the question.
>
> …

[1-341] Notes

1. Section 41 imposes a mandatory duty on the court to disallow a question if the court forms the opinion that the question is a disallowable question: see further *Uniform Evidence Law*, ALRC Report 102 (Final Report), 2005 at [5.90], [5.114]. The Court of Criminal Appeal confirmed that the now repealed s 275A(5) *Criminal Procedure Act* 1986, which had materially similar language to s 41(5), imposed an *obligation* on a court to disallow an improper question. This was the case regardless of whether an objection was taken by a party to the question: *FDP v R* (2009) 74 NSWLR 645 at [26]–[28]; *Gillies v DPP* [2008] NSWCCA 339 at [65].

2. Spigelman CJ said when dealing with a previous statutory form of s 41 in *R v TA* (2003) 57 NSWLR 444 at [8]:

> Judges play an important role in protecting complainants from unnecessary, inappropriate and irrelevant questioning by or on behalf of an accused. That role is perfectly consistent with the requirements of a fair trial, which requirements do not involve treating the criminal justice system as if it were a forensic game in which every accused is entitled to some kind of sporting chance.

3. Section 41 is premised on an assumption that the question will elicit relevant evidence: *R v TA* at [12]. The court must balance the probative value of the (relevant) evidence sought to be elicited with the effect of the cross-examination upon the witness: *R v TA* at [8], [13]. If the probative force of an anticipated answer is likely to be slight, even a small element of harassment, offence or oppression would be enough for the court to disallow the question: *R v TA* at [12].

4. Section 41 is not the only source of law for improper questions. In *Libke v The Queen* (2007) 230 CLR 559, Heydon J detailed the law governing cross-examination generally, including the powers of a cross-examiner: at [118]; offensive questioning: at [121]; comments by a cross-examiner during the course of questioning: at [125]; compound questions (simultaneously pose more than one inquiry and call for more than one answer): at [127]; cutting off answers before they were completed: at [128]; questions resting on controversial assumptions: at [129]; argumentative questions: at [131] and the role of the judge: at [133]. The court held the judge should have intervened to control persistently inappropriate commentary by the prosecutor to prevent any later suggestion of unfairness: at [41], [53], [84], [133]. Hayne J discussed the role of the judge at [84]–[85].

   See also P Johnson, "Controlling unreasonable cross-examination" (2009) 21(4) *JOB* 29.

[1-342] Cross-examination concerning complainant's prior sexual history

Sections 293(2) and 293(3) *Criminal Procedure Act* 1986 provide that evidence relating to the prior sexual history of the complainant is inadmissible subject to exceptions outlined in s 293(4)(a)–(f). Evidence falling within the exceptions can only be admitted if its probative value outweighs any distress, humiliation or embarrassment the complainant might suffer as a result of its admission: s 293(4).

Sections 293(5) to 293(8) set out the procedure for determining whether evidence said to fall within the identified exceptions in s 293(4) may be admitted. In summary:

- evidence related to the complainant's sexual reputation, sexual experience or sexual activity cannot be given unless the court has first decided the evidence is admissible: s 293(5)
- questions of the admissibility of the evidence are determined in the absence of the jury: s 293(7)
- the accused may be permitted to cross-examine a complainant concerning evidence of the complainant's sexual experience, or lack of it, or participation or lack of participation in sexual activity, if the evidence was disclosed or implied in the prosecution case, and the accused would be unfairly prejudiced if not able to do so: s 293(6)
- if the court decides the evidence is admissible, written reasons must be given identifying with clarity the nature and scope of the evidence and the reasons for concluding it is admissible, before the evidence is led: s 293(8).

There has been some controversy associated with s 293 since it was first enacted, principally because of its capacity to prejudice an accused in the conduct of their trial. A five-judge Bench was convened in *Jackmain (a pseudonym) v R* [2020] NSWCCA 150 to consider how s 293 applied in the context of allegations of previous unrelated false complaints and the correctness of *M v R* (unrep, 15/9/93, NSWCCA) (where it was held, in respect of an earlier version of s 293, that it extended to exclude such evidence). The controversy concerning the section and the relevant case law was summarised by Leeming JA at [88]–[178].

Section 293 was designed to exclude, to a significant degree, cross-examination of a complainant's sexual activity or experience with only limited exceptions: *Jackmain v R* at [15]. Its purpose is to protect sexual assault complainants and prevent embarrassing and humiliating cross-examination of a complainant about their past sexual activities: *Jackmain v R* at [23]–[24]; [233]; [246]–[247]; *GP v R* [2016] NSWCCA 150 at [40].

Section 293 renders otherwise relevant evidence inadmissible; if the evidence in question is irrelevant, or otherwise inadmissible, it does not fall within the parameters of s 293: *Decision Restricted* [2021] NSWCCA 51 at [42]; *R v Morgan* (1993) 30 NSWLR 543 at 544; see also *HG v The Queen* (1999) 197 CLR 414 at [24].

The procedure for determining admissibility

The procedure contemplated by s 293(7) for determining whether evidence is admissible is a voir dire: *Decision Restricted* [2020] NSWCCA 115 at [56]. To facilitate the conduct of the voir dire, s 293 must be read down to permit evidence that would otherwise be inadmissible to be given so the task under ss 293(6) and 293(7) can be performed. The effect is that the exclusionary rules in ss 293(2) and 293(3) do not apply to evidence given during the voir dire: *Decision Restricted* [2020] NSWCCA 115 at [53]–[58]; [94]; *Jackmain v R* at [16]; [91]–[95]; [248] .

Generally, counsel should provide a detailed written statement of the evidence proposed to be led so the trial judge can determine whether the evidence falls within the parameters of s 293(4) and its probative value: *Taylor v R* (2009) 78 NSWLR 198 at [44]–[45]. In *Jackmain v R*, at [248], Wilson J (Johnson J agreeing at [234])

observed that ordinarily the voir dire would be conducted on the documents as "it would be wholly inconsistent with the intention of the legislature … for a complainant to be required to give evidence *viva voce* and endure the sort of humiliating and distressing cross-examination that the Parliament sought to prevent." In an appropriate case, however, it may be necessary for oral evidence to be given: see for example *Decision Restricted* [2020] NSWCCA 115 at [94], where the oral evidence was to be given by persons other than the complainant.

Before the evidence is given, precise written reasons must be given for admitting the evidence and recording the nature and scope of the admitted evidence (s 293(8)): *Taylor v R* at [44]–[47]; *Dimian v R* (unrep, 23/11/95, NSWCCA). However, there is no need for the questions that are to be asked to be specifically identified: *Taylor v R* at [48].

Whether the evidence discloses the complainant has had sexual experience or taken part in sexual activity in s 293(3) is determined according to ordinary evidentiary principles: *Decision Restricted* [2020] NSWCCA 115 at [107].

The exclusions in s 293(4)

Within the very narrow parameters of the provision, s 293(4) should be construed broadly in the interests of the accused: *R v Taylor* at [36]; *Decision Restricted* [2021] NSWCCA 51 at [55]–[57]. However, it is important to bear in mind the intent of the legislature in introducing s 293 and its predecessors. In *GP v R* [2016] NSWCCA 150, Payne JA (McCallum and Wilson JJ agreeing) said at [40]–[41]:

> Section 293 … clearly strikes a balance between competing interests being, on the one hand the interest of preventing distressing and humiliating cross-examination of sexual assault victims about their prior sexual history and on the other, the interest of permitting an accused person to cross-examine victims about defined aspects of their sexual history in the circumstances prescribed in the exceptions contained within s 293.
>
> …
>
> [A]n approach to construction which seeks to discern a single purpose, and construing the legislation as though it pursued that purpose to the fullest extent possible may be contrary to the manifest intention of the legislation.

A number of cases have considered aspects of the exclusions in s 293(4). As to:

- the meaning of the expression "connected set of circumstances" and "at or about the time of" in s 293(4)(a) see: *Jackmain v R* at [189]–[195] and particularly at [191] where emphasis was given to the very short temporal period intended to apply; *R v Morgan* (1993) 30 NSWLR 543 (decided under s 409B, the predecessor provision); *R v Edwards* [2015] NSWCCA 24 at [25]–[30]; *GEH v R* [2012] NSWCCA 150 at [11]–[13] (Basten JA) and [35] (Harrison J); *Decision Restricted* [2021] NSWCCA 51 at [59]–[60] (Leeming JA, Walton J agreeing) but cf Adamson J at [88]–[91].
- the fact false complaint evidence may have the capacity to fall within the exceptions in s 293(4) see: *Adams v R* [2018] NSWCCA 303 at [163]–[177]. Where there is false complaint evidence years remote from the alleged offending, the temporal requirement in s 293(4)(a) cannot be satisfied: *Jackmain v R* at [25]; [190]; [235]; [238]; [240].

- whether evidence of fear and anxiety constitutes "disease or injury…attributable to the sexual intercourse so alleged" referred to in s 293(4)(c) see: *GP v R* [2016] NSWCCA 150 at [34], [44]; a psychological condition of diagnosed depression and suicidal ideation falls within the term "disease or injury": *JAD v R* [2012] NSWCCA 73 at [83].
- the phrase "sexual intercourse so alleged" in s 293(4)(c)(i) includes only the physical act and excludes issues of consent: *Taleb v R* [2015] NSWCCA 105 at [93].

In *Decision Restricted* [2021] NSWCCA 51, Leeming JA (Walton J agreeing; Adamson J dissenting) observed, at [64], that when weighing the probative value of the evidence "the distress, humiliation or embarrassment" to the complainant that was relevant was that which was over and above that which would inevitably occur by giving evidence even without reference to the matters caught by s 293.

[1-343] Cross-examination of defendant as to credibility

Section 104 of the *Evidence Act* 1995 provides for further protections in relation to cross-examination as to credibility in addition to those prescribed in ss 102 and 103. The section outlines the circumstances where leave is, and is not, required to cross-examine a defendant as to his or her credibility. Section 104 provides:

> (1) This section applies only to credibility evidence in a criminal proceeding and so applies in addition to section 103.
>
> (2) A defendant must not be cross-examined about a matter that is relevant to the assessment of the defendant's credibility, unless the court gives leave.
>
> (3) Despite subsection (2), leave is not required for cross-examination by the prosecutor about whether the defendant:
>
> (a) is biased or has a motive to be untruthful, or
>
> (b) is, or was, unable to be aware of or recall matters to which his or her evidence relates, or
>
> (c) has made a prior inconsistent statement.
>
> (4) Leave must not be given for cross-examination by the prosecutor under subsection (2) unless evidence adduced by the defendant has been admitted that:
>
> (a) tends to prove that a witness called by the prosecutor has a tendency to be untruthful, and
>
> (b) is relevant solely or mainly to the witness's credibility.
>
> (5) A reference in subsection (4) to evidence does not include a reference to evidence of conduct in relation to:
>
> (a) the events in relation to which the defendant is being prosecuted, or
>
> (b) the investigation of the offence for which the defendant is being prosecuted.
>
> (6) Leave is not to be given for cross-examination by another defendant unless:
>
> (a) the evidence that the defendant to be cross-examined has given includes evidence adverse to the defendant seeking leave to cross-examine, and
>
> (b) that evidence has been admitted.

[1-347] Notes

1. Section 104 applies "only to credibility evidence in a criminal proceeding": s 104(1). If the evidence is relevant for some other purpose and admissible under Pt 3.2–3.6, s 104 does not apply: s 101A; *R v Spiteri* (2004) 61 NSWLR 369 at [35]. The issue of whether a particular item of evidence is relevant only to the credibility of a witness or not will depend upon the facts and circumstances of each individual case: *Peacock v R* [2008] NSWCCA 264 at [51].

2. A defendant must not be cross-examined about a matter that is relevant to the assessment of the defendant's credibility, unless the court gives leave: s 104(2). Leave to cross-examine a defendant by the prosecutor is *not* required where it is directed to whether the defendant: is biased or has a motive to be untruthful; is unable to recall matters to which his or her evidence relates; or, has made a prior inconsistent statement: s 104(3). There is a general discussion of the credibility provisions in *Tieu v R* (2016) 92 NSWLR 94 at [26]–[47], [135]–[136].

3. Where leave is required under s 104(2), it is essential that the court give proper attention to the requirements of s 104 and make a specific determination as to leave: *Tieu v R* at [142], [136], [139]. The court should ask the prosecution to address in submissions the gateway provisions in ss 104(4), 103 and 192: *Tieu v R* at [141]–[143]. The general leave provision under s 192(2) is engaged: *Tieu v R* at [36], [135]. The court must take into account the non-exhaustive list of matters in s 192 in deciding whether to grant leave: *Stanoevski v The Queen* (2001) 202 CLR 115 at [41] (also discussed in **Character** at [2-350]); *R v El-Azzi* [2004] NSWCCA 455 at [270]. The evidence must also satisfy the requirements of both s 104(4) and s 103: *R v El-Azzi* at [250]. The common law resistance to allowing evidence of prior criminal history is also relevant in guiding the exercise of the s 104(2) discretion: *R v El-Azzi* at [199]–[200]. Ordinarily the danger of unfair prejudice created by evidence of a serious criminal conviction would substantially outweigh its probative value: *R v El-Azzi* at [199]–[200]. The judge did not err in the particular case by permitting cross-examination of the defendant about a corruption offence: *R v El-Azzi* at [200]–[201].

4. Section 104(6) addresses cross-examination by another defendant. The provision "applies only to credibility evidence": s 104(1). To that extent it does not cover the field on the topic of cross-examination by another defendant. The court in *R v Fernando* [1999] NSWCCA 66 at [287]–[290] made reference to the (common) law on the subject of cross-examination by another defendant. Although leave was not sought under s 104(6), the court noted at [287] that the purpose of s 104(6) is to create a "restriction of cross-examination of an accused person directed to the issue of credibility".

   For commentary and directions on the accused's right to silence see **Silence — Evidence of** at [4-100]–[4-130].

[The next page is 51]

Jury

The following discussion deals with issues relating to the jury. Unless otherwise stated a reference to a section of an Act is a reference to a section of the *Jury Act* 1977 (NSW) (the Act). For further information about empanelling the jury see [1-010].

[1-440] Number of jurors

The number of jurors in a criminal trial is determined by s 19 of the Act. There is provision for the empanelment of additional jurors. That section applies to the trial of Commonwealth offences: *Ng v The Queen* (2003) 217 CLR 521.

The number of jurors can be reduced in accordance with s 22. That section applies to a trial of Commonwealth offences: *Brownlee v The Queen* (2001) 201 CLR 278; *Petroulias v R* (2007) 73 NSWLR 134.

[1-445] Anonymity of jurors

Potential jurors are not required to disclose their identities except to the sheriff: s 37. They are to be referred throughout the proceedings by numbers provided to them by the sheriff: s 29(4). The defence is not entitled to any information concerning any of the jurors: *R v Ronen* (2004) 211 FLR 320.

[1-450] Adverse publicity in media and on the internet

An adjournment of a trial or a stay of the prosecution may be granted because of adverse media publicity. The court proceeds on the basis that the jurors will act in accordance with their oaths and directions given against being prejudiced by media publicity and opinions disseminated in social media. A stay will only be granted where no action can be taken by the judge to overcome any unfairness due to publicity taking into account the public interest in the trial of persons charged with serious offences.

Generally see *The Queen v Glennon* (1992) 173 CLR 592 at 605–606; *Skaf v R* [2008] NSWCCA 303 at [27]; *R v Jamal* (2008) 72 NSWLR 258 at [16]; *Dupas v The Queen* (2010) 241 CLR 237 at [35]–[39]; *Hughes v R* (2015) 93 NSWLR 474 at [61]–[86].

