Judicial Commission of New South Wales

CRIMINAL TRIAL COURTS BENCH BOOK

Update 73

June 2023

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 73

Update 73, June 2023

Update 73 amends the *Criminal Trial Courts Bench Book* to incorporate recent case law and legislative developments. The following chapters have been revised:

Acquittal — directed

- **[2-050] Introduction** to add reference to the ballot procedure in accordance with s 55G *Jury Act* 1977 where a directed acquittal is being ordered in relation to only some accused persons or counts and the jury consists of more than 12 jurors.

Complicity

- **[2-770] Notes** to add reference to *Mitchell v The King* [2023] HCA 5 where it was held that combining the doctrine of extended joint criminal enterprise with the South Australian statutory provision of constructive murder (drafted in similar terms to s 18 *Crimes Act* 1900 (NSW)) was impermissible as it amounted to creating a new doctrine of "constructive, constructive murder", where no such doctrine has ever existed.

Expert evidence

- **[2-1140] Notes** to add reference to *Al-Salmani v R* [2023] NSWCCA 83 which confirms that it will be a rare case where responsive answers by an expert to a cross-examiner's questions would be objectionable, and *Dirani v R* [2021] NSWCCA 202 regarding the inadmissibility of police expert opinion evidence where such evidence was mere speculation and not based on any identified expertise.

Complaint evidence

- **[5-030] Evidence of complaint where witness not available under s 65(2)** to add reference to *RC v R* [2022] NSWCCA 281 regarding what constitutes the requirement of "all reasonable steps" being taken to compel a person to give evidence in the Dictionary definition of "unavailability of persons" for the purpose of s 65(1) *Evidence Act* 1995.

Expert evidence — specialised knowledge of child behaviour

- **[5-310] Notes** to add reference to *BQ v R* [2023] NSWCCA 34 regarding the admissibility of expert evidence where it addresses the relationship between a child and a perpetrator and its effect on the child's behaviour, and circumstances governing jury directions about how such evidence is not relevant to a particular complainant's credibility.

Break, enter and commit serious indictable offence

- **[5-5100] Suggested direction** to amend the suggested direction, which has been designed to fit the most common offence of break, enter and steal, to incorporate

the ruling in *BA v The King* [2023] HCA 14 that a person with lawful authority to enter premises will not be guilty of "breaking and entering" under s 112 *Crimes Act*, even if force is used to gain entry.

- **[5-5110] Notes** to add reference to *BA v The King*, *Ghamrawi v R* (2017) 95 NSWLR 405 and *Singh v R* [2019] NSWCCA 110 regarding the concept of "breaking" and "constructive breaking" at common law; and *Nassr v R* [2015] NSWCCA 284 regarding the definitions of "serious indictable offence" and "dwelling-house".

Duress

- **[6-170] Notes** to add reference to *Rowan (a pseudonym) v R* [2022] VSCA 236 where it was held that a continuing or ever present threat subsisting at the time of the offence was sufficient to engage the defence of duress.

Necessity

- **[6-350] Introduction** to add reference to *Veira v Cook* [2021] NSWCA 302 regarding factors to be taken into account in determining whether the defence of necessity is established.

Summing up format

- **[7-000] Suggested outline of summing up** to add reference to *Cook (a pseudonym) v R* [2022] NSWCCA 282 regarding the requirement of the trial judge to give oral directions where written directions are provided.

Judicial Commission of New South Wales

CRIMINAL TRIAL COURTS BENCH BOOK

Update 73

June 2023

FILING INSTRUCTIONS OVERLEAF

Judicial Commission of New South Wales

Level 5, 60 Carrington Street, Sydney NSW 2000

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FILING INSTRUCTIONS

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Acquittal — directed

[2-050] Introduction

Last reviewed: June 2023

The trial judge has a duty to direct an acquittal if at the conclusion of the prosecution evidence the charge or any available charge has not been proved by the evidence. The trial judge has no power to direct a verdict merely because he or she has formed the view that a guilty verdict would be unsafe or unsatisfactory: *R v R* (1989) 18 NSWLR 74. A verdict of not guilty may be directed only if "there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty": *Doney v R* (1990) 171 CLR 207 at 214–215; *LK v The Queen* (2010) 241 CLR 177 at [29].

If a directed acquittal is being ordered in relation to only some accused persons or counts and the jury consists of more than 12 jurors immediately before the delivery of the directed acquittal(s), a ballot must be conducted in accordance with s 55G *Jury Act* 1977 to select a verdict jury to deliver the directed acquittal(s) (with the excluded jurors remaining in court but sitting out of the jury box). An order must then be made that the excluded jurors re-join the jury (and return to the jury box) for the continuation of the trial in respect of the accused person(s) or counts (as the case may be) that have not yet been the subject of a verdict in accordance with s 55G(5)(a) *Jury Act*.