[1-455] Excusing jurors

The trial judge must direct the prosecutor to inform the members of the jury panel of the nature of the charge, the identity of the accused and the principal witnesses to be called: s 38(7)(a). The judge then calls upon members of the panel to apply to be excused if they cannot bring an impartial consideration to the case: s 38(7)(b). The judge can determine such applications or any other application for a potential juror to be excused: s 38.

If the case is likely to involve non-verbal evidence (eg transcripts of recordings of conversations in a foreign language) that would be challenging for a person with less than optimal reading skills, members of the jury panel should be so informed and applications to be excused for this reason should be invited.

Note: s 38(10) and cl 5 *Jury Regulation* 2015 as to non-disclosure of certain identities. See *Criminal Practice and Procedure NSW* at [29-50,605.5]. See *Dodds v R* [2009] NSWCCA 78 at [61] as to the procedure in such a case.

[1-460] Right to challenge

The right of the parties to challenge jurors is contained in Pt 6 of the Act. Section 41 preserves the right to challenge the poll and array: see *Criminal Practice and Procedure NSW* at [29-50,725]ff, *Criminal Law (NSW)* at [JA.41.20].

Section 42 provides for peremptory challenges. These may be made by a legal practitioner on behalf of the accused: s 44.

A challenge for cause is to be determined by the trial judge: s 46. As to challenge for cause see *Criminal Practice and Procedure NSW* at [29-50,750]ff; *Criminal Law (NSW)* at [JA.46.20].

[1-465] Pleas

Pleading on arraignment is dealt with in Pt 3 Div 5 *Criminal Procedure Act* 1986 (CPA). This Division includes the various pleas available to an accused eg plea of autrefois, and a change of plea during the trial.

As to a plea of guilty in respect of an alternative count, whether or not included in the indictment, and the prosecutor's election to accept the plea, see s 153 CPA; *Criminal Practice and Procedure NSW* at [2-s 153.1]; *Criminal Law (NSW)* at [CPA.154.120].

[1-470] Opening to the jury

It is suggested that each member of the jury be provided with a written document which can be referred to in the course of the opening and left with the jury during the trial. It is a matter for the judge what issues should be addressed in the written document but it is suggested that it should at least include a brief explanation of the following:

- the respective role of a judge and a jury
- the nature of a criminal trial
- the onus and standard of proof
- the desirability of not discussing the trial with any person outside the jury room
- the duty of jurors to bring irregularities in the conduct of the trial to the judge's attention and report any juror misconduct
- the prohibition against making inquiries outside the courtroom including using the Internet or visiting the scene of the crime and indicating that such conduct is a criminal offence
- that they should discuss the matter only in the jury room and when they are all assembled
- that they should ignore any media reporting of the trial
- the principal issues in the case if they are known.

[1-475] Jury booklet and DVD

The jury members will already have been provided with some information about the trial process and their duties and responsibilities. The sheriffs screen a DVD entitled "Welcome to jury service" to the jury panel prior to empanelment. The sheriff's officers

have standing orders to do this at all court houses. It is suggested that judges should acquaint themselves with the content of this DVD. Judges wishing to obtain a copy should contact the Assistant Sheriff, Manager Jury and Court Administration.

A booklet "Welcome to Jury Service" is also available at all court houses and may be distributed to jury members by the sheriff's officers after empanelment. Officers have standing instructions to only distribute this booklet with the concurrence of the presiding judge. The booklet also provides information about the trial process, the jurors' duties and responsibilities, and a variety of practical matters (such as court hours and meals).

[1-480] Written directions for the jury at the opening of a trial

Nature of a criminal trial

A criminal trial occurs when the Crown alleges that a member of the community has committed a crime and the accused denies the allegation. The trial is conducted on the basis that the parties determine the evidence to be placed before the jury and identify the issues that the jury needs to consider. The jury resolves the dispute by giving a verdict of guilty or not guilty of the crime or crimes charged. A criminal trial is not an investigation into the incidents surrounding the allegation made by the Crown and is not a search for the truth. Therefore neither the judge nor the jury has any right to make investigations or inquiries of any kind outside the courtroom and independent of the parties. The verdict must be based only upon an assessment of the evidence produced by the parties. That evidence is to be considered dispassionately, fairly and without showing favour or prejudice to either party. The verdict based upon the evidence must be in accordance with the law as explained by the judge.

Role of judge and jury

The jury as a whole is to decide facts and issues arising from the evidence and ultimately to determine whether the accused is guilty of the crime or crimes charged in the indictment. These decisions are based upon the evidence presented at the trial and the directions of law given by the judge. Before the jury is asked to deliberate on their verdict counsel will make their own submissions and arguments based upon the evidence. The jury must follow directions of law stated by the judge and take into account any warning given as to particular aspects of the evidence. Each juror is to act in accordance with the oath or affirmation made at the start of the trial to give "a true verdict in accordance with the evidence". A true verdict is not one based upon sympathy or prejudice or material obtained from outside the courtroom.

The judge is responsible for the conduct of the trial by the parties. The judge may be required to make decisions on questions of law throughout the trial including whether evidence sought to be led by a party is relevant. The judge must ensure that the trial is fair and conducted in accordance with the law. The judge will give directions of law to the jury as to how they approach their task during their deliberations in a summing up before the jury commences its deliberations. The judge does not determine any facts, resolve any issues raised by the evidence or decide the verdict.

Jury foreperson

The jury foreperson is the representative or spokesperson for the jury. He or she can be chosen in any way the jury thinks appropriate. The main function of the foreperson is

to deliver the verdict on behalf of the jury. Sometimes the jury chooses to communicate with the judge through a note from the foreperson. The foreperson has no greater importance or responsibility than any other member of the jury in its deliberations. The foreperson can be changed at any time.

Onus and standard of proof

The Crown has the obligation of proving the guilt of the accused based upon the evidence placed before the jury. This obligation continues throughout the whole of the trial. The accused is not required to prove any fact or to meet any argument or submission made by the Crown. The accused is to be presumed innocent of any wrongdoing until a jury finds his or her guilt proved by the evidence in accordance with the law.

The Crown has to prove the essential facts or elements that go to make up the charge alleged against the accused. Each of the essential facts must be proved beyond reasonable doubt before the accused can be found guilty. Suspicion cannot be the basis of a guilty verdict nor can a finding that the accused probably committed the offence. The accused must be given the benefit of any reasonable doubt arising about his or her guilt.

No discussions outside jury room

A juror should not discuss the case or any aspect of it with any person other than a fellow juror. Any discussion by the jury about the evidence or the law should be confined to the jury room and only when all jurors are present. This is because each member of the jury is entitled to know the views and opinions of every other member of the jury about the evidence and the law as the trial proceeds.

Any discussion with a person other than a juror risks the opinions of a person, who has not heard the evidence, who has not heard arguments or submissions by counsel or who may not understand the applicable law, influencing the jury's deliberations and perhaps ultimately the verdict given. The opinions of a person who is not a juror are not only irrelevant but they are unreliable as they may depend upon prejudice or ignorance.

Duties of a juror to report irregularities

It is the duty of a juror to bring to the attention of the judge any irregularity that has occurred because of the conduct of fellow jurors during the course of the trial. This should occur immediately the juror learns of the misconduct. The matters to be raised include:

- the fact that a juror has been discussing the matter with a person who is not a juror or making inquiries outside the jury room
- that a juror is refusing to participate in the jury's functions
- that a juror is not apparently able to comprehend the English language
- that a juror appears to lack the ability to be impartial.

Criminal conduct by a juror during and after the trial

1. It is a criminal offence for a juror to make any inquiry during the course of a trial for the purpose of obtaining information about the accused or any matters relevant to the trial. The offence is punishable by a maximum of 2 years imprisonment.

For this offence, "making any inquiry" includes:

- asking a question of any person
- conducting any research including the use of the internet
- viewing or inspecting any place or object
- conducting an experiment
- causing another person to make an inquiry.

2. It is a criminal offence for a juror to disclose to persons other than fellow jury members any information about the jury's deliberations or how a juror or the jury formed any opinion or conclusion in relation to an issue arising in the trial, including any statements made, opinions expressed, arguments advanced or votes cast during the course of the jury's deliberations. The offence is punishable by a fine.
3. It as a criminal offence for a juror or former juror, for a reward, to disclose or offer to disclose to any person information about the jury's deliberations or how a juror or the jury formed any opinion or conclusion in relation to an issue arising in the trial, including any statements made, opinions expressed, arguments advanced or votes cast during the course of the jury's deliberations. The offence is punishable by a fine.

Media reports

Members of the jury should ignore any reports of the proceedings of the trial by the media. The report will obviously be a summary of the proceedings or some particular aspect of the evidence or arguments made by counsel. No importance should be attributed to that part of the evidence or any argument made simply because it happens to be reported in the media. Sometimes the material reported will be taken out of the context of the trial as a whole and may not be fair or accurate.

[1-490] Suggested (oral) directions for the opening of the trial following empanelment

Note: the headings in this direction are for the benefit of the judge.

Serving on a jury may be a completely new experience for some, if not all, of you. It is therefore appropriate for me to explain a number of matters to you. During the course of the trial I will remind you of some of these matters if they assume particular importance and I will give you further information if necessary.

Other sources of information for jurors

Some of what I am about to say to you may sound familiar because it was referred to in the DVD that you were shown earlier by the sheriff's officers. Some of it will also appear in [*a booklet/a document*] that you will receive a little later.

There is a great deal of material that you are being asked to digest in a short period but the more you hear it the more likely you are to understand it and retain it.

The charge(s)

It is alleged by the Crown that the accused committed the offence of … [*give details of offence*]. [*Name of the accused*] will be referred to throughout the trial as "the

accused" as a matter of convenience and only because [*he/she*] has been accused of committing an offence. [*He/she*] has pleaded "not guilty", that is the accused has denied the allegation made by the Crown and it becomes your responsibility, as the jury, to decide whether the Crown is able to prove [*that charge/those charges*] beyond reasonable doubt.

[Where there are multiple charges, add

It is alleged by the Crown that [*the accused*] committed a number of offences. Those charges are being tried together as a matter of convenience. However, you will, in due course, be required to return a verdict in relation to each of them. You will need to consider each charge separately. There is no legal requirement that the verdicts must all be the same but this will become more apparent when you and I are aware of the issues you have to determine.]

[Where appropriate, add

You must not be prejudiced against the accused because [*he/she*] is facing a number of charges. The accused is to be treated as being not guilty of any offence, unless and until [*he/she*] is proved guilty by your evaluation of the evidence and applying the law that I will explain to you. The charges are being tried together merely because it is convenient to do so because there is a connection between them. But that does not relieve you of considering the charges separately or the Crown of proving each of them beyond reasonable doubt.**]**

[If there are any alternative charges, add

The charges in counts [*indicate counts in indictment*] are said to be in the alternative. What that means is that, if you find the accused not guilty of the first of those charges, you will then be asked to consider whether [*he/she*] is guilty or not guilty of the alternative charge. If you find the accused guilty of the first of those charges then you will not be required to make a decision and return a verdict on the alternative charge. I will say something more about this after the evidence has concluded.**]**

Roles and functions

Later in the proceedings I will have more to say to you about our respective roles and functions. From the outset, however, you should understand that you are the sole judges of the facts. In respect of all disputes about matters of fact in this case, it will be you and not I who will have to resolve them. In part, that means that it is entirely up to you to decide what evidence is to be accepted and what evidence is to be rejected. For that reason you need to pay careful attention to each witness as their evidence is given. You should not only listen to what the witnesses say but also watch them as they give their evidence. How a witness presents to you and how he or she responds to questioning, especially in cross-examination, may assist you in deciding whether or not you accept what that witness was saying as truthful and reliable. You are entitled to accept part of what a witness says and reject other parts of the evidence.

Each of you is to perform the function of a judge. You are the judges of the facts and that means the verdict(s) will ultimately be your decision. I have no say in what evidence you accept or reject or what arguments and submissions of counsel you find persuasive. Nor do I decide what verdict or verdicts you give in respect of the [charge/ charges] before you. That is your responsibility and you make that decision by determining what facts you find proved and by applying the law that I will explain.

Of course I also have a role as a judge but, as you would probably have assumed, I am the judge of the law. During the trial I am required to ensure that all the rules of procedure and evidence are followed. During the trial and at the end of the evidence, I will give you directions about the legal principles that are relevant to the case and explain how they should be applied by you to the issues you have to decide. I may be required by law to warn you as to how you must approach certain types of evidence. In performing your function you must accept and apply the law that comes from me.

Legal argument

During the trial a question of law or evidence may arise for me to decide. I may need to hear submissions from the lawyers representing the parties before I make a decision. If that occurs, it is usually necessary for the matter to be debated in your absence and you will be asked to retire to the jury room. You should not think this is so that information can be hidden from you. I assure you that any material the parties believe is necessary for you to reach your verdict(s) will be placed before you. The reason you are asked to leave the courtroom is simply to ensure counsel can be free to make submissions to me on issues of law that do not concern you. It is also to ensure you are not distracted by legal issues so you can concentrate on the evidence once I have made my ruling. It only complicates your task if, for example, you were to hear about some item of evidence I ultimately decide is not relevant to the case. So, if a matter of law does arise during the course of the evidence, I ask for your patience and understanding. I assure you that your absence from the courtroom will be kept to the minimum time necessary.

Introduction of lawyers

Let me introduce the lawyers to you. The barrister sitting [.....] is the Crown Prosecutor. In a criminal case, the Prosecutor presents the charge(s) in the name of the State, and on behalf of the community. That does not mean the Prosecutor should be treated any differently than defence counsel, simply because of their function. The Crown's arguments and submissions made to you at the end of the trial should not be treated as more persuasive simply because they are made on behalf of the State or the community. They are no more than arguments presented to you by one of the parties in these proceedings and you can accept them or reject them based upon your evaluation of their merit and how they accord with your findings of fact based upon the evidence. By tradition, the Crown Prosecutor is not referred to by [*his/her*] personal name but as, in this case, [*Mr/Ms*] Crown. This is to signify that the prosecutor is not acting in a personal capacity.

The barrister sitting [.....] is [*name of defence counsel*] and [*he/she*] appears for the accused, and will represent [*him/her*] throughout the trial. Defence counsel will also ultimately put arguments and submissions to you. Just as with the Prosecutor you should decide them on their merits and as they accord with your view of the evidence.

Selection of foreperson/representative

[*You have been told by my associate that*] you are required to choose a [*foreperson/representative*]. That person's role will simply be to speak for all of you whenever you need to communicate with me. If your [*foreperson/representative*] raises a question with me on the jury's behalf, it helps to maintain the anonymity of individual jurors. But any one of you is entitled to communicate with me in writing if necessary. The [*foreperson/representative*] also announces your verdict(s) on behalf of the jury as a whole. We do not require each juror to each give his or her verdict(s). But bear

in mind that the [*foreperson/representative*] does not have any more functions or responsibilities than these. You are all equals in the jury room. You all have the same entitlement and responsibility in discussing the evidence and ultimately deciding upon your verdict(s).

How you choose your [*foreperson/representative*] is entirely up to you. There is no urgency to reach a final decision on that matter, and you can feel free to change your [*foreperson/representative*] if you wish to do so at any time. When you have chosen your [*foreperson/representative*], he or she should sit in the front row of the jury box in the seat nearest to me and that way I will know who you have chosen.

Queries about evidence or procedure

If you have any questions about the evidence or the procedure during the trial, or you have any concerns whatsoever about the course of the trial or what is taking place, you should direct those questions or concerns to me, and only to me. The Court officers attending on you are there to provide for your general needs, but are not there to answer questions about the trial itself. Should you have anything you wish to raise with me, or to ask me, please write a note and give it to the officer. The note will be given to me and, after I have discussed it with counsel, I shall deal with the matter.

Note taking

You are perfectly entitled to make notes as the case progresses. Writing materials will be made available to you. If you decide to take notes, may I suggest you be careful not to allow note taking to distract you from your primary task of absorbing the evidence and assessing the witnesses. Do not try to take down everything a witness says. It may be more significant to note your reaction to a particular witness as that may be significant in your later assessment of the evidence. It may be important, for example, to note the reaction of a witness in cross-examination. A note of how you found the witness, for example whether you thought the witness was trying to tell you the truth, or was on the other hand being evasive, might be more important to recall during your deliberations than actually what the witness said.

This is because everything said in this courtroom is being recorded so there is the facility to check any of the evidence you would like to be reminded about. You should also bear in mind that after the evidence has been presented you will hear closing addresses from the lawyers and a summing-up from me in which at least what the parties believe to be the more significant aspects of the evidence will be reviewed. In that way you will be reminded of particular parts of the evidence.

A transcript of the evidence of every witness will become available only a daily basis. If you would like to have a copy of the transcript, either of all of the evidence, or just of the evidence of a particular witness, then you only need to ask.

[Where appropriate — prior media publicity

If you have read or heard or have otherwise become aware of any publicity about the events with which this trial is concerned, or about the accused, it is of fundamental importance that you put any such publicity right out of your minds. Remember that you have each sworn an oath, or made an affirmation, to decide this case solely upon the evidence presented here in this courtroom and upon the basis of the legal directions I give to you. Before you were empanelled I asked that any person who could not be objective in their assessment of the evidence ask to be excused. None of you indicated

you had a problem in that regard. You would be disobeying your oath or affirmation if you were to take into account, or allowed yourself to be influenced by, information that has come to you from something you have read, seen or heard outside the courtroom.**]**

Media publicity during the trial

It may be that during the trial some report may appear on the internet or in newspapers or on the radio or television. You should pay no regard to those reports whatsoever. They will obviously be limited to some particular matter that is thought to be newsworthy by the journalist or editor. It may be a matter which is of little significance in light of the whole of the evidence and it may have no importance whatsoever in your ultimate deliberations. Often these reports occur at the start of the trial and refer to the opening address of the prosecutor. They then tend to evaporate until the closing addresses or the jury retires to deliberate. Do not let any media reports influence your view as to what is important or significant in the trial. Further do not allow them to lead you into a conversation with a friend or member of your family about the trial.

The nature of a criminal trial

There are some directions I am required to give to you concerning your duties and obligations as jurors but first let me explain a little about a criminal trial.

The overall issue is whether the Crown can prove the charge(s) alleged against the accused. The evidence placed before you on that issue is under the control of the counsel of both parties. In our system of justice the parties place evidence before the jury provided that it is relevant to the questions of fact that you have to determine. The parties decide what issues or what facts are in dispute. I play no part in which witnesses are called. My task is only to ensure the evidence is relevant: that is, to ensure the evidence is of some significance to the issues raised and the ultimate question whether the Crown has proved the accused's guilt. Usually there will be no issue as to whether evidence is relevant but if a dispute arises about it, that is a matter I must determine as a question of law. Otherwise I have no part to play in how the trial is conducted, what evidence is placed before you or what issues you are asked to resolve on the way to reaching a verdict.

Onus and standard of proof

The obligation is on the Crown to put evidence before a jury in order to prove beyond reasonable doubt that the accused is guilty of the [*charge/charges*] alleged against him/her. It is important you bear in mind throughout the trial and during your deliberations this fundamental aspect of a criminal trial. The Crown must prove the accused's guilt based upon the evidence it places before the jury. The accused has no obligation to produce any evidence or to prove anything at all at any stage in the trial. In particular the accused does not have to prove [*he/she*] did not commit the offence. The accused is presumed to be innocent of any wrongdoing until a jury is satisfied beyond reasonable doubt that [*his/her*] guilt has been established according to law. This does not mean the Crown has to satisfy you of its version of the facts wherever some dispute arises. What is required is that the Crown proves those facts that are essential to make out the charge(s) and proves those facts beyond reasonable doubt. These are sometimes referred to as the essential facts or ingredients of the offence. You will be told shortly what the essential facts are in this particular case.

[*If known, note the particular issue(s) in dispute and what the Crown has to prove*.]

The expression "proved beyond reasonable doubt" is ancient and has been deeply ingrained in the criminal law of this State for a very long time. You have probably heard this expression before and the words mean exactly what they say – proof beyond reasonable doubt. This is the highest standard of proof known to the law. It is not an expression that is usually explained by trial judges but it can be compared with the lower standard of proof required in civil cases where matters need only be proved on what is called the balance of probabilities. The test in a criminal case is not whether the accused is probably guilty. In a criminal trial the Crown must prove the accused's guilt beyond reasonable doubt. Obviously a suspicion, even a strong suspicion, that the accused may be guilty is not enough. A decision that the accused has probably committed the offence(s) also falls short of what is required. Before you can find the accused guilty you must consider all the evidence placed before you, and ask yourself whether you are satisfied beyond a reasonable doubt that the Crown has made out its case. The accused is entitled by law to the benefit of any reasonable doubt that is left in your mind at the end of your deliberations.

Deciding the case only on the evidence

It should be obvious from what I have just said that you are not here to determine where the truth lies. You are not simply deciding which version you prefer: that offered by the Crown or that from the defence. You are not investigating the incident giving rise to the charge(s). You are being asked to make a judgment or decision based upon the evidence placed before you. Jurors might in a particular case feel frustrated by what they see as a lack of evidence or information about some particular aspect of the case before them. In some rare cases this has led jurors to make inquiries themselves to try and fill in the gaps that they perceive in the evidence. But that is not your function, nor is it mine. If you or I did our own investigations that would result in a miscarriage of justice. Any verdict given, even if it was not actually affected by those investigations, would be set aside by an appeal court. That would result in a waste of your time and that of your fellow jurors, and lead to considerable expense to the community and the parties.

You are judges deciding facts and ultimately whether the accused's guilt has been proved beyond reasonable doubt based upon the material placed before you during the trial. You must understand that it is absolutely forbidden that you make any inquiries on any subject matter arising in the trial outside the courtroom. To do so would be a breach of your oath or affirmation, it would be unfair to both the Crown and the defence and you would have committed a criminal offence. If you felt there was some evidence or information missing, then you simply take that fact into account in deciding whether on the evidence that is before you the Crown has proved the guilt of the accused beyond reasonable doubt.

Prohibition against making enquiries outside the courtroom

It is of fundamental importance that your decision in this trial is based only upon what you hear and see in this courtroom: that is; the evidence, the addresses of counsel and what I say to you about the law. You must not, during the course of the trial, make any inquiries of your own or ask some other person to make them on your behalf. In particular you are not to use any aid, such as legal textbooks, to research any matter in connection with your role as a juror.

It is a serious criminal offence for a member of the jury to make any inquiry for the purpose of obtaining information about the accused, or any other matter relevant to the

trial. It is so serious that it can be punished by imprisonment. This prohibition continues from the time the juror is empanelled until the juror is discharged. It includes asking a question of any person other than a fellow juror or me. It includes conducting any research using the internet.

[*If the judge considers it appropriate add*

You should keep away from the internet and the other communication sources which may pass comment upon the issues in this trial. You may not communicate with anyone about the case on your mobile phone, smart phone, through email, text messaging, or on Twitter, through any blog or website, any internet chatroom, or by way of any other social networking websites including Facebook, MySpace, LinkedIn and YouTube. You should avoid any communication which may expose you to other people's opinions or views.]

You are not permitted to visit or inspect any place connected with the incidents giving rise to the charge(s). You cannot conduct any experiments. You are not permitted to have someone else make those enquiries on your behalf.

Always keep steadily in your mind your function as a judge of the facts as I have explained it to you. If you undertake any activity in connection with your role as a juror outside the court house, then you are performing a different role. You have stopped being an impartial judge and have become an investigator. That is not a role you are permitted to undertake. It would be unfair to both the Crown and the accused to use any material obtained outside the courtroom because the parties would not be aware of it and, therefore, would be unable to test it or make submissions to you about it.

Further, the result of your inquiries could be to obtain information that was misleading or entirely wrong. For example, you may come across a statement of the law or of some legal principle that is incorrect or not applicable in New South Wales. The criminal law is not the same throughout Australian jurisdictions and even in this State it can change rapidly from time to time. It is part of my function to tell you so much of the law as you need to apply in order to decide the issues before you.

Discussing the case with others

You should not discuss the case with anyone except your fellow jurors and only when you are all together in the jury room. This is because a person with whom you might speak who is not a fellow juror would, perhaps unintentionally make some comment or offer some opinion on the nature of the charge or the evidence which is of no value whatever. That person would not have the advantage you have of hearing the evidence first-hand, the addresses of counsel on that evidence and the directions of law from me.

Any comment or opinion that might be offered to you by anyone who is not a fellow juror might influence your thinking about the case, perhaps not consciously but subconsciously. Such a comment or opinion cannot assist you but can only distract you from your proper task.

If anyone attempts to speak to you about the case at any stage of the trial it is your duty to report that fact to me as soon as possible, and you should not mention it to any other member of the jury. I am not suggesting that this is even remotely likely to happen in this case but I mention it simply as a precaution and it is a direction given to all jurors whatever the nature of the trial.

I must bring to your attention that it is an offence for a juror during the course of the trial to disclose to any person outside the jury room information about the deliberations of the jury or how the jury came to form an opinion or conclusion on any issue raised at the trial.

Bringing irregularities to the judge's attention

If any of you learn that an impermissible enquiry had been made by another juror or that another juror had engaged in discussions with any person outside the jury room, you must bring it to my attention. Similarly, if at any stage you find material in the jury room that is not an exhibit in the case, you should notify me immediately.

The reason for bringing it to my attention as soon as possible is that, unless it is known before the conclusion of the trial, there is no opportunity to fix the problem if it is possible to do so. If the problem is not immediately addressed, it might cause the trial to miscarry and result in the discharge of the jury in order to avoid any real or apparent injustice.

Reporting other misconduct and irregularities — s 75C Jury Act

If, during the trial, any of you suspect any irregularity in relation to another juror's membership of the jury, or in relation to the performance of another juror's functions as a juror you should tell me about your suspicions. This might include:

- the refusal of a juror to take part in the jury's deliberations, or
- a juror's lack of capacity to take part in the trial (including an inability to speak or comprehend English), or
- any misconduct as a juror, or
- a juror's inability to be impartial because of the juror's familiarity with the witnesses or legal representatives in the trial, or
- a juror becoming disqualified from serving, or being ineligible to serve, as a juror.

You also may tell the sheriff after the trial if you have suspicions about any of the matters I have just described.

Breaks/personal issues/daily attendance

It is not easy sitting there listening all day, so if at any stage you feel like having a short break of say five minutes or so, then let me know. Remember, I do not want you to be distracted from your important job of listening to the evidence. If you feel your attention wandering and you are having trouble focusing on what is happening in court then just raise your hand and ask me for a short break. I can guarantee that if you feel like a break out of the courtroom, then others in the courtroom will too. So please don't be reluctant to ask for a break if you want one.

If you are too hot or too cold, or you cannot hear or understand a witness or if you face any other distraction while in the courtroom let me know so I can try to attend to the problem.

If any other difficulty of a personal nature arises then bring it to my attention so I can see if there is some solution. If it is absolutely necessary, the trial can be adjourned for a short time, so that a personal problem can be addressed.

However, it is important that you understand the obligation to attend the trial proceedings every day at the time indicated to you. If a juror cannot attend for whatever reason then the trial cannot proceed. We do not sit with a juror missing because of illness or misadventure. Of course there is no point attending if you are too ill to be able to sit and concentrate on the evidence or if there is an important matter that arises in your personal life. But you should understand that by not attending the whole trial stops for the time you are absent, which will result in a significant cost and inconvenience to the parties and your fellow jurors.

Outline of the trial

Shortly I will ask the Crown Prosecutor to outline the prosecution case by indicating the facts the Crown has to prove and the evidence the Crown will call for that purpose. This is simply so you have some understanding of the evidence as it is called in the context of the Crown case as a whole. What the Crown says is not evidence and is merely an indication of what it is anticipated the evidence will establish.

[*If there is to be a defence opening add*

I shall then ask [*defence counsel*] to respond to the matters raised by the Crown opening. The purpose of this address is to indicate what issues are in dispute and briefly the defence answer to the prosecution's allegations. Neither counsel will be placing any arguments before you at this stage of the trial.]

Then the evidence will be led by way of witnesses giving testimony in the witness box. There may also be documents, photographs and other material that become exhibits in the trial.

At the end of all of the evidence both counsel will address you by way of argument and submissions based upon the evidence. You will hear from the Crown first and then the defence.

I will then sum up to you by reminding you of the law that you have to apply during your deliberations and setting out the issues you will need to consider before you can reach your verdict(s).

You will then be asked to retire to consider your verdict(s). You will be left alone in the jury room with the exhibits to go about your deliberations in any way you choose to do so. If your deliberations last for more than a day then you will be allowed to go home overnight and return the next day. We no longer require jurors to be kept together throughout their deliberations by placing them in a hotel as used to be the case some time ago.

When you have reached your verdict(s) you will let me know. You will then be brought into the courtroom and your [*foreperson/representative*] will give the verdict(s) on behalf of the whole jury. That will complete your functions and you will then be excused from further attendance.

[1-492] Jury questions for witnesses

It is impermissible for a judge to allow the jury to directly question a witness during a trial: *R v Pathare* [1981] 1 NSWLR 124; *R v Damic* [1982] 2 NSWLR 750 at 763; *R v Sams* (unrep, 7/3/1990, NSWCCA).

An indirect process is equally undesirable: *Tootle v R* (2017) 94 NSWLR 430. The trial judge in *Tootle v R* invited the jury to formulate questions for the witnesses. The questions were submitted to the judge, subjected to a voir dire process, and those deemed permissible were asked of the witness by the Crown prosecutor. The course taken was impermissible: *Tootle v R* at [63]. The mere fact of the jury's involvement in the eliciting of evidence compromised their function and altered the nature of the trial in a fundamental respect: *Tootle v R* at [63], [67].

An invitation to the jury to participate in the questioning of witnesses is incompatible with both the adversarial process and the customary directions to withhold judgment until evidence is complete: *Tootle v R* at [42]–[44], [58].

[1-494] Expert evidence

Where there is some complexity in the expert evidence it may be helpful, however, to give the jury the opportunity to raise with the judge any matter they would like to be further explained or clarified. The jury could be asked to retire to the jury room to consider whether there is anything they wish to raise before the expert is excused and to send a note which the judge will then discuss with counsel. It has been held that judges sitting alone are entitled to intervene within reasonable limits to clarify evidence: *FB v R* [2011] NSWCCA 217 at [90].

[1-495] Offences and irregularities involving jurors

There are a number of offences relating to the performance of a jury's functions contained in Pt 9 of the Act. These include:

- disclosure of information by jurors about their deliberations: s 68B
- inquiries by jurors to obtain information: s 68C
- soliciting information from, or harassing, jurors: s 68A.