As to the power of the judge to direct a verdict: see generally *Criminal Practice and Procedure NSW* at [7-525].

It had been customary for the trial judge to give the jury some explanation for requiring the foreperson to give a verdict at the trial judge's direction. But as there is now an appeal available to the Crown against a directed verdict of acquittal on a ground that "involves a question of law" pursuant to s 107 *Crimes (Appeal and Review) Act* 2001, full reasons should be given by the judge for the decision to direct an acquittal so that the decision can be subject to consideration by the Court of Criminal Appeal. For an example of an appeal against a directed verdict: see *R v PL* [2009] NSWCCA 256.

[2-060] Suggested direction — directed acquittal

Last reviewed: June 2023

Note The suggested direction does not require that full reasons be given to the jury at the time of requiring the directed verdict be given. But as explained above, such reasons must be given at the time of directing the verdict or shortly thereafter as the Crown has 28 days following the verdict in which to lodge an appeal against the decision.

Members of the jury, in your absence I have heard submissions concerning whether sufficient evidence had been led by the Crown that would entitle you to return a verdict of "guilty". As a matter of law, I have concluded that the evidence given could not establish the essential ingredients of the offence.

The verdict must come from you, but you have no choice in the matter because of my ruling in law. You will not need to retire. I will simply say to the [*foreman/forewoman*]: "Do you, in accordance with my direction, find the accused 'not guilty' of [*offence*]?" and the [*foreman/forewoman*] will necessarily say "Yes".

[The next page is 185]

Complicity

[2-700] Introduction

Last reviewed: June 2023

A person may be criminally liable in various ways for a crime physically committed by another person. For the sake of simplicity, that other person is referred to in the suggested directions as "the principal offender", and the person charged with complicity in that crime is referred to as "the accused". See suggested directions on **Conspiracy** at **[5-5300]**; **Manslaughter** at **[5-6200]**ff and **Murder** at **[5-6300]**ff.

For the general law on complicity and the various ways that an accused may be held criminally responsible for the crime committed by the principal offender under State law: see Pt 9 *Crimes Act* 1900 (NSW); *Criminal Practice and Procedure (NSW)*, Pt 6 "Criminal responsibility"; *Criminal Law (NSW)*, annotations to Pt 9 *Crimes Act* at [CA.345.20]ff; New South Wales Law Reform Commission, *Complicity*, Report 129, 2010.

For the law on complicity in Commonwealth offences: see Pt 2.4 *Criminal Code Act* 1995 (Cth), especially ss 11.2 and 11.2A. (Note: s 11.2A commenced on 20 February 2010.) As to the position before: see *Handlen v The Queen* (2011) 245 CLR 282; Butterworths, *Federal Criminal Law*, annotations to Pt 2.4 *Criminal Code*; Thomson Reuters, Federal Offences, annotations to Pt 2.4 *Criminal Code*.

As to proof of the commission of an offence by the principal offender if that person is tried separately: see s 91(1) *Evidence Act* 1995.

Accessorial liability

[2-710] Suggested direction — accessory before the fact

Last reviewed: June 2023

This form of liability applies only where the principal offence is a "serious indictable offence": see ss 346 and 4 *Crimes Act*; see s 351 in relation to "minor indictable offences". The applicable directions will depend upon the nature of the issues before the court, for example, whether the accused accepts that the relevant acts relied upon by the Crown were committed but argues that there was no requisite mental state. There is no need to refer to terms such as "counsel" or "procure" unless those terms have been used in the charge, or raised by the parties; "to counsel" means "to order, advise encourage or persuade"; "to procure" means that the accused intentionally took steps to ensure that the offence was committed by the principal.

The Crown accepts that the accused was not present when the crime of [*specify offence*] was committed by [*the principal offender*]. But it alleges that the accused is still guilty of that crime because of what [*he/she*] did before the crime was committed by [*the principal offender*]. This allegation is known in law as being an accessory

before the fact to the offence that was later committed by a person I will describe as a principal offender. The Crown must prove beyond reasonable doubt both that [*the principal offender*] committed an offence of a particular type and that the accused was an accessory to that crime before it was committed.

A person is guilty of being an accessory before the fact where at some time before the crime is actually carried out, he or she intentionally encourages or assists the principal offender to commit that crime. Therefore, there must be some act committed by the accessory that was intended to bring about the crime later committed by the principal offender. The act of an accessory can consist of conduct of encouraging, including advising, urging or persuading the principal offender to commit the crime, or it can be assisting in the preparations for the commission of the crime. It can be both encouraging and assisting the principal offender.