A judge has power to examine a juror in relation to the following:

- the publication of prejudicial material during the trial: s 55D
- whether there has been a breach of the prohibition against making inquiries under s 68C: s 55DA. See *R v Wood* [2008] NSWSC 817; *Smith v R* (2010) 79 NSWLR 675 at [32]–[33]. The focus of the prohibition under s 68C is upon obtaining, or attempting to obtain, extraneous information about the accused or some other matter relevant to the trial: *Carr v R* [2015] NSWCCA 186 at [19].

[1-500] Communications between jurors and the judge

Notes between the jury and the judge should be disclosed to the parties unless they concern the jury's deliberation process, or where the communication concerns a matter unconnected with the issues to be determined, or where the subject was inappropriate for the jury to raise with the judge: *Burrell v R* [2007] NSWCCA 65 at [217], [263]–[268].

[1-505] Discharging individual jurors

The provisions concerning the discharge of jurors are found in Pt 7A of the Act.

Section 53A requires the mandatory discharge of a juror if they were mistakenly or irregularly empanelled, have become excluded from jury service, or have engaged in misconduct relating to the trial (s 53A(1)).

Finding misconduct under s 53A(1)(c) involves a two-stage process. The court must find *on the balance of probabilities* the juror has *in fact* engaged in misconduct, *and* that conduct amounts to an offence against the Act (s 53A(2)(a)) *or* gives rise to the risk of a substantial miscarriage of justice (s 53A(2)(b)). Section 53A(2)(b) concerns actual conduct giving rise to a risk — not a risk actual conduct has occurred. The relationship to be examined is between the established conduct and whether it is potentially a risk causative of a miscarriage of justice: *Zheng v R* [2021] NSWCCA 78 at [65]–[69].

In *R v Rogerson (No 27)* [2016] NSWSC 152 at [10] a juror observed sleeping during the evidence was found to have engaged in misconduct. However, bringing a newspaper or clippings from the paper into the jury room (*Carr v R* [2015] NSWCCA 186 at [20]) or playing a word game in the jury room during breaks in the proceedings (*Li v R* (2010) 265 at [151]) were both held not to be misconduct giving rise to a miscarriage of justice.

Section 53B concerns the discretionary discharge of a juror for reasons such as illness, infirmity or incapacitation: see *Lee v R* [2015] NSWCCA 157 at [42] for ill health and illiteracy; *R v Lamb* [2016] NSWCCA 135 at [13] for contact with the accused; or, for the dragnet category in s 53B(d) "any other reason affecting the juror's ability to perform the functions of a juror" see *R v Qaumi (No 41)* [2016] NSWSC 857 at [41] for apprehended bias. Sufficient reasons should be given for a decision to discharge a juror: *Le v R* [2012] NSWCCA 202 at [67]–[68].

As to the discretionary discharge of a juror generally see: *Wu v The Queen* (1999) 199 CLR 99; *BG v R* [2012] NSWCCA 139; *Le v R*; *Criminal Practice and Procedure NSW* at [20-50,955.5]; *Criminal Law (NSW)* at [JA.53B.20].

[1-510] Discretion to discharge whole jury or continue with remaining jurors

Section 53C of the Act provides that where a juror dies or is discharged during the trial, the court *must* discharge the whole jury if a trial with the remaining jurors would result in risk of a substantial miscarriage of justice or otherwise proceed under s 22. Section 22 of the Act permits the balance of the jury to continue after the discharge of a juror.

There is no rigid rule governing whether or not to discharge a whole jury for an inadvertent and potentially prejudicial event occurring during the trial. It depends on: the seriousness of the event in the context of the contested issues; the stage the mishap occurs; the deliberateness of the conduct; and the likely effectiveness of a judicial direction to overcome its apprehended impact: *Zheng v R* [2021] NSWCCA 78 at [92]–[96].

A separate decision, with express orders and reasons, should be made for continuing with the balance of the jury: *BG v R* [2012] NSWCCA 139 at [101], [137]; *Le v R* [2012] NSWCCA 202 at [54]–[71].

As to continuing with the balance of the jury see: *Crofts v The Queen* (1996) 186 CLR 427 at 432, 440; *Wu v The Queen* (1999) 199 CLR 99; *Criminal Practice and Procedure NSW* at [29-50,960.5].

[1-515] Suggested direction following discharge of juror

In criminal trials, justice must not only be done, but it must appear to be done. That means that nothing should be allowed to happen which might cause any concern or give the appearance that the case is not being tried with complete fairness and impartiality. Because of this great concern which the law has about the appearance of justice, even the most innocent of misadventures, such as a juror talking to someone who, as it turns out, is a potential witness in the case or is associated in some way with the prosecution or any one in the defence, can make it necessary for the whole jury to be discharged.

Fortunately, what has happened in the present case does not make it necessary for me to do that. It suffices that I have discharged as members of the jury the … [*give number: for example, two*] person(s) who, no doubt, you have noticed are no longer with you. In fairness to [*this/these*] person(s), I should indicate that no personal blameworthiness of any sort attaches to them. Nevertheless, the appearance of justice being done must be maintained. What now will happen is that the trial will continue with the … [*give number: for example, 10*] of you who remain, constituting the jury. [*It will be necessary, of course, for you to choose a new foreperson.*]

It is very easy for misadventures to occur. But I do ask you to please be careful to use your common sense and discretion to avoid any situation that might give rise to some concern as to the impartiality of the remaining members of the jury.

[1-520] Discharge of the whole jury

Where the trial judge considers it necessary to discharge the whole of the jury over the objection of one of the parties, in all but exceptional cases the judge should stay the decision, inform counsel in the absence of the jury and adjourn proceedings until the parties have considered whether to appeal against the decision under s 5G(1) *Criminal Appeal Act* 1912: *Barber v R* [2016] NSWCCA 125 at [49]; *R v Lamb* [2016] NSWCCA 135 at [35].

While there will be circumstances where the decision should be given effect immediately those cases will be the exception to the rule: *Barber v R* at [49]. If there is to be a review, the judge should give reasons for the decision and excuse the jury until the determination is made.

[1-525] Provision of transcripts

Section 55C of the Act provides that upon request the jury may be given a copy of the whole or part of the trial transcript. This can include addresses and the summing up: *R v Sukkar* [2005] NSWCCA 54 at [84]. See generally *R v Fowler* [2000] NSWCCA 142 at [91]; *R v Bartle* [2003] NSWCCA 329 at [687].

[1-530] Suggested direction — use of the transcripts

Members of the jury you are to be given the [*transcript/part of the transcript*] of the evidence. Usually the transcript is accurate and the parties have been given the opportunity to indicate whether they believe that any part of it is not accurate. If you have a note of the evidence that is inconsistent with the transcript, then you should raise that matter for clarification. The transcript is given to you to help you recall the precise

evidence of a witness or the evidence about a particular topic. If you are concerned with a part of the witness' evidence then you should consider what [*he/she*] said about that topic in evidence in chief and in cross-examination. You should also put that part of the evidence in context of the evidence given by the witness.

You should not give the evidence more weight than it deserves because it is now in written form and because you are, in effect, receiving that evidence a second time. It is important to recall the evidence as it was given during the trial and what, if anything, you thought about the reliability of the evidence as you heard it. You should also bear in mind what counsel had to say about the evidence and any criticisms made of it during addresses.

[*If appropriate the jury can be reminded of particular comments made about the evidence by counsel in addresses.*]

[*In the case of the transcript of evidence of the complainant it may be necessary to remind the jury of the evidence [if any] given by the accused or a defence witness in relation to specific matters in the complainant's evidence.*]

[*If appropriate*

You have asked for the transcript of the evidence of witness A. You will recall that witness B also gave evidence about the issue/s raised in witness A's evidence. In order for you to properly consider [*that/those issue/s*] I have also made available to you the transcript of witness B's evidence. I would encourage you to read the evidence of B in relation to that issue as well as the evidence of witness A. This will remind you of the whole of the evidence on [*that/those issue/s*].]

[1-535] Written directions

Section 55B of the Act provides that a direction in law may be given in writing. It is a matter for the exercise of discretion as to whether and when to give written directions. A fundamental factor informing the exercise of that discretion is whether providing written directions is likely to assist the jury in understanding the issues in the trial: *Trevascus v R* [2021] NSWCCA 104 at [66]. It is suggested that in an appropriate case, written directions on the elements of the offences (including question trails) and available verdicts and any other relevant matter be given to the jury before counsel address with a short oral explanation of the directions.

However, s 55B does not abrogate the trial judge's obligation to give oral directions concerning the elements of the offences: *Trevascus v R* at [65]; see also the discussion of the relevant cases at [52]–[63]. The judge must emphasise to the jury that the written directions are not a substitute for the oral directions given: *Trevascus v R* at [67].

A written direction can be given at any stage: *R v Elomar* [2008] NSWSC 1442 at [27]–[30].

Further, any document can be provided to the jury with the consent of counsel, such as a chronology, or a "road-map" to aid the jury in understanding the evidence, especially in complicated factual matters: *R v Elomar*, is an example.

[The next page is 123]

Trial instructions A–G

Circumstantial evidence

Complaint evidence

Complicity

Consciousness of guilt, lies and flight

Demonstrations — see "Views and demonstrations" at [4-335]ff

Election of accused not to give evidence or offer explanation

Expert evidence

[The next page is 165]

Complaint evidence

[2-550] Introduction

Evidence of complaint by an alleged victim is admissible under s 66(2) *Evidence Act* 1995, where the complainant gives evidence. It is some evidence of the fact the accused conducted himself/herself as alleged in the complaint. The evidence can also be used to show consistency of conduct by the complainant. This type of evidence is not restricted to sexual assault cases. Evidence can be admitted under this section as relevant to any offence provided it is first-person hearsay under s 62 of the Act.

Evidence of complaint can also be admissible under s 65(2) *Evidence Act*, where the person making the complaint is not available to give evidence, for example where the complainant is dead or for some other reason is not available: see cl 4 of the Dictionary to the Act.

Further, such evidence can be admitted with leave under s 108(3)(b) in order to re-establish the credibility of a witness. In that case, the complaint can become evidence of the truth of the allegation made in the complaint by the operation of s 60 of the Act unless limited under s 136.

[2-560] Evidence of complaint where witness available to give evidence — s 66(2)

As to the admissibility of complaint under s 66(2): see generally *Papakosmas v The Queen* (1999) 196 CLR 297; *Criminal Practice and Procedure NSW* at [3-s 66.1]; *Uniform Evidence Law* (15 ed, 2020) at [EA.66.60]ff; *Uniform Evidence in Australia*, (3rd ed, 2020) at 66-2ff.

The use to be made of the evidence can be limited under s 136 of the Act so that it cannot be used as proof of the fact of what was asserted in the complaint, but relevant only to the credibility of the alleged victim. This limit, however, would not generally be applied to complaint evidence admitted under s 66(2): see generally: *R v BD* (unrep, 28/7/97, NSWCCA); *Papakosmas v The Queen* at [40]; *Criminal Practice and Procedure NSW* at [3-s 136.1]; *Uniform Evidence Law* (15 ed, 2020) at [EA.136.60]ff; *Uniform Evidence in Australia*, (3rd ed, 2020) at 136.1ff.

Section 66(2A) sets out matters the court may take into account in determining whether the occurrence was fresh in the memory of the person who made the representation. The phrase "fresh in the memory" is interpreted more broadly than by the High Court in *Graham v The Queen* (1998) 195 CLR 606: *R v XY* [2010] NSWCCA 181 at [78]-[79], [99]; and at [83]-[98]; see also *The Queen v Bauer (a pseudonym)* (2018) 266 CLR 56 at [89]. The time that has passed between the alleged offences and the complaint remains relevant but is not determinative: *R v XY* [2010] NSWCCA 181 at [79]. It is necessary to consider the facts in each case. In sexual assault cases it is recognised the nature of the offending may be such that the events involved may remain fresh in a complainant's memory for many years: *The Queen v Bauer (a pseudonym)* at [92]; *R v XY* at [85]; *R v Gregory-Roberts* [2016] NSWCCA 92 at [47]–[48]; *Kassab (a pseudonym) v R* [2021] NSWCCA 46 at [339]–[340].

As the evidence is admitted as hearsay, a warning may be required under s 165(1)(a) of the Act: see generally *R v TJF* [2001] NSWCCA 127 where there was delay and

the complaint was prompted; *Criminal Practice and Procedure NSW* at [3-s 165.1]ff; *Uniform Evidence Law* (15 ed, 2020) at [EA.165.90]ff; *Uniform Evidence in Australia*, (3rd ed, 2020) at 165-9ff.

[2-570] Suggested direction — where complaint evidence admitted under s 66(2)

The following direction suits a case in which the fact of an assault is disputed. It may be modified for a case where the act is not disputed but there is an issue as to consent. If use of the evidence has been limited under s 136 *Evidence Act*, the direction should omit reference to the evidence having twofold use and omit the reference to s 60 *Evidence Act* use.

Where the evidence is used to re-establish credibility under s 108(3), the following direction may be used with appropriate adaptation including, of course, omission of references to s 60 *Evidence Act* use.

The directions include any required in accordance with s 294 if delay in complaint is raised.

If it is contended there is a difference between the complainant's evidence and a prior complaint, a direction under s 293A of the *Criminal Procedure Act* as suggested at [2-618] may be incorporated where indicated.

The Crown relies on the evidence of the complainant having told [*witness*] about the alleged assault by the accused. This is referred to by lawyers as "complaint evidence" or "evidence of complaint". I will use those terms as a shorthand description of this evidence. [*Set out the evidence of complaint.*]

The first issue for you to decide is whether you accept the evidence of complaint. It was/was not disputed by the accused. [*Set out defence contentions if disputed*.]

If you accept the complaint evidence, the following directions apply to how it may be used.

Section 60 use

The first way in which the evidence may be relevant is that it can be regarded as additional evidence the complainant was assaulted in the way [*she/he*] described. So, not only would you have the complainant having given evidence before you about having been assaulted by the accused. You would also have the description of the assault that was given to [*witness*].

You should have regard to all of the circumstances relevant to making the complaint. In considering using the evidence for this purpose you should consider how consistent the complaint to [*witness*] is with the evidence the complainant gave in court. If there are discrepancies, you should consider why that may be so and whether that has a bearing upon whether you should treat the complaint evidence as additional evidence of the complainant having been assaulted.

[*Set out the competing arguments as to this, if any.*]

[*Where, for a prescribed sexual offence, a s 293A direction is appropriate*, insert the direction suggested at [2-618].]

Credibility use

The second way the evidence of complaint may be used is that it can be relevant to the truthfulness of the complainant's evidence in court. The Crown says the fact [*she/he*] complained to [*witness*] when [*she/he*] did **[*add if relevant:* *and in the manner in which she/he did*]** makes it more likely [*she/he*] is telling you the truth about having been assaulted by the accused.

A matter you might consider in relation to using the evidence for this purpose is whether the complainant's conduct was consistent with the allegation. In other words, did [*she/he*] act in the way you would expect [*her/him*] to act if [*she/he*] had been assaulted as [*she/he*] claims? Things you might think about in relation to this are the timing of the complaint, in relation to when the assault is said to have occurred **[*if relevant:*** and the way the complainant appeared to [*witness*] when making the complaint**]**.

In considering whether there was consistency between the alleged assault and the complainant's conduct in complaining, you might bear in mind that different people have different personalities. In a given situation they might not all behave in the same way. In this case you are being asked to consider the complainant and the way [*she/he*] reacted to the experience [*she/he*] says [*she/he*] had.

Another matter you should consider is that just because a person says something on more than one occasion it does not mean that what is said is necessarily true or reliable. A false or inaccurate statement does not become more reliable just because it is repeated.

[*If there was a delay in complaint for a prescribed sexual offence, add (s 294(2)):* In relation to the timing of the complaint made to [*witness*], you should bear in mind that a delay in complaining does not necessarily indicate that the allegation is false. There may be good reasons why a victim of a sexual assault may hesitate in making, or refrain from making, a complaint about it. (*Summarise the competing cases as to this*.)**]**

[*In relation to delay in complaint for a prescribed sexual offence* (that is, where the "sufficient evidence" test under s 294(2)(c) is met) add: However, the accused has argued that the delay in making a complaint is inconsistent with the conduct of a truthful person who has been sexually assaulted and so you should regard this as indicating that the complainant's evidence is false. The accused asks you to rely upon the evidence that … [*set out the evidence relied upon by the accused said to justify that the jury should use the delay in assessing the complainant's credibility*].**]**

So, taking into account these matters, the question is whether the evidence of complaint supports **[if s 294(2)(c) applies**: or detracts from**]** the credibility of the complainant.

[*Where the evidence is limited to credibility under s 136 add:* You can only use the evidence of complaint in this way. You cannot use it as evidence that the assault occurred. The Crown did not lead the complaint evidence as itself being able to prove the charge. You can only find the charge proved on the evidence given in the courtroom and not what was said at some other place and time to [*witness*].**]**

Conclusion

So, that is how the evidence of complaint may be used in your deliberations. First you must decide whether you accept the complaint was in fact made to [*witness*] and what was actually said. Then you need to consider the various matters I have spoken about. [*A summary of the various matters that should be considered may be useful.*]

[*Summarise the competing cases to the extent that this has not already been done.*]

[2-590] Evidence of complaint where witness not available under s 65(2)

Evidence of a complaint about the accused's conduct can be admitted as evidence of the truth of the allegation under s 65 even though the complainant is not available as a witness, for example in a murder case. Such evidence will usually be admitted as evidence of a relationship between the complainant and the accused and is admitted for the purpose of being used by the jury as evidence of the truth of the allegation made.

Section 65(2) is premised upon an assumption that a party is seeking to prove a specific fact and so it requires the identification of the particular representation to be adduced to prove the fact: *Sio v The Queen* (2016) 259 CLR 47 at [57]. It is then that the court considers the circumstances of the representation to determine whether the conditions of admissibility have been met under s 65(2): *Sio v The Queen* at [57]. Section 65(2)(d)(ii) is directed at circumstances that of themselves tend to negative motive and opportunity of the declarant to lie: *Sio v The Queen* at [64].

Section 65(2)(d)(ii) requires a court to be positively satisfied that the representation which is tendered was made in circumstances that make it likely to be reliable notwithstanding its hearsay character: *Sio v The Queen* at [64].

The test in s 65(2)(b) is less stringent than that in either s 65(2)(c) or (d) but cases considering those parts of s 65(2) apply to the test in s 65(2)(b) provided the different language of each is borne in mind: *Priday v R* [2019] NSWCCA 272 at [29]–[37]. As to evidence admitted under s 65(2): see generally *Sio v The Queen* at [53]–[74]; *R v Serratore* (1999) 48 NSWLR 101; *R v Toki (No 3)* [2000] NSWSC 999; *Criminal Practice and Procedure NSW* at [3-s 65.1]ff; *Uniform Evidence Law* (15 ed, 2020) at [EA.65.150]ff; *Uniform Evidence in Australia*, (3rd ed, 2020) at 65-2ff.

As to the unavailability of a witness: see cl 4 of the Dictionary and generally, *Criminal Practice and Procedure NSW* at [3-s 65.15]; *Uniform Evidence Law* (15 ed, 2020) at [EA.65.150]ff; *Uniform Evidence in Australia*, (3rd ed, 2020) at 65-4.

Because of the variety of the situations in which such evidence can be given, no suggested form of direction is appropriate. However, a suitable direction can be adapted from the first part of the suggested direction in [2-570].

A warning would need to be given as to the fact that the evidence is hearsay under s 165 if it is requested.

[2-600] Evidence of complaint as a prior consistent statement under s 108(3)

Evidence of complaint that is not admitted under s 66(2), can be admitted in examination in chief or re-examination of the complainant by the Crown under s 108(3)(b). The evidence can only be introduced with the leave of the court: see s 192(2).

As to s 108(3)(b): see generally, *Graham v The Queen* (1998) 195 CLR 606; *R v DBG* [2002] NSWCCA 328; *Criminal Practice and Procedure NSW* at [3-s 108.1]; *Uniform Evidence Law* (15 ed, 2020) at [EA.108.150]ff; *Uniform Evidence in Australia*, (3rd ed, 2020) at 108-3ff.

[2-615] Warning where difference in complainant's account — prescribed sexual offences only

In trials for a prescribed sexual offence, where there is evidence suggesting a difference in the complainant's account that may be relevant to their truthfulness or reliability, it may be necessary to give the jury a direction in accordance with s 293A of the *Criminal Procedure Act* 1986. A "prescribed sexual offence" is defined in s 3. "Difference" is defined to include a gap or an inconsistency in the account or a difference between the account and another account: s 293A(3). The direction is not given as a matter of course but after submissions have been heard from the parties: s 293A(1). If it is decided the circumstances warrant the direction the jury may be informed that:

(i) people may not recall all the details of a sexual offence or may not describe it the same way each time, and

(ii) trauma may affect people differently, including affecting how they recall events, and

(iii) it is common for there to be differences in accounts of a sexual offence, and

(iv) both truthful and untruthful accounts of a sexual offence may contain differences, and

that it is for the jury to decide whether or not any differences in the complainant's account are important in assessing the complainant's truthfulness and reliability: s 293A(2).

[2-618] Suggested direction

The defence case is that [*name of witness*] was not telling the truth, that there were gaps in the account [*she/he*] gave, and that there were differences and inconsistencies between [*her/his*] accounts given.

[*Summarise relevant evidence*]

Experience shows that people may not remember all the details of an event including a sexual offence in the same way each time, that trauma may affect people differently and may affect how they recall events, that sometimes there are differences in an account of a sexual offence, and both truthful and untruthful accounts of an event including a sexual offence may contain differences. It is your job, and entirely a matter for you members of the jury, as judges of the facts, to decide whether or not any differences in the complainant's account are important in assessing [*her/his*] truthfulness and reliability.

[2-620] Suggested direction — delay in, or absence of, complaint

This direction must be given when evidence is given, or a question is asked, tending to suggest an absence of, or delay in, making a complaint: s 294(1). The direction must not extend to warning that delay is relevant to the complainant's credibility "unless there is sufficient evidence to justify such a warning": s 294(2)(c).

You have heard evidence that the complainant did not complain about what [*she/he*] claims the accused did to [*her/him*] until [*she/he*] told [*set out details of when, to whom, and nature of complaint*].

[***Alternatively***: You have heard the complainant did not make any complaint about what [*she/he*] claims the accused did to [*her/him*].]

The delay in making a complaint about the alleged conduct of the accused [*or an absence of a complaint*] does not necessarily indicate the allegation the offence was committed is false. There may be good reasons why a victim of sexual assault may hesitate in making, or may refrain from making, a complaint about such an assault.

[***Where appropriate***: You have heard evidence that the complainant did not complain until [*she/he*] did so to [*specify*] because [*specify the explanation offered*].]

[***Where appropriate*** (that is, where the "sufficient evidence" test under s 294(2)(c) is met):

However, the delay in making a complaint [*or the absence of a complaint*] is a matter that you may take into account in assessing the credibility of the complainant's evidence as to what [*she/he*] said the accused did. The accused has argued that the delay in making a complaint [*or the absence of a complaint*] is inconsistent with the conduct of a truthful person who has been sexually assaulted and so you should regard this as indicating the complainant's evidence is false. [*She/he*] asks you to rely upon the evidence that … [*set out the evidence relied upon by the accused said to justify that the jury should use the delay in assessing the complainant's credibility*].

This is a matter which you should consider.]

[2-630] Notes

1. The statutory basis for the direction is found in s 294(1)–(3) *Criminal Procedure Act* 1986. The section is headed "Warning to be given by Judge in relation to lack of complaint in certain sexual offence proceedings" which provides:

    (1) This section applies if, on the trial of a person for a prescribed sexual offence, evidence is given or a question is asked of a witness that tends to suggest:

    (a) an absence of complaint in respect of the commission of the alleged offence by the person on whom the offence is alleged to have been committed, or

    (b) delay by that person in making any such complaint.

    (2) In circumstances to which this section applies, the Judge:

    (a) must warn the jury that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false, and

(b) must inform the jury that there may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making, a complaint about the assault, and

(c) must not warn the jury that delay in complaining is relevant to the victim's credibility unless there is sufficient evidence to justify such a warning.

(3) If the trial of the person also relates to a domestic violence offence alleged to have been committed by the person against the same victim, the Judge may —

(a) also give a warning under section 306ZR, or

(b) give a single warning to address both types of offences.

Sections 294(1), (2)(a) and (b) were previously found in s 405B *Crimes Act* 1900 and s 107 *Criminal Procedure Act*. Section 294(2) was enacted to override the presumption expressed in *Kilby v The Queen* (1973) 129 CLR 460 at 465 that a failure of a person to complain at the earliest reasonable opportunity may be used by the jury as evidence relevant to the falsity of the complaint: *Jarrett v R* (2014) 86 NSWLR 623 at [34]. Section 294(2)(c) (added in 2007) provides the judge cannot give a warning about delay "unless there is sufficient evidence to justify such a warning".

2. The addition of s 294(2)(c) significantly recasts s 294(2): *Jarrett v R* (2014) 86 NSWLR 623 at [38]. It is complemented by s 294AA (inserted at the same time) which prohibits the judge from warning a jury that complainants as a class are unreliable witnesses and that there is danger of convicting on the uncorroborated evidence of a complainant: *Jarrett v R* at [38]. Section 294(2)(c) restricts the circumstances in which a judge can direct a jury that the delay in, or an absence of, complaint can be taken into account in assessing the complainant's credibility. The court in *Jarrett v R* at [43] held that the circumstances and the nature of the warning will vary from case to case; the test of "sufficient evidence" must be the basis of the warning and it must mould with the mandatory directions required by s 294(2)(a) and (b). In *Jarrett v R* at [43], Basten JA said:

> Without being prescriptive, there must be something in the evidence sufficient to raise in the judge's mind the possibility that the jury may legitimately consider that the delay could cast doubt on the credibility of the complaint. Usually, one would expect that such matters would have been put to the complainant in the course of cross-examination. Those very matters may constitute the "good reasons" why there was no timely complaint for the purposes of par (b), but, if not believed, may form the evidence justifying the warning under par (c).

An inconsistency between a complainant's complaints is "not the basis for a direction based on delay": *Jarrett v R* at [49].

[2-640] Delay in complaint and forensic disadvantage to the accused

Where s 165B *Evidence Act* applies, a direction in the form of a warning regarding any forensic disadvantage to the accused is to be given if:

(a) the proceedings are criminal proceedings in which there is a jury: s 165B(1). (The section applies in judge alone trials by virtue of s 133(3) *Criminal Procedure Act* 1986 which requires the judge to take the warnings required to be given to a jury into account: *W v R* [2014] NSWCCA 110 at [126]–[127], [130].)

(b) the court is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay: s 165B(2)

  (i) significant forensic disadvantage includes, but is not limited to, death or inability to locate any potential witness and loss or otherwise unavailability of any potential evidence: s 165B(7)

  (ii) delay includes delay between the alleged offence and it being reported: s 165B(6)(a)

  (iii) significant forensic disadvantage is not established by mere passage of time by itself: s 165B(6)(b), and

(c) a party makes an application for the direction: s 165B(2).

The need to direct the jury on the forensic disadvantage occasioned to the accused as a result of delay in complaint emanated from the High Court decisions in *Longman v The Queen* (1989) 168 CLR 79 and later *Crampton v The Queen* (2000) 206 CLR 161 at [45]. Section 165B substantially changed the law as declared in those cases.

The onus is on the accused to satisfy the court the delay has caused a significant forensic disadvantage: *Cabot (a pseudonym) v R (No 2)* [2020] NSWCCA 354 at [39].

In *TO v R* [2017] NSWCCA 12 at [167], the court (Price J; Button and Fagan JJ agreeing) summarised the effect of s 165B with reference to the cases of *Groundstroem v R* [2013] NSWCCA 237 and *Jarrett v R* (2014) 86 NSWLR 623 at [60]–[63]:

1. The duty on the judge to give a direction in accordance with subsection (2) arises only on application by a party and what is said to be the particular significant forensic disadvantage must form part of the application: *Groundstroem v R* at [56].
2. Subsection (5) prohibits the judge from directing the jury "about any forensic disadvantage the defendant may have suffered because of delay" otherwise than in accordance with the section: *Jarrett v R* at [53].
3. There is a duty to inform the jury of the nature of the disadvantage and the need to take that disadvantage into account when considering the evidence, only when the judge is satisfied that the defendant has "suffered a significant forensic disadvantage because of the consequences of delay": *Jarrett* at [53].
4. Subsection (3) provides a rider to the obligation to inform where the judge is satisfied there are "good reasons" for not taking that step: *Jarrett* at [53].
5. Subsection (4) prohibits the judge from suggesting that it would be dangerous or unsafe to convict the defendant "solely because of" the delay or the disadvantage. Otherwise, no particular form of words need be used: *Jarrett* at [53].
6. Whether there has been a significant forensic disadvantage depends on the nature of the complaint and the extent of the delay in the circumstances of the case. The

extent of delay is not the test. It is the consequence of delay which is decisive: *Groundstroem* at [61]. The proper focus of s 165B is on the disadvantage to the accused: *Jarrett* at [60].

7. The concept of delay is relative and judgmental. Although various factors may contribute to a delay, where a significant element is misconduct on the part of the accused, any resultant forensic disadvantage may not be characterised as a consequence of delay or, in the alternative, may provide a good reason for a judge not to give a direction, pursuant to the exception in s 165B(3): *Jarrett* at [61]–[62].

8. If the accused is put on notice of the complaint, any failure to make inquiry thereafter will not normally constitute a consequence of the delay, but a consequence of the accused's own inaction: *Jarrett* at [63].

The focus of s 165B is on the disadvantage to the accused and, unlike *Longman v The Queen*, there is no generalised assumption concerning the reliability of the complainant's evidence as a consequence of the delay: *Jarrett v R* at [54], [60]. Section 165B(4) specifically prohibits the giving of a "dangerous to convict" *Longman* direction which was considered by the Parliament to be an encroachment on the fact-finding task of the jury: *W v R* at [125]. A failure by a party to apply for a forensic disadvantage direction does not prevent a judge giving such a direction in order to avoid a perceptible risk of a miscarriage of justice: *TO v R* at [181] and [183]. This is supported by the preservation of the common law under s 9(1) *Evidence Act* and by the text of s 165B(5) which include "… but this section does not affect any other power of the judge to give any warning to, or to inform, the jury": *TO v R* at [181]–[182].