In this case, the Crown alleges, and must prove beyond reasonable doubt, that the accused [*specify the act or acts of encouraging and/or assisting in the preparations relied upon by the Crown*] intending that [*the principal offender*] would commit the crime of [*specified offence*] later. The Crown must prove that by these acts the accused intentionally [*encouraged and/or assisted*] [*the principal offender*] to commit the crime of [*specified offence*].

The fact that a person knew that another person intended to commit a particular crime does not by itself mean that he or she is guilty of being an accessory before the fact. Nor is it enough that a person merely approves of the commission of the crime but did not make the approval known to the principal offender. To make out the offence, the Crown must prove beyond reasonable doubt that the accused intentionally encouraged [*the principal offender*] to commit the crime, and/or the accused assisted [*the principal offender*] in the preparations for the commission of the crime. There must be some conduct on the accused's part carried out with the intention to [*encourage and/or assist*] [*the principal offender*] to commit the crime that was later committed. Here, the Crown relies on [*specify the encouragement and/or assistance relied upon by the Crown*].

Before a person can be convicted of being an accessory before the fact, the Crown must prove beyond reasonable doubt that, at the time of the encouragement and/or assistance, the accused knew all the essential facts or circumstances which would make what was later done a crime. This includes the state of mind of the principal offender when those acts are carried out. The accused need not actually know that what he or she encourages and/or assists the principal offender to do is in law a crime. The accused does not need to have the legal knowledge that the conduct to be committed by the principal offender actually amounts to a criminal offence. But he or she must believe that what he or she is encouraging and/or assisting the principal offender to do are acts that make up the crime committed.

Here, according to the Crown's allegation, the crime foreseen by the accused was the offence of [*specify offence*]. The Crown must, therefore, prove that, at the time of the alleged [*encouragement and/or assistance*] given to [*the principal offender*], the accused foresaw that [*the principal offender*] would [*set out the elements of the serious indictable offence charged*]. Further, the Crown must prove beyond reasonable doubt that the [*encouragement and/or assistance*] given by the accused was aimed at the commission by [*the principal offender*] of that criminal act.

In summary, before you can convict the accused of being an accessory, the Crown must prove beyond reasonable doubt each of the following:

1. that [*the principal offender*] committed the offence of [*specify offence*], and
2. [*set out the alternative(s) which apply*] that:
   (a) the accused intentionally encouraged [*the principal offender*] to commit that offence, and/or
   (b) the accused intentionally set out to assist [*the principal offender*] in the preparations to commit that offence, and
3. that the crime which [*the principal offender*] committed was one that the accused intended would be committed.

   [*If applicable* or was within the scope (see below) of what [*he/she*] foresaw that [*the principal offender*] would do], and
4. that the accused knew at the time of [*the encouragement and/or assistance*] all the essential facts, both of a physical and mental nature, which made what was to be done by [*the principal offender*] a crime,

   [*and* ***if applicable*** *(see below)*:
5. that the accused, before the crime was committed by [*the principal offender*] neither had a genuine change of mind nor expressly instructed [*the principal offender*] not to commit the offence.**]**

For you to be satisfied that [*the principal offender*] committed the crime, the Crown must prove each of the following facts beyond reasonable doubt.

[*Set out the elements of the specified offence committed by the principal offender.*]

[Where applicable, add involvement of third party

The act intended to encourage the commission of the crime or assist in its preparation may be carried out personally by the accused or through the intervention of a third person acting on the accused's behalf, or a combination of both.**]**

[Where the offence committed differs from that contemplated

On the facts you find proved by the evidence, you might conclude that the crime foreseen by the accused at the time of the alleged [*encouragement and/or assistance*] differed from the crime actually committed by [*the principal offender*]. If that is your finding, then the Crown must prove beyond reasonable doubt that the crime committed by [*the principal offender*] was nevertheless within the scope of the type of conduct that the accused intended to [*encourage and/or assist*] and that it was not something materially different from what the accused foresaw would be done by [*the principal offender*].**]**

[Where there is evidence of a belief that there is no real possibility of the commission of the crime

If the accused at the time of the alleged [*encouragement and/or assistance*] does not honestly believe that the commission of the offence by [*the principal offender*] is a real possibility, the accused is not guilty of being an accessory. The accused claims [*set out the details of the claim that it was believed that there was no real possibility that the crime would be committed*]. It is necessary for the Crown to prove beyond reasonable doubt that the accused did not honestly have this belief.**]**

[Where there is evidence of withdrawal by the accused of encouragement and/or assistance

The [*encouragement and/or assistance*] given to [*the principal offender*] by an accessory must be continuing. The accused has claimed [*set out basis upon which the accused claims to have withdrawn*]. The law provides that an accused may avoid criminal responsibility if:

(a) he or she did in fact withdraw his or her encouragement and/or assistance, and

(b) communicated that fact to the principal offender, and

(c) did everything reasonably possible to prevent the commission of the crime.