The phrase "because of" in s 165B(2) requires that the consequences of delay cause, or is one matter causing, significant disadvantage to the accused: *Cabot (a pseudonym) v R (No 2)* at [71]. Where the accused's conduct significantly contributes to the delay in complaint because of, for example, threats the accused made to a complainant, any forensic disadvantage is a consequence of the accused's own actions, not the delay in complaint: *Jarrett v R* at [62]; *Cabot (a pseudonym) v R (No 2)* at [71]. Misconduct of an accused may also be relevant under s 165B(3) as to whether there are "good reasons" not to give the direction: *Cabot (a pseudonym) v R (No 2)* at [73].

Any warning given under s 165B must not infringe s 294AA(1) *Criminal Procedure Act* which provides, inter alia, that the judge "must not warn a jury, or make any suggestion to a jury, that complainants as a class are unreliable witnesses". This prohibition includes "a warning to a jury of the danger of convicting on the uncorroborated evidence of any complainant": s 294AA(2). Section 165 *Evidence Act* is "subject to" s 294AA: s 294AA(3). See also [3-615] at notes 4 and 5.

[2-650] Suggested direction — delay in complaint and forensic disadvantage to the accused

Note: The suggested direction should be modified so as to deal only with the actual and possible disadvantages encountered in the case at hand and omitting assumptions that may not be applicable.

There is a warning I must give you relating to this issue of the delay in [*or absence of*] any complaint being made by the complainant.

It is most important that you appreciate fully the effects of delay [*or absence of complaint*] on the ability of [*the accused*] to defend [*himself/herself*] by testing prosecution evidence [*or bringing forward evidence*] in [*his/her*] own case, to establish a reasonable doubt about [*his/her*] guilt.

In this regard, I refer to the following specific difficulties encountered by [*the accused*] in testing the evidence of the prosecution [*or in adducing evidence*] in [*his/her*] own case … [*these specific difficulties should be highlighted in such a way as to make it clear that delay, for which the accused had not been responsible, had created those difficulties. All additional significant circumstances require comment. These may include:*

- *the delay in instituting the prosecution*
- *the possibility of distortion in human recollection*
- *the nature of the allegations*
- *the age of the complainant at the time of the allegations having regard to the current and previous forms of ss 165A and 165B Evidence Act*
- *the prosecution case is confined to the evidence of the complainant, and*
- *any unusual or special features.*]

These difficulties put the accused at a significant disadvantage in responding to the prosecution case, either in testing the prosecution evidence, or in bringing forward evidence [*him/herself*] to establish a reasonable doubt about [*his/her*] guilt, or both.

The delay means that evidence relied upon by the Crown cannot be as fully tested as it otherwise might have been.

Had the allegations been brought to light and the prosecution commenced much sooner, it would be expected that the complainant's memory for details would have been clearer. This may have enabled [*her/his*] evidence to be checked in relation to those details against independent sources so as to verify it, or to disprove it. The complainant's inability to recall precise details of the circumstances surrounding the incident(s) makes it difficult for the accused to throw doubt on [*her/his*] evidence by pointing to circumstances which may contradict [*her/him*]. Had the accused learned of the allegations at a much earlier time [*he/she*] may have been able to recall relevant details which could have been used by his counsel in cross-examination of the complainant.

Another aspect of the accused's disadvantage is that had [*he/she*] learned of the allegations at a much earlier time [*he/she*] may have been able to find witnesses or items of evidence that might have either contradicted the complainant or supported [*his/her*] case, or both. [*He/she*] may have been able to recall with some precision what [*he/she*] was doing and where [*he/she*] was at particular times on particular dates and to have been able to bring forward evidence to support [*him/her*].

You should also take into account that because of the delay the accused has lost the opportunity to bring forward evidence from [*set out specific items of evidence lost or no longer available*].

Because the accused has been put into this situation of significant disadvantage [*he/she*] has been prejudiced in the conduct of his defence. As a result, I warn you that before

you convict the accused you must give the prosecution case the most careful scrutiny. In carrying out that scrutiny you must bear in mind the matters I have just been speaking about — the fact that the complainant's evidence has not been tested to the extent that it otherwise could have been and the inability of the accused to bring forward evidence to challenge it, or to support [*his/her*] defence.

[The next page is 287]

Onus and standard of proof

It is essential that the jury be directed appropriately and clearly on the onus and standard of proof. The following are various passages which may be of assistance wholly or in part.

[3-600] Suggested direction — where the defence has no onus

Onus of proof

As this is a criminal trial the burden or obligation of proof of the guilt of the accused is placed squarely on the Crown. That burden rests upon the Crown in respect of every element or essential fact that makes up the offence with which the accused has been charged. That burden never shifts to the accused. There is no obligation whatsoever on the accused to prove any fact or issue that is in dispute before you. It is of course not for the accused to prove his/her innocence but for the Crown to establish his/her guilt.

A critical part of the criminal justice system is the presumption of innocence. What it means is that a person charged with a criminal offence is presumed to be innocent unless and until the Crown persuades a jury that the person is guilty beyond reasonable doubt.

[***Note**: For situations where there is an onus of proof on the accused see specific instances, such as supplying drugs at [5-1800], substantial impairment at [6-570], mental illness at [6-230].*]

[If the defence has called evidence (or relies on an account in a police interview) and a Liberato direction is not considered necessary:

The fact the accused has given/called evidence before you [*or relies on an account given in an interview by police*] does not alter the burden of proof. The accused does not have to prove that his/her version is true. The Crown has to satisfy you that the account given by the accused [*and defence witnesses*] should not be accepted as a version of events that could reasonably be true.]

[***Note**: In some instances this direction will not be appropriate because the accused may be guilty even if there is no dispute over the facts, for example where guilt is based upon an objective evaluation such as whether the accused's driving was dangerous in an offence under s 52A Crimes Act.*]

Standard of proof

Proving the accused's guilt beyond reasonable doubt is the high standard of proof the Crown must achieve before you can convict [*him/her*] and the words mean exactly what they say — proof beyond reasonable doubt. When you finish considering the evidence in the trial and the submissions made by the parties you must ask yourself whether the Crown has established the accused's guilt beyond reasonable doubt.

[*Where the Crown must negative a defence/issue to the criminal standard, a long accepted direction which can be given (after making clear that the Crown must prove all ingredients of the charge beyond reasonable doubt) is as follows*:

"Has the Crown eliminated any reasonable possibility that the accused acted in self-defence/was extremely provoked/acted under duress, etc?"]

The Crown does not have the burden of proving beyond reasonable doubt every single fact that is in dispute. The obligation that rests upon the Crown is to prove the elements of the charge; that is the essential facts that make up the charge, and to prove those facts beyond reasonable doubt. Soon I will outline for you what those elements, or essential facts, are.

In a criminal trial there is only one ultimate issue that a jury has to decide. Has the Crown proved the guilt of the accused beyond reasonable doubt? If the answer is "yes", the appropriate verdict is "guilty". If the answer is "no", the verdict must be "not guilty".

[Where the accused has given or called evidence or evidence has been adduced of a conflicting defence version of events (typically in answers in a record of interview (see Note at [3-605]):

The accused relies on an account of events in [*the evidence he/she gave, or called, or in his/her interview by the police*] That account is to the following effect … [*summarise the account relied upon*].

It is important you understand that the accused must be found not guilty if *his/her* guilt has not been proved beyond reasonable doubt and that *she/he* is entitled to the benefit of any reasonable doubt you may have at the end of your deliberations.

It follows from this (***Liberato* direction**):

First, if you believe the accused's evidence [*the account relied on by the accused in his/her interview with the police*], obviously you must acquit.

Second, if you find difficulty in accepting the accused's evidence [*the account relied on by the accused in his/her interview with the police*], but think it might be true, then you must acquit.

Third, if you do not believe the accused's evidence [*if you do not believe the account relied on by the accused in his/her interview with the police*], then you should put it to one side. Nevertheless, the question will remain: has the Crown, upon the basis of evidence that you do accept, proved the accused's guilt beyond reasonable doubt?

[3-603] Notes

1. There is longstanding authority for the proposition that, except in certain limited circumstances, no attempt should be made to explain or embellish the meaning of the phrase "beyond reasonable doubt": *Green v The Queen* (1971) 126 CLR 28 at 32–33; *La Fontaine v R* (1976) 136 CLR 62 at 71; *R v Reeves* (1992) 29 NSWLR 109 at 117; *Raso v R* [2008] NSWCCA 120 at [20]. If, in an address, counsel suggests that fantastic or unreal possibilities should be regarded by the jury as affording a reason for doubt, the judge can properly instruct the jury that fantastic or unreal possibilities ought not to be regarded by them as a source of reasonable doubt: *Green v The Queen* at 33; or as put in *Keil v The Queen* (1979) 53

ALJR 525, "fanciful doubts are not reasonable doubts". It is generally undesirable to direct a jury in terms which contrast proof beyond reasonable doubt with proof beyond any doubt: *The Queen v Dookheea* (2017) 91 ALJR 960 at [28]. However, an effective means of conveying the meaning of the phrase beyond reasonable doubt to a jury may be by contrasting the standard of proof beyond reasonable doubt with the lower civil standard of proof on the balance of probabilities: *The Queen v Dookheea* at [41].

2. The question of whether there is a reasonable doubt is a subjective one to be determined by each individual juror: *Green v The Queen* at 32–33; *R v Southammavong* [2003] NSWCCA 312 at [28]. There was no error in *R v Southammavong* by the trial judge saying, in response to a jury request for clarification, that "the words 'beyond reasonable doubt' are ordinary everyday words and that is how you should understand them": at [23]. Newman J said in *R v GWB* [2000] NSWCCA 410 at [44] that "judges should not depart from the time honoured formula that the words 'beyond reasonable doubt' are words in the ordinary English usage and mean exactly what they say".

3. If a judge gives the jury written directions it is essential that the directions make clear where the legal onus is on the Crown to eliminate any reasonable possibility: *Hadchiti v R* (2016) 93 NSWLR 671 at [106], [112] (see Special Bulletin 32). A trial judge should take particular care before introducing the concept of reasonable possibility in the course of explaining the onus and standard of proof to the jury. The written directions in *Hadchiti v R* were held to be contrary to law because of the repeated use of the expression "reasonable possibility" throughout and the failure to make clear the onus of proof was on the Crown: *Hadchiti v R* at [44], [112] and see *Moore v R* [2016] NSWCCA 185 at [114].

4. Proof of a matter beyond reasonable doubt involves rejection of all reasonable hypotheses or any reasonable possibility inconsistent with the Crown case: *Moore v R* at [43] per Basten JA; RA Hulme J generally agreed at [94] and see RA Hulme J at [125]. It is not erroneous to direct that if there is a reasonable possibility of some exculpatory factor existing then the jury should find in favour of the accused: *Moore v R* at [99], [125]. The jury should be directed in terms that it is a matter for the Crown to "eliminate any reasonable possibility" of there being such exculpatory matter: *Moore v R* at [99], [125] and several cases cited at [99]–[124]. Framing the issue of self-defence in terms a reasonable possibility does not distort the onus and standard of proof and is consistent with the oft cited case of *R v Katarzynski* [2002] NSWSC 613 at [22]: *Moore v R* at [122]–[124] and see Basten JA in *Moore v R* at [43]. The concept of a reasonable possibility in a question trail is definitive and does not give rise to an answer other than "yes" or "no" — there is no "middle ground" answer of "not sure": *Moore v R* at [36]; [129].

[3-605] The *Liberato* direction — when a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness or the accused's account in a recorded police interview

1. In *Liberato v The Queen* (1985) 159 CLR 507 at 515, Brennan J in his dissenting judgment (Deane J agreeing) spoke of a case in which there is evidence relied upon by the defence conflicting with that relied upon by the Crown. In such a case, a jury

might consider "who is to be believed". His Honour said it was essential to ensure the jury were aware that deciding such a question in favour of the prosecution does not conclude the issue as to whether guilt has been proved beyond reasonable doubt. The jury should be directed that:

(a) a preference for the prosecution evidence is not enough — they must not convict unless satisfied beyond reasonable doubt of the truth of that evidence;

(b) even if the evidence relied upon by the accused is not positively believed, they must not convict if that evidence gives rise to a reasonable doubt about guilt.

2. In *De Silva v The Queen* [2019] HCA 48, the High Court noted that there were differing views as to whether a *Liberato* direction was appropriate in a case where the conflicting defence version of events was not given on oath by the accused, but was before the jury, typically in the accused's answers in a record of interview and said such a direction should be given:

(a) if there is a perceived risk of the jury thinking they have to believe the accused's evidence or account before they can acquit, or of the jury thinking it was enough to convict if they prefer the complainant's evidence over the accused's evidence or account (*De Silva v The Queen* at [11], [13]); or

(b) in a case where the accused gives or calls evidence and/or there is an out of court representation (for example in an ERISP) that is relied upon (*De Silva v The Queen* at [11]).

3. The *Liberato* direction in the suggested direction at [3-600] is modelled on what was proposed by the High Court in *De Silva v The Queen* at [12]. A *Liberato* direction should be given in any case where the trial judge perceives there is a real risk the jury may be left with the impression the evidence the accused relies on will only give rise to a reasonable doubt if they believe it is truthful, or that a preference for the complainant's evidence is sufficient to establish guilt: at [9].

[3-610] Suggested direction — essential Crown witness ("*Murray* direction") (in cases other than prescribed sexual offences)

The following direction applies where there is one witness essential to the Crown case.

Wherever the Crown seeks to establish the guilt of an accused person with a case based largely or exclusively on a single witness it is important that the jury are told that they should exercise caution.

That is what I am going to tell you now.

You must exercise caution before you convict the accused because the Crown case largely depends on you accepting the reliability of the evidence of a single witness.

This being so, unless you are satisfied beyond reasonable doubt that the [*essential Crown witness*] is both an honest and accurate witness in the account [*he/she*] has given, you cannot find the accused guilty. Before you can convict the accused, you should examine the evidence of the [*essential Crown witness*] very carefully in order to satisfy yourselves that you can safely act upon that evidence to the high standard required in a criminal trial.

That caution is not based upon any personal view that I have of the [*essential Crown witness*]. I told you at the outset of this summing up that I would not express my personal opinions on the evidence. But in any criminal trial, where the Crown case relies solely or substantially upon the evidence of a single witness, a jury must always approach that evidence with particular caution because of the onus and standard of proof placed upon the Crown.

I am not suggesting to you that you are not entitled to convict the accused upon the evidence of the [*essential Crown witness*]. Clearly you are entitled to do so but only after you have carefully examined the evidence and satisfied yourself that it is reliable beyond reasonable doubt.

In considering the [*essential Crown witness'*] evidence and whether it does satisfy you of the accused's guilt, you should of course look to see if it is supported by other evidence.

[3-615] Notes

1. The above direction is derived from *R v Murray* (1987) 11 NSWLR 12 where Lee J said at 19(E):

> In all cases of serious crime it is customary for judges to stress that where there is only one witness asserting the commission of the crime, the evidence of that witness must be scrutinised with great care before a conclusion is arrived at that a verdict of guilty should be brought in; but a direction of that kind does not of itself imply that the witness' evidence is unreliable.

   R v Murray is cited with approval by the High Court in *Robinson v The Queen* (1999) 197 CLR 162 at [21]; *Tully v The Queen* (2006) 230 CLR 234 per Kirby J at [55]–[59], and see also Hayne J at [89].

2. The High Court has held that the direction should be given in appropriate cases where there is a perceptible risk of miscarriage of justice if the jury is not warned of the need to scrutinise the evidence of a complainant with care before arriving at a conclusion of guilt: *Robinson v The Queen* (1999) 197 CLR 162 at [25]–[26]. The direction "emphasises what should be clear from the application of the onus and standard of proof: if the Crown case relies upon a single witness then the jury must be satisfied that the witness is reliable beyond reasonable doubt": *Smale v R* [2007] NSWCCA 328 at [71] per Howie J. This does not mean that in cases where there is one principal witness in the Crown case a *Murray* direction is automatically required — if that witness' evidence is corroborated by other evidence in the trial, such as documentary evidence, forensic evidence or other physical evidence there is no basis for a direction: *Gould v R* [2021] NSWCCA 92 at [134], [136]; cf *Ewen v R* [2015] NSWCCA 117 at [104]. In *Gould v R*, at [135], Adamson J explained this by reference to an offence of sexual intercourse without consent where the fact of intercourse was in issue in the trial (putting to one side the effect of s 294AA *Criminal Procedure Act* 1986 for the purposes of the example) — if the only evidence of intercourse was the complainant's evidence then a *Murray* direction was required. However, if the complainant had undergone testing with a Sexual Assault Identification Kit which identified semen in her vagina which

DNA testing showed matched that of the accused then a direction would not be required. While the complaint was still the principal witness, her evidence, at least in relation to that element of the offence, was corroborated by other evidence.

3. There is no particular form of words prescribed for giving a *Murray* direction; nor is there any obligation to use the verb "scrutinize": *Kaifoto v R* [2006] NSWCCA 186 at [72]; *Williams v R* [2021] NSWCCA 25 at [144].

4. Although the requirement to give a *Murray* direction extends to "all cases of serious crime" (*R v Murray* at 19) in the case of prescribed sexual offences (defined in s 290 *Criminal Procedure Act*) consideration must be given to the effect of s 294AA *Criminal Procedure Act* and *Ewen v R* [2015] NSWCCA 117 (see point 5 below). Cases decided before the enactment of s 294AA, where the appellant was charged with a prescribed sexual offence, are no longer good law (see, for example, *R v Davis* [1999] NSWCCA 15 at [20]; *R v Connors* [2000] NSWCCA 470 at [125]; *R v Burt* [2003] NSWCCA 248 at [72]; *R v Li* [2003] NSWCCA 386 at [65]; *DTS v R* [2008] NSWCCA 329).

5. Section 294AA *Criminal Procedure Act*, which commenced on 1 January 2007, provides:

   (a) A judge in any proceedings to which this Division applies must not warn a jury, or make any suggestion to a jury, that complainants as a class are unreliable witnesses.

   (b) Without limiting subsection (1), that subsection prohibits a warning to a jury of the danger of convicting on the uncorroborated evidence of any complainant.

   (c) Sections 164 and 165 of the *Evidence Act* 1995 are subject to this section.

   The legislature intended to prohibit warnings that call into question (by reason *only* of absence of corroboration) the reliability not only of complainants as a class, but also of a complainant in any particular case: *Ewen v R* [2015] NSWCCA 117 at [136]. A *Murray* direction, based *only* on the absence of corroboration, is tantamount to a direction that it would be dangerous to convict on the uncorroborated evidence of the complainant: *Ewen v R* at [140]. If the direction suggests that merely because a complainant's evidence is uncorroborated, it would be, on that account, dangerous to convict, it transgresses s 294AA(2): *Ewen v R* at [141]. Such a conclusion cannot be avoided by switching from one linguistic formula ("dangerous to convict") to another ("scrutinise the evidence with great care"). However formulated, the substance of the direction is the same — that, merely because the evidence is uncorroborated, it would be unsafe for the jury to act upon it: *Ewen v R* at [141].

   This does not mean that directions appropriate to the circumstances of the individual case cannot be given as envisaged in *Longman v The Queen* (1989) 168 CLR 79: *Ewen v R* at [143]. A direction would not contravene s 294AA if it concerned specific evidence in the case, including weaknesses or deficiencies as described in *Longman v The Queen*, *Robinson v The Queen* (1999) 197 CLR 162 and *Tully v The Queen* (2006) 230 CLR 234. Neither would a direction concerning delay in bringing the case. Nor would a direction which addressed a scenario where the evidence indicated that others were present and were or may have been in a

position to observe what took place, and were not called to give evidence: *Ewen v R* at [143]–[144]. The latter direction would, however, have to be consistent with *Mahmood v Western Australia* (2008) 232 CLR 397 at [27]. See further **Witnesses — not called** at [4-370], [4-375].

[3-625] Motive to lie and the onus of proof

Crown witnesses

1. A motive to lie or to be untruthful, if it is established, may "substantially affect the assessment of the credibility of the witness": ss 103, 106(2)(a) *Evidence Act* 1995. Where there is evidence that a Crown witness has a motive to lie, the jury's task is to consider that evidence and to determine whether they are nevertheless satisfied that the evidence given is true: *South v R* [2007] NSWCCA 117 at [42]; *MAJW v R* [2009] NSWCCA 255 at [31]. The jury's task does not include speculating whether there is some other reason why the Crown witness would lie: *Brown v R* [2008] NSWCCA 306 at [50]. Nor does it include acceptance of the Crown witness's evidence unless some positive answer to that question is given by the accused: *South v R* at [42].

2. If the defence case directly asserts a motive to lie on the part of a central Crown witness, the summing-up should contain clear directions on the onus of proof, including a direction that the accused bears no onus to prove a motive to lie and that rejection of the motive asserted does not necessarily justify a conclusion that the evidence of the witness is truthful: *Doe v R* [2008] NSWCCA 203 at [58]. Where the defence does not directly raise the issue, it is impermissible for the prosecutor to submit (for the purpose of promoting the acceptance of a Crown witness as a witness of truth) that the accused did not advance a motive to lie. The jury should not be given the impression that the accused bears some onus of proving the existence of a motive for the fabrication of the allegations against him or her: *Doe v R* at [59]–[60].

The accused

3. It is impermissible to cross-examine an accused to show that he or she does not know of any reason why the complainant (or indeed a central Crown witness) has a motive to lie: *Palmer v The Queen* (1998) 193 CLR 1 at [8]; *Doe v R* at [59]. The question focuses the jury's attention on irrelevant material and invites them to accept the evidence unless some positive answer is given by the accused: *Palmer v The Queen* at [8]. An open-ended question to the accused, "why would the complainant lie?", "simply should never be asked" by a prosecutor in a trial: *Doe v R* at [54]; *South v R* [2007] NSWCCA 117 at [44]; *Causevic v R* [2008] NSWCCA 238 at [38]. If in closing addresses the prosecutor makes a comment or asks a rhetorical question to that effect when the issue has not been raised, the judge should give full, firm and clear directions on the onus of proof, including a direction that the accused bears no onus to prove a motive to lie: *Palmer v The Queen* at [7]–[8]; *Doe v R* at [59]–[60]; *Cusack v R* [2009] NSWCCA 155 at [105].

4. The evidence of an accused person is subject to the tests which are generally applicable to witnesses in a criminal trial: *Robinson v The Queen* (1991) 180 CLR 531 at 536. However, the trial judge should refrain from directing the jury that

the accused's interest in the outcome of the proceedings is a factor relevant to assessing his or her credibility as a witness: *Robinson v The Queen* at 535–536; *MAJW v R* [2009] NSWCCA 255 at [37]–[38]. *Robinson v The Queen* did not create a new rule. It applied a more general principle that directions should not deflect the jury from its fundamental task of deciding whether the prosecution had proved its case beyond reasonable doubt: *Hargraves v The Queen* (2011) 245 CLR 257 at [46]. Nevertheless trial judges must not instruct juries in terms of the accused's interest in the outcome of the proceedings whether as a direction of law or as a judicial comment on the facts: *Hargraves v The Queen* at [46]. A direction of that kind seriously impairs the fairness of the trial and undermines the presumption of innocence: *Robinson v The Queen* at 535.

See further **Cross-examination of defendant as to credibility** at [1-343] and **Consciousness of Guilt, Lies and Flight** at [2-950]ff.

[3-630] Suggested direction — where the defence has an onus

In the type of case now before you, however, there is an exception to the general propositions of law which I have just put, namely — that the Crown must prove its case, and prove it beyond reasonable doubt. The law makes provision in respect of one matter which arises for your decision in this trial, in which the accused must prove [*his/her*] case. I will explain shortly what that matter is.

Now however, I wish to emphasise that the law is that where the proof of any matter is on an accused person, that is to say, by way of exception to the general rule which I have explained, then the accused is not required to prove that matter beyond reasonable doubt — the standard of proof imposed upon the Crown.

The accused needs only to establish what the accused relies upon, in this regard, to a lower standard of proof than beyond reasonable doubt. The accused is required to prove the accused's case, in this regard, only on the balance of probabilities. That is to say the accused needs only to show that it is more likely than not that what the accused asserts is so.

[The next page is 531]

Summing-up format

[7-000] Suggested outline of summing-up (for use as an aide memoire)

Prior to final addresses, it is prudent for the judge to raise with counsel, in the absence of the jury, the specific legal issues which in their submissions have arisen in the trial and which need to be the subject of specific reference in the summing-up. The task of drafting the summing-up is the responsibility of the trial judge. It cannot be delegated to the parties: *Hamilton (a pseudonym) v R* [2020] NSWCCA 80 at [83]–[84]; [97]. Of course, the trial judge is entitled to have the detailed assistance of the parties with regard to correctly explaining to the jury the law, the evidence, and the matters in dispute.

The following summing-up format is suggested purely as a guide and is not intended to be exhaustive:

1. Burden and standard of proof.
2. Where there is more than one count, each count is to be considered separately.
3. Where there is more than one defendant, each case is to be considered separately.
4. Legal elements of each count (a direction of law). It is not the function of a trial judge to expound to the jury the principles of law going beyond those which the jurors need to understand to resolve the issues that arise for decisions in the case: *The Queen v Chai* (2002) 76 ALJR 628. For example, in sexual assault cases it is unnecessary and unhelpful to direct the jury upon elements of consent not relevant to the issues in the case: *R v Mueller* (2005) 62 NSWLR 476 at [4] and [42]. Consideration needs to be given to any alternative verdicts: see **Alternative verdicts and alternative counts** at [2-210].
5. It is generally not good practice to read legislation to a jury: *Pengilley v R* [2006] NSWCCA 163 at [41]; *R v Micalizzi* [2004] NSWCCA 406 at [36]. Where it is necessary to refer to a legal principle derived from statute, it is the effect of the provision, so far as it is relevant to the issue before the jury, that should be conveyed.
6. Any general matters of law which require direction — for assistance in this regard, reference might be conveniently made to the chapters in the Bench Book under the various headings in "Trial Instructions". This will operate as a check list, although it is not suggested that it would be exhaustive.
7. How the Crown seeks to make out its case — this will involve an outline of the nature of the Crown case, by reference to the various counts. Where necessary, the Crown case against separate accused(s) should be distinguished.
8. Defences — this will involve an outline of the defence or defences raised by the accused, distinguishing where necessary between individual accused.
9. Evidence — here reference should be made to the relevant evidence, relating it, where possible, to the legal issues which arise under the particular counts and the defences raised. It will be necessary, of course, to distinguish between direct and circumstantial evidence. A legal direction on circumstantial evidence will already have been given.
10. Summarise arguments of counsel again relating them, if possible, to particular counts and defences and legal issues.
11. Recap any matters where essential.

12. In the absence of the jury, seek submissions from counsel in relation to any factual or legal issues which they contend were not appropriately dealt with in the summing-up. In *DJF v R* [2011] NSWCCA 6, Giles JA, with whom RA Hulme J agreed, said that even outlining a matter on which further directions are sought should be done in the absence of the jury: at [16].
13. As to the use by the judge of written directions: see **The jury** at [1-535]. Written directions (including question trails) do not replace the need to give oral directions: *Trevascus v R* [2021] NSWCCA 104 at [65].

[7-020] Suggested direction — summing-up (commencement)

The following is based upon the assumption that there is more than one accused.

Members of the jury, the accused stand before you upon an indictment which is in the following terms … [*read the indictment*].

I take this opportunity of reminding you that, at this stage, at all times you are free to ask any questions about these legal directions I am giving you if you have any difficulty with them. You can ask as often as you like and ask any questions that you wish in regard to both the legal directions and any questions of fact.

Members of the jury, to that charge each accused has pleaded "not guilty". It becomes your duty and your responsibility, therefore, to consider whether each accused is "guilty" or "not guilty" of the charge and to return your verdict(s) according to the evidence which you have heard.

I propose to commence this summing-up with a number of general directions which, to some extent, repeat those I gave you at the beginning of the trial. However, it is important I give them again, not only to remind you of what I said earlier but also to place those directions in the context of the trial which has now taken place.

What I said earlier was, in a sense, an explanation to you of the part you were expected to play in the trial, and a warning to you that it was necessary for you to participate in the determination of the factual issues from the outset.

I remind you that you are bound to accept those principles of law which I give to you and to apply them to the facts of the case as you find them to be. The facts of the case and the verdicts you give are for you, and you alone, because you alone are the judges of the facts.

I am the judge of the law, but you are quite correctly called the judges of the facts. I have nothing to do with those facts or your decisions in relation to them. I have nothing to do with what you accept as truthful, or what evidence you decide to reject as untruthful; nor indeed what weight you might give to any one particular part of the evidence given or what inferences you draw from that evidence.

It is for you to assess the various witnesses and decide whether they are telling the truth. You have seen each of the witnesses as they have given their evidence. It is a matter for you entirely as to whether you accept that evidence.

Your ultimate decision as to what evidence you accept and what evidence you reject may be based on all manner of things, including what the witness has had to say; the manner in which they said it; and the general impression which they made upon you when giving evidence.

In relation to accepting the evidence of witnesses, you are not obliged to accept the whole of the evidence of any one witness. You may, if you think fit, accept part and reject part of the same witness' evidence. The fact you do not accept a portion of a witness' evidence does not mean you must necessarily reject the whole of their evidence. You could accept the remainder of their evidence if you think it is worthy of acceptance,

You have heard addresses from counsel for the Crown and counsel for the accused. You will consider the submissions they have made in their addresses and give those the submissions such weight as you think fit. In no sense are those submissions evidence in the case.

If I happen to express any views upon questions of fact, you must ignore those views. That is what I mean when I say you are the sole judges of the facts of the case.

I am, of course, entitled to express a view. I do not, however, propose to try to persuade you one way or the other in the case — that is not my task. I may, when I come to a particular issue, suggest to you that there is no real dispute about it. That of course is my view and it is open to you, if you wish, to reject that view if it does not accord with your own independent assessment of the evidence.

I shall, of course, endeavour (during the summing-up) to focus attention upon those parts of the evidence which seem to me to be the areas in respect of which counsel have devoted most of their attention. Of course, it is necessary for you in deliberating to consider all of the evidence and not only the evidence to which I have referred you or to which you have been referred by counsel.

You are brought here from various walks of life and you represent a cross section of the community — a cross section of its wisdom and its sense of justice. You are expected to use your individual qualities of reasoning; your experience; and your understanding of people and human affairs.

In particular, and I cannot stress this too strongly, you are expected to use your common sense and your ability to judge your fellow citizens, so that you bring to the jury room (during the course of your deliberations) your own experience of human affairs, which must necessarily be as varied as there are twelve of you. It is that concentration of your own experience and your own individual abilities, wisdom and common sense which is, of course, the critical foundation of the whole jury system which has lasted in this State for almost two hundred years (and in many other democratic countries for far longer than that).