In these circumstances, the onus is on the Crown to prove beyond reasonable doubt a negative, that is, it must prove that any one of these facts did not occur. That means that the Crown must prove either that the accused did not in fact withdraw [*his/her*] [*encouragement and/or assistance*] or that the accused did not communicate that fact to [*the principal offender*], or that the accused did not do everything reasonable possible to prevent the commission of the crime.**]**

[2-720] Suggested direction — accessory at the fact – aider and abettor

Last reviewed: June 2023

As to the distinction between an aider and abettor, and a principal: see *R v Stokes and Difford* (1990) 51 A Crim R 25. The Crown can prove an offence by proving that the accused was either a principal or an aider and abetter without proving which the accused was: *R v Stokes and Difford* at 35; *R v Clough* (1992) 28 NSWLR 396 at 398–400. See *Mann v R* [2016] NSWCCA 10 for the elements of affray for a principal in the second degree or a participant in a joint criminal enterprise.

The Crown does not allege that the accused committed the crime of [*specified offence*]. The Crown's allegation is that the accused was what the law calls an aider and abettor in the commission by the principal offender of that crime.

An aider and abettor is a person who is present at the place where, and at the time when, a crime is committed by another person and who intentionally assists or gives encouragement to that other person to commit that crime.

The fact that a person was simply present at the scene of the crime is not enough to make that person an aider and abettor even if the person knew the crime was to be committed. A bystander at the commission of a crime is not guilty of any offence. The Crown must prove beyond reasonable doubt that the person was present at the scene of the crime intending to assist or encourage the person who commits the crime. A person is guilty as an aider and abettor only if the Crown proves beyond reasonable doubt that the person was present when the crime was committed for the purpose of aiding and assisting the principal offender if required to do so. If the person is present for that purpose, that makes the person an aider and abettor in that crime even if such encouragement or assistance is not actually required.

Before you can convict the accused as being an aider and abettor to the commission of an offence, you must first be satisfied beyond reasonable doubt that [*the principal offender*] committed the crime of [*specify offence*]. [*This fact may, or may not, be an issue at the trial and what is said to the jury will vary accordingly.*]

If the Crown has satisfied you of that fact, you must then consider whether, at the time when that crime was being committed, the accused was present, intending to assist or to encourage [*the principal offender*] in its commission.

Before you could find that the accused intentionally assisted or encouraged [*the principal offender*] in the commission of the crime, you must be satisfied beyond reasonable doubt that the accused knew all the essential facts or circumstances that gave rise to the commission of the crime by [*the principal offender*]. The accused does not have to know that what is being done by [*the principal offender*] is in law a crime. The accused does not need to have legal knowledge that the conduct being carried out by [*the principal offender*] actually amounts to a criminal offence. But [*he/she*] must know that [*the principal offender*] intends to commit all the acts that amount to a crime with the state of mind that makes those acts criminal.

The Crown relies on the following matters in support of its allegation that the accused gave assistance or encouragement to [*the principal offender*] [*set out the matters on which the Crown relies*].

In short then, to establish that the accused is guilty of the offence charged on the basis that the accused was an aider and abettor, the Crown must prove beyond reasonable doubt each of the following:

1. the commission of the crime by [*the principal offender*]
2. the presence of the accused at the scene of the crime when the crime was committed
3. the accused's knowledge of all the essential facts or circumstances that must be proved for the commission of the offence by [*the principal offender*]
4. that with that knowledge the accused intentionally assisted or encouraged [*the principal offender*] to commit that crime.

For you to be satisfied that [*the principal offender*] committed the crime, the Crown must prove each of the following facts beyond reasonable doubt [*set out the elements of the crime committed by the principal offender*].

[2-730] Suggested direction — accessory after the fact

Last reviewed: June 2023

As to accessory after the fact, see s 347 *Crimes Act* which makes provision for how the accessory may be tried. Sections 348–350 contain provisions relating to punishment, depending upon the nature of the principal offence. The offence of being an accessory after the fact can be committed by rendering assistance either to the principal offender or to a person who aids and abets the principal. The prosecution must establish the accused had knowledge of the precise crime committed by a principal offender: *Gall v R* [2015] NSWCCA 69 at [164] (confirming a submission at [155]), [249]–[251], [257]).

The Crown does not allege that the accused was involved in the commission of the crime carried out by [*the principal offender*].

The charge brought against the accused is that [*he/she*] assisted [*the principal offender*] after [*he/she*] committed the crime of [*nature of crime*] and gave that assistance with knowledge that [*the principal offender*] had committed that crime.

Where a person knowingly assists an offender after a crime has been committed, the person is an accessory after the fact to the crime committed by the other person. This allegation is known in law as being an accessory after the fact to the offence that was earlier committed by a person who I will describe as a principal offender. A charge that a person is an accessory after the fact to a crime committed by another is an allegation that the person giving that assistance has himself or herself committed a crime. It is a separate and distinct offence from that committed by the principal offender but it is dependent upon the fact that the principal offender committed a specific crime.

Here, the Crown must prove beyond reasonable doubt both the commission of the crime of [*insert crime*] by [*the principal offender*] and that the accused assisted [*the principal offender*] knowing that the crime had been committed. A person is an accessory after the fact to the commission of a crime if, knowing that the crime has been committed, the person assists the principal offender. It could be, for example, by disposing of the proceeds of the crime, or by doing an act intending to hinder the arrest, trial or punishment of the principal offender.

In this case, the Crown alleges that the accused assisted [*the principal offender*] by [*state allegation by prosecution*]. The Crown says this was done with the purpose of [*specify the alleged reason for the assistance rendered by the accused*]. To be guilty of being an accessory after the fact, the Crown must also prove beyond reasonable doubt that the accused knew [*the principal offender*] acted in a way and with a particular state of mind that gives rise to a criminal offence. The accused does not need to have the legal knowledge that those facts amount to a crime, but [*he/she*] must know or truly believe that the facts and circumstances giving rise to the specific offence alleged have occurred. [*It may be necessary to set out the evidence upon which the Crown relies to establish the knowledge or belief of the accused that an offence has been committed depending upon the issues raised at the trial.*]

In summary, before you can convict the accused of the offence of being an accessory after the fact to the commission of a crime, the Crown must satisfy you beyond reasonable doubt of each of the following essential facts:

1. that the crime of [*specify offence*] was committed by [*the principal offender*]
2. that the accused intentionally assisted [*the principal offender*]
3. that at the time of that assistance, the accused was aware of all the essential facts and circumstances that give rise to the precise offence committed by the [*the principal offender*]
4. that the accused with that knowledge, intentionally assisted [*the principal offender*] by [*specify the allegation and particularise concisely*]
5. that the accused gave that assistance so that [*the principal offender*] could escape arrest, trial or punishment for the offence committed by [*him/her*].

[Where applicable — explanation of belief and knowledge

For the purposes of the offence with which the accused is charged, a well-founded belief is the same as knowledge. A person may know that an event has occurred even

though he or she has not witnessed the occurrence of that event personally. A person can accept what he or she is told by some person about the occurrence of an event and, therefore, believe that the event has taken place. It will often be the case in a charge of accessory after the fact that the accused is said to have known of the commission of a crime simply on the basis of what he or she is told by the principal offender or some other person who witnessed the commission of the crime. The accused may come to know that a crime has been committed by the principal offender from inferences that the accused has drawn from facts which he or she believes have occurred.**]**

In the present case, the Crown must prove that the accused did [*set out the allegation of assistance*] knowing or believing that the crime of [*set out the alleged crime committed by the principal offender*] had been committed by [*the principal offender*] and gave assistance in the way the Crown alleges with the intention of assisting [*the principal offender*] to escape [*arrest, trial or punishment*] for the crime committed by [*him/her*].

Joint criminal enterprise and common purpose

[2-740] Joint criminal liability

Last reviewed: June 2023

In the usual case it will be necessary for the judge to instruct the jury in relation to the elements of the offence and, where appropriate, the principles governing accessorial or joint enterprise liability: *Huynh v The Queen* [2013] HCA 6 at [31]. Joint criminal liability between two or more persons for a single crime may be established by the Crown in different ways:

(a) where the crime charged is the very crime that each of the participants agreed to commit: *Gillard v The Queen* (2003) 219 CLR 1 at [109]–[110],

(b) where the crime committed fell within the scope of the joint criminal enterprise agreed upon as a possible incident in carrying out the offence the subject of the joint criminal enterprise: see *McAuliffe v The Queen* (1995) 183 CLR 108 at 114–115 affirmed in *Miller v The Queen* (2016) 259 CLR 380 at [29]; *Clayton v The Queen* [2006] HCA 58 at [17],

(c) where the crime committed was one that the accused foresaw might have been committed during the commission of the joint criminal enterprise although that crime was outside the scope of the joint criminal enterprise: see *McAuliffe v The Queen* at 115–118 affirmed in *Miller v The Queen* at [10], [51], [135], [148].

Joint criminal liability arises from the making of the agreement (tacit or express) and the offender's participation in its execution: *Huynh v The Queen* at [37]. A person participates in a joint enterprise by being present when the agreed crime is committed: *Huynh v The Queen* at [38]; *Youkhana v R* [2015] NSWCCA 41 at [13]. Although presence at the actual commission of the crime is sufficient, it is not necessary if the offender participated in some other way in furtherance of the enterprise: *Dickson v R* (2017) 94 NSWLR 476 at [47]–[48]; *Sever v R* [2010] NSWCCA 135 at [146]; *Osland v The Queen* (1998) 197 CLR 316 at [27]. If participation by the accused is not in issue a specific direction explaining the concept may not be required: *Huynh v The Queen* at [32]–[33].

In *IL v The Queen* (2017) 262 CLR 268 there was disagreement as to what the High Court had held in *Osland v The Queen* (1998) 197 CLR 316 (see Special Bulletin 33 which explains *IL's* case). Bell and Nettle JJ at [65] opined that in a joint criminal enterprise the only acts committed by one participant that are attributed to another participant are those acts that comprise the actus reus of the commission of a crime. Kiefel CJ, Keane and Edelman JJ did not agree: "… joint criminal liability involves the attribution of acts. The attribution of acts means that one person will be personally responsible for the acts of another". Gaegler J at [106] agreed with Kiefel CJ, Keane and Edelman JJ. See also Gordon J at [152]. The direction below follows the prevailing view in *IL's* case.

In *Miller v The Queen*, the plurality at [6]–[45] reviewed the history of the doctrine of extended joint criminal enterprise, including the UK decision of *R v Jogee* [2016] 2 WLR 681, and the current law as stated in *McAuliffe v The Queen* at 114–115. The High Court declined to alter the law following *R v Jogee*. If any change to the law is to be made, it should be made by the Parliament: *Miller v The Queen* at [41].

The concept of extended common purpose only arises where the offence committed is different from the offence which is the subject of the joint criminal enterprise (referred to as the foundational offence): see *May v R* [2012] NSWCCA 111 at [249]–[252].

For the purposes of the following suggested directions on extended criminal liability, (b) and (c) above are merged because the distinction may be confusing to a jury. Whether the crime committed is foreseen as a possible incident in carrying out the joint criminal enterprise, (b) above, or foreseen as a possible consequence of the commission of the joint criminal enterprise, (c) above, is not so significant a distinction as to require separate directions to meet those particular factual situations. The accused is criminally liable for the commission of the further offence, if he or she foresees the possibility of it being committed during the course of carrying out the joint criminal exercise no matter what the reason is for that foresight. The suggested directions use the term "additional crime" rather than "incidental crime" or "consequential crime" to avoid the distinction which seems to be of theoretical more than of practical significance. It may be that, where the additional offence is viewed as incidental to the commission of the joint criminal enterprise, it will be more easily proved that the commission of that offence was foreseen as a possibility by a particular participant. The suggested directions are based on a scenario where the crime, the subject of the joint enterprise is committed *and* an additional crime is also committed.

[2-750] Suggested direction — (a) joint criminal enterprise

Last reviewed: June 2023

The law is that where two or more persons carry out a joint criminal enterprise, that is an agreement to carry out a particular criminal activity, each is held to be criminally responsible for the acts of another participant in carrying out that enterprise or activity. This is so regardless of the particular role played in that enterprise by any particular participant. The Crown must establish both the existence of a joint criminal enterprise and the participation in it by the accused.

A joint criminal enterprise exists where two or more persons reach an understanding or arrangement amounting to an agreement between them that they will commit a crime.

The agreement need not be expressed in words, and its existence may be inferred from all the facts and circumstances surrounding the commission of the offence that are found proved on the evidence.

The agreement need not have been reached at any particular point in time before the crime is committed, provided that at the time of the commission of the crime the participants have agreed that the crime should be committed by any one or all of them.

The circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish that at some point in time an agreement has been reached between them that the crime should be committed. For example, if two people are at the very same time punching a third person, a jury could infer or conclude that they had agreed to assault that person.

It does not matter whether the agreed crime is committed by only one or some of the participants in the joint criminal enterprise, or whether they all played an active part in committing that crime. All of the participants in the enterprise are equally guilty of committing the crime regardless of the actual part played by each in its commission.

The Crown must prove beyond reasonable doubt that the crime which was the subject of the joint agreement was in fact committed. It therefore must prove beyond reasonable doubt that each of the essential facts or ingredients, which make up that crime, was committed, regardless of who actually committed them [*specify the ingredients of the crime charged*]. Further in respect of a particular accused, the Crown must prove beyond reasonable doubt that he or she was a participant in the commission of that crime as part of a joint criminal enterprise with one or more persons.

Note: *It is essential to identify the elements of the offence the subject of the joint criminal enterprise and to direct the jury that the participants agreed to do all the acts with the relevant intention necessary to establish the offence: TWL v R [2012] NSWCCA 57 at [36].*

[The following example may be given if thought appropriate in assisting the jury to understand the concept of a joint criminal enterprise. Care should be taken in not making the example more serious than the actual offence before the court. The following is an example of a possible scenario that might appropriately be given to the jury.]

You may take the following as an example of the operation of the law relating to joint criminal enterprise. Suppose that three people are driving in the same vehicle and they see a house with a lot of newspapers at the gate. One says to the others, "Let's check out this place". The car pulls up, two of them get out and one of them stays in the car behind the steering wheel with the engine running, while the other two go to the front door. One of the two persons breaks the glass panel on the outside of the door, places a hand through the panel, unlatching the door and opening it. The other goes inside and collects some valuables and comes out. Meanwhile, the one who opened the door has returned to the vehicle without entering the house. The question arises whether the three of them have by their acts and intentions committed the offence of breaking into the house and stealing objects from it.

Only one of them broke into the house (being the person who broke the glass panel and put a hand inside to open the door). Only one of them entered the house and stole something (that is the one who removed the valuables from the house) and the

third person did neither of those things. But the law provides that, if a jury were satisfied that by their actions (rather than merely by their words) all three had reached an understanding or arrangement which amounted to an agreement between them to commit the crime of break, enter and steal from a house, each of the three is criminally responsible for the acts of the others. On this example all three could be found guilty of breaking, entering and stealing from the house regardless of what each actually did.

[2-760] Suggested direction — (b) and (c) extended common purpose

Last reviewed: June 2023

Note: The suggested direction is based on a scenario where the crime the subject of the joint enterprise is committed and an additional crime is also committed.

The law is that where two or more persons carry out a joint criminal enterprise, that is an agreement to carry out a particular criminal activity, each is responsible for the acts of another participant in carrying out that enterprise or activity. This is so regardless of the role taken by a particular participant. The Crown must establish both the existence of a joint criminal enterprise and the participation in it by the accused.

A joint criminal enterprise exists where two or more persons reach an understanding or arrangement amounting to an agreement between them that they will commit a crime. The agreement need not be expressed in words, and its existence may be inferred from all the facts and circumstances surrounding the commission of the offence that are found proved on the evidence.

The agreement need not have been reached at any particular time before the crime is committed, provided that at the time of the commission of the crime, the participants have agreed that the crime should be committed by any one or all of them.

The circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish that at some point in time an agreement has been reached between them that the crime should be committed. For example, if two people are at the very same time punching a third person, a jury could infer or conclude that they had agreed to assault that person.

It does not matter whether the agreed crime is committed by only one or some of the participants in the joint criminal enterprise, or whether they all played an active part in committing that crime. All of the participants in the enterprise are equally guilty of committing the crime regardless of the actual part played by each in its commission.

The Crown must prove beyond reasonable doubt that the crime which was the subject of the joint agreement was in fact committed. It therefore must prove beyond reasonable doubt that each of the essential facts or ingredients, which make up that crime, was committed, regardless of who actually committed them. Further, in respect of a particular accused, the Crown must prove beyond reasonable doubt that he or she was a participant in the commission of that crime as part of a joint criminal enterprise with one or more persons.

But it may be that in carrying out the joint criminal enterprise, one of the participants commits an additional offence that was not the crime that they had agreed to commit but

was one that at least one or some of the other participants foresaw might be committed. In such a case, not only would each of those participants be guilty of the offence that they agreed to commit, but those participants who foresaw the possibility of the commission of the additional offence would also be guilty of the additional offence.

Here, the Crown alleges the accused was a participant in a joint criminal enterprise to commit the offence of [*insert offence alleged by the Crown*] and [*he/she*] foresaw that the additional crime of [*insert additional offence alleged by the Crown*] might be committed. So for the accused to be guilty of the additional crime, the Crown must prove beyond reasonable doubt that [*he/she*] foresaw the possibility that this crime might be committed in carrying out the joint criminal enterprise. The Crown alleges that the additional crime committed is [*insert alleged offence*].

Note: *It is essential to identify the elements of the additional offence and to direct the jury that the accused must foresee the other participant or participants might do all the acts with the relevant intention necessary to establish the commission of the additional offence: McAuliffe v The Queen (1995) 183 CLR 108 at 114–115. This part of the direction will vary according to the facts.*

[An example of the commission of an additional crime outside the scope of the joint enterprise might be as given to the jury if appropriate as follows.]

As an example of the principle that I have just explained to you, let us suppose that three people plan to rob a bank. The plan is that one person will drive the getaway car, another is to stand guard at the doorway to warn of any approach by the police and assist in their getaway from the bank, and the third is to enter the bank itself with a sawn-off shotgun. It is the third person's job to use the shotgun to threaten the teller into handing over the money. That is, the crime to which they have jointly agreed is to be committed by them carrying out their assigned roles, and all three could be found guilty of the crime of armed robbery on the bank staff. The person who drives the car is just as guilty as the one to whom the money is handed over by the teller. You may think that that is only common sense.

The three members of this joint criminal enterprise accordingly reach the bank: one is sitting in the get-away vehicle, another is keeping guard at the door and the third is armed with the gun and inside the bank. However, suppose that things do not go as planned and the teller reaches over to press an alarm button despite a warning not to do so. As a result, the robber in the bank deliberately fires the gun at the teller to stop the alarm being sounded and wounds the teller.

At the time this is happening, of course, the robber in the bank is alone and has no opportunity to consult with the other two persons as to what should be done as a result of the actions of the teller. The other two have no control over what the third person does. The question may arise as to whether the other two persons are criminally responsible for the more serious crime that has been committed by the third man being an armed robbery with wounding.

First of all, as I have explained, each of the three is guilty of the crime which was the immediate subject of their original agreement: that is the armed robbery of the bank. That is because everyone who embarks upon a joint criminal enterprise is criminally responsible for all of the acts done by each of them in the execution or carrying out of the agreed crime.

Because things do not always turn out precisely as planned, the law makes each participant in the joint enterprise criminally responsible, not only for the acts done as part of that enterprise, but also for any additional acts that the participant foresees as possibly being committed in carrying out the joint criminal enterprise. If any one of the participants does an act which they all foresaw may possibly be done in the course of committing the agreed crime, then all of them are criminally responsible for that act. Thus, to take the example which I have already given you, if the person guarding the door pushed a bystander out of the way to prevent that person from interfering with their escape after the armed robbery was complete, all three would be guilty of that assault as well as of the armed robbery, if the possibility that the person on guard may have to do something like that was, obviously enough, originally foreseen by them in carrying out the robbery.

On the other hand, and to take perhaps an extreme example, if the person guarding the door (unknown to the others) had a hand grenade, removed the pin and lobbed it inside the bank to prevent those inside from interfering with their escape, you might think that this is hardly an act that the others would foresee as possibly happening during the robbery, and, therefore, they would not be guilty of any offence resulting from the injuries caused by the explosion. This person's act of throwing a grenade would not have been foreseen as incidental to or as a consequence of the execution of the joint criminal enterprise to carry out an armed robbery

In relation to the wounding of the teller by the person with the sawn-off shotgun however, the question is whether the discharge of the weapon was foreseen by the others as a possible occurrence in carrying out the armed robbery. That question is answered by a consideration of what a particular participant knew about the circumstances in which the robbery was to take place. If, for example, the other members of the joint criminal enterprise were aware that the robber in the bank would be armed with a loaded weapon, a jury might conclude that in those circumstances the agreement to threaten the teller with the weapon might possibly include the commission of an additional crime being that in carrying out that threat the weapon would be fired, if the teller resisted, and some person may be injured as a result. The jury in such a case would be entitled to convict all three participants in the armed robbery of the more serious crime of armed robbery with wounding, even though the wounding was not part of the agreement and even though only one of them was actually involved in the wounding. Such a conviction would follow if the Crown proves beyond reasonable doubt that each of the participants foresaw the possibility of the shotgun being fired and injuring someone as a result.

[***If appropriate*** *— where the Crown alleges different liability between participants, that is, there is different evidence as to each participant's knowledge of the events surrounding the enterprise which the Crown alleges leads to different conclusions as to the foreseeability of the additional offence, add*]:

Let us now consider a further situation, one where not everyone engaged in the joint criminal enterprise foresaw the possibility that the shotgun would be fired injuring someone in the bank. Let us assume, for example, that there had been a discussion amongst the three participants to the joint enterprise beforehand as to whether the gun should be loaded, and there had been a clear agreement reached between them that it would be unloaded. If, notwithstanding this agreement and unbeknown to the others, the man with the shotgun had loaded it, then the others would not be criminally

responsible for any injury caused by the discharge of the weapon during the robbery. This is because the discharge of the weapon was not part of the agreement and could not have been foreseen by the others as a possible incident or consequence occurring in the course of carrying out the robbery.

But let us now assume another scenario. Suppose that one of the other two participants, let us say the driver of the getaway car, knew that the person who was to carry the shotgun was unhappy with the agreement that the gun should not be loaded, that this person had access to ammunition and that he or she was someone who could not always be trusted to keep his or her word. In such a case, a jury might find it proved beyond reasonable doubt that despite the agreement reached that the gun should not be loaded, the driver foresaw that the person armed with the gun might load it and so foresaw that there was a possibility that the gun would be discharged during the robbery injuring some person in the bank. If the jury found beyond reasonable doubt that the driver had this possibility in mind