You have very important matters to decide in this case — important not only to the accused but also to the whole community. The privilege which you have of sitting in judgment upon your fellow citizens is one which carries with it corresponding duties and obligations. You must, as a jury, act impartially, dispassionately and fearlessly. You must not let sympathy or emotion sway your judgment.

Let me now say something to you about the onus of proof. This is, as you have already been told more than once, a criminal trial of a most serious nature and the burden of proof of guilt of the accused is placed on the Crown. That onus rests upon the Crown in respect of every element of the charges. There is no onus of proof on the accused at all. It is not for the accused to prove [*his/her/their*] innocence but for the Crown to prove [*his/her/their*] guilt and to prove it beyond reasonable doubt.

It is, and always has been, a critical part of our system of justice that persons tried in this court are presumed to be innocent, unless and until they are proved guilty beyond reasonable doubt. This is known as the "presumption of innocence". This expression "proved beyond reasonable doubt" is an ancient one. It has been deeply ingrained in the criminal law of this State for almost two hundred years and it needs no explanation from trial judges.

The Crown does not have to prove, however, every single fact in the case beyond reasonable doubt. The onus which rests upon the Crown is to prove the elements of the charges beyond reasonable doubt. Soon I will outline to you the elements of the charges.

In a criminal trial there is only one ultimate issue. Has the Crown proved the guilt of the accused beyond reasonable doubt? If the answer is "Yes", the appropriate verdict is "Guilty". If the answer is "No", the verdict must be "Not guilty".

[Commonwealth offences — where unanimity is required:

Under our system of law, your verdict [on each count], whether it be "guilty" or "not guilty", must be unanimous. As this is a prosecution for a Commonwealth offence, majority verdicts are not recognised. That is not to say that each of you must agree upon the same reasons for your verdict. You may individually rely upon different parts of the evidence or place a different emphasis upon parts of the evidence. However, by whatever route you each arrive at your decision, that final decision of either "guilty" or "not guilty" [in relation to each charge] must be the decision of all of you, unanimously, before it can become your verdict.**]**

[State offences — where majority verdicts available:

Under our system of law, your verdict [on each count], whether it be "guilty" or "not guilty" must be unanimous. That is not to say that each of you must agree upon the same reasons for your verdict. You may individually rely upon different parts of the evidence or place a different emphasis upon parts of the evidence. However, by whatever route you each arrive at your decision, that final decision of either "guilty" or "not guilty" [in relation to each charge] must be the decision of all of you, unanimously, before it can become your verdict.

As you may know, the law permits me, in certain circumstances, to accept a verdict which is not unanimous. Those circumstances may not arise at all, so that when you retire I must ask you to reach a verdict upon which each one of you agree. Should, however, the circumstances arise when it is possible for me to accept a verdict which is not unanimous, I will give you a further direction.]

[The question whether there should be reference to majority verdicts has been considered. See Note 8 at [7-040] below.]

[7-030] Suggested direction — final directions

Except for two matters, I have now completed all I have to say to you before asking you to retire to consider your verdict(s).

First, if at any stage of your deliberations you would like me to repeat or further explain any of the directions of law I have given you, please do not hesitate to ask.

It is fundamental that you should understand the principles which you are required to apply. If you have any doubt about those principles, then you are not only entitled to ask for further assistance, but you should ask for it. All you have to do is to write a note setting out the assistance you would like and give it to the court/sheriff's officer who will deliver it to me. Upon receiving such a request, I shall discuss the matter with counsel, and the court will then reassemble for the purpose of seeking to assist you.

I must stress that your deliberations are confidential so please do not include anything that would disclose the content of your discussions, including any voting patterns.

[**Where the jury do not have transcript**] Secondly, all of the evidence has been recorded. Although you will not have the advantage of having a transcript of that evidence for your perusal, if you wish, at any stage of your deliberations, to have any part of that evidence checked or read back to you, then that can be arranged. You need only let one of the court/sheriff's officers know and the court will reassemble for that purpose.

[**Where the jury have transcript**] Secondly, you have available to you the transcript of the evidence but if you experience any difficulty locating a particular passage that you are interested in, let me know by way of a note and I should be able to assist. I also remind you that whilst every effort is made to ensure the transcript is accurate, it is possible there may be errors. So if you have any doubt about whether something has been correctly transcribed, please let me know and I will endeavour to assist.

Return of verdict(s)

I shall now tell you what will happen when you return with your verdict(s). You will take your places in the jury box. Your foreperson will be asked to stand. My associate will then direct questions to [*him/her*]. They will be … [*refer here to so much of the procedure and the questions which the foreperson will be asked as is appropriate to the particular case*].

[*In trials involving multiple counts or accused, it may be worth suggesting that the foreperson have the verdicts written down to assist him/her.*]

Before I ask you to retire, I will ask counsel if there is anything they wish to raise.

[*Ask counsel in turn. It may be expected that if there is a matter that is uncontroversial, counsel may announce the subject matter and it may be dealt with in the presence of the jury. Otherwise the jury should be asked to leave while the matter is discussed.*]

[*If there is nothing raised, or after further directions have been given as a result of counsel's submissions, proceed as follows:*]

I now ask that you retire to consider your verdict(s). The exhibits will be sent to you shortly.

[*It is wise to have counsel check that all is in order and nothing extraneous is with the exhibits before they go to the jury room.*]

[7-040] Notes

1. **Section 161 *Criminal Procedure Act* 1986**

   The above suggested directions are given upon the basis that the judge intends to summarise the evidence during the course of the summing-up. However, s 161

Criminal Procedure Act provides that the judge need not summarise the evidence if of the opinion that, in all of the circumstances of the trial, a summary is not necessary. In the case of a short trial with narrow issues and other relevant factors, the trial judge may decide in the exercise of his or her discretion not to summarise the evidence: *R v DH* [2000] NSWCCA 360; *Alharbi v R* [2020] NSWCCA 130 at [73]–[77].

Importantly, s 161 does not relieve the judge of the obligation to put the defence case accurately and fairly to the jury and instruct the jury about how the law applies to that case: *Wong v R* [2009] NSWCCA 101 at [141]; *AS v R* [2010] NSWCCA 218 at [21]; *Condon v R* (unrep, 9/10/95, NSWCCA). This does not require that it be done at length but there needs to be sufficient to highlight the evidence most relevant to the defence case: *Alharbi v R* at [75], [77], [82]. When putting the defence case to the jury, it must be made clear that the onus of proof remains on the prosecution: *Wong v R* at [141].

2. **Desirability of the judge raising the identification of the relevant legal issues with counsel at the conclusion of the evidence**

   (a) At the conclusion of the summing-up, it should be the invariable practice of the trial judge to enquire of counsel, in the absence of the jury whether he or she has overlooked any directions of law and appropriate warnings which should have been given to the jury as well as hearing submissions on the correctness or otherwise of directions of law which have in fact been given. If this practice is sedulously followed, it should go a long way to avoid the recurring cost, inconvenience and personal distress associated with a new trial: *R v Roberts* (2001) 53 NSWLR 138 at [67]. Notwithstanding counsel may take a position with respect to particular directions and request that no direction be given, as occurred in *DC v R* [2019] NSWCCA 234 where the trial judge was asked not to give a direction about lies, the obligation to ensure the accused receives a fair trial may require the judge to do so: *DC v R* at [148] ff. In such cases this should be raised with the parties first: at [149].

   (b) The responsibility of counsel to assist the trial judge in this regard was stressed in *R v Roberts* at [57], *R v Mostyn* [2004] NSWCCA 97 at [54]–[56] and *R v Gulliford* [2004] NSWCCA 338 at [182]–[184].

   (c) In *R v Micalizzi* [2004] NSWCCA 406 at [60], the view was expressed that, generally speaking, counsel appearing for either party is required to formulate the direction, warning or comment required by the trial judge, where counsel believes that what the trial judge has said to the jury is insufficient to ensure a fair trial for the accused or the Crown.

3. **Essential elements of a summing-up**

   Generally, the summing-up should be as concise as possible so the jury is not "wearied beyond the capacity of concentration": *Alharbi v R* at [78]. In *R v Williams* (unrep, 10/10/90, NSWCCA), the court said that a summing-up:

   > … should involve no more and no less than a clear and manageable explanation of the issues which are left to the jurors in the particular case before them. There is no need to venture beyond a clear statement of the relevant legal principles as they affect the particular case and against which they are to apply their decisions on the factual questions which arise.

See also *R v Chai* [2002] HCA 12 at [18].

4. **Alternative charges and arguments not put**

A judge has a special judicial obligation to leave manslaughter to the jury where it is an available verdict: *James v The Queen* (2014) 253 CLR 475 at [23]. A judge is obliged to instruct the jury on any defence or partial defence where there is material raising it regardless of the tactical decisions of counsel as part of ensuring a fair trial. However, it is wrong to equate this obligation with leaving alternative verdicts: *James v The Queen* at [33]. The test is what justice to the accused requires: *James v The Queen* at [34]; *The Queen v Keenan* (2009) 236 CLR 397 at 438. If neither party relies on an included offence then the judge may conclude that it is not a real issue in the trial: *James v The Queen* at [37].

See the discussion in **Alternative verdicts and alternative counts** at [2-210].

If the judge advances an argument in support of the Crown case that was not put by the Crown this can occasion a significant forensic unfairness to the accused where his counsel is unable to address the jury on the new point: *R v Robinson* [2006] NSWCCA 192 at [137]–[149] where Johnson J set out the relevant principles.

5. **Requirements of fairness**

On the other hand if a judge refers to the evidence on a crucial issue, fairness requires that there be reference to the competing versions, and the competing considerations, including the inferences arising: *Cleland v The Queen* (1982) 151 CLR 1 per Gibbs CJ at 10; *Domican v The Queen* (1992) 173 CLR 555 at 560–561; *R v Zorad* (1990) 19 NSWLR 91 at 105; *El-Jalkh v R* [2009] NSWCCA 139 at [147]; *RR v R* [2011] NSWCCA 235 at [85]; *Buckley v R* [2012] NSWCCA 85 at [9]–[14]. It is therefore essential, if a summing-up is to be fair and balanced, that the defence case be put to the jury: *Abdel-Hady v R* [2011] NSWCCA 196 at [134]ff.

The defence case must be fairly and accurately put during the summing-up so that the jury can properly consider the issues raised. If that opportunity is not given, then there has been a miscarriage of justice: *Wong v R* [2009] NSWCCA 101 at [133]; *AS v R* [2010] NSWCCA 218 at [21]; *R v Malone* (unrep, 20/4/94, NSWCCA); *R v Meher* [2004] NSWCCA 355 at [76]. This extends to explaining any basis upon which the jury might properly return a verdict in the accused's favour: *Castle v The Queen* (2016) 259 CLR 449 at [59]. Reference to the defence case encompasses any challenge to the prosecution evidence and submissions: *Dixon v R* [2017] NSWCCA 299 at [14].

6. **Circumstances in which judge may express his or her view of the facts**

The High Court has made clear that while a judge may comment on the facts during a summing-up, it is preferable not to do so, unless it is necessary to maintain fairness between the parties.

Four members of the High Court said in *RPS v The Queen* (2000) 199 CLR 620 at [42], that:

> … it has long been held that a trial judge may comment (and comment strongly) on factual issues. But although a trial judge *may* comment on the facts, the judge is not bound to do so except to the extent that the judge's other functions require

> it. Often, perhaps much more often than not, the safer course for a trial judge will be to make no comment on the facts beyond reminding the jury, in the course of identifying the issues before them, of the arguments of counsel.

In *McKell v The Queen* (2019) 264 CLR 307 the plurality reiterated that a trial judge's discretion to comment on the facts should be exercised with circumspection and that comments conveying a trial judge's opinion of the proper determination of any disputed factual issue to be determined by the jury should not be made: at [3], [5], [47]–[50]; *The Queen v Abdirahman-Khalid* [2020] HCA 36 at [77]. However, there are circumstances where judicial comment is necessary to maintain the balance of fairness between the parties by, for example, correcting errors in a closing address: at [53]–[54]. *Lai v R* [2019] NSWCCA 305 is an example of a case where the trial judge crossed the line of permissible comment by conveying his opinion of disputed facts which created a substantial risk the jury might actually be persuaded of the accused's guilt: [109].

7. **Directions where counsel overlooks/breaches the rule in *Browne v Dunn***

A trial court must always endeavour to demonstrate flexibility in its response to a breach of the rule in *Browne v Dunn*, which is to be determined by the particular circumstances of the case and the course of the proceedings: *Khamis v R* [2010] NSWCCA 179 at [42]; *MWJ v The Queen* (2005) 80 ALJR 329 at [18]. A non-exhaustive list of possible responses by a court to a breach of the rule appears in *Khamisv R* at [43]–[46] including that if the accused's evidence is allowed and there has been a breach of the rule the trial judge may fashion appropriate and careful directions to the jury: see also *RWB v R* [2010] NSWCCA 147 at [101], [116].

In general, it is dangerous for a trial judge to give a jury direction critical of the failure of counsel to put a proposition to a witness (in accordance with the rule in *Browne v Dunn* (1893) 6 R 67)): *RWB v R* at [101]; *Llewellyn v R* [2011] NSWCCA 66 at [98]. If any direction is given, it is important for the jury also to be told that there may often be reasons, of which the jury are unaware, why such a thing was not done: *R v Banic* at [23] and *R v Liristis* [2004] NSWCCA 287 at [59]–[89]. It is unfair to suggest to a jury that the only inference that they should draw is that the witness failed to include the contentious matter in his or her statement or instructions: *RWB v R* at [101], [116]. In some cases it is necessary to instruct the jury that oversights by counsel occur: *Llewellyn v R* at [98].

8. **Brief reference to majority verdicts in summing-up**

The suggested direction makes a brief reference to a majority verdict.

A brief reference to majority verdicts in the summing-up has been held not to undermine the direction that a unanimous verdict is required: *Ingham v R* [2011] NSWCCA 88 at [25]. However, if any reference is made in the summing-up it must not give the jury an indication of the time when a majority verdict will be accepted by the court: *Hunt v R* [2011] NSWCCA 152 at [27]. McClellan CJ at CL in *Ingham v R* at [25], said that a brief reference to a majority verdict in the summing-up has the "advantages referred to by the Victorian Court of Appeal" [in *R v Muto* [1996] 1 VR 336 at 339] which "are equally applicable to criminal trials in NSW". The advantages referred to in *Muto* include: being frank with the jury

from the start; not pretending that majority verdicts are not possible; not confusing the jury with premature and largely irrelevant information about the effect of the majority verdict section; making clear that their verdict should be unanimous; and finally, to put the possibility of a majority verdict out of their minds. Macfarlan JA in *Doklu v R* [2010] NSWCCA 309 at [79] was inclined to the view that "it is better not to mention the possibility unless there is a reason to do so" but this approach was not taken or endorsed in *Ingham v R* [2011] NSWCCA 88: see brief reference to *Doklu v R* at [87]. Apart from Victoria, a brief reference to majority verdicts is made in England and Wales (*The Consolidated Criminal Practice Direction — Criminal Procedure Rules* at IV.46.1) and *Archbold* (2005) at 4-433, p 504. As to the position in other States and Territories, see discussion in *Ingham v R* [2011] at [69]–[81].

If after the summing-up the jury indicate that it cannot agree: see **Prospect of disagreement** at [8-050]ff.

[The next page is 1451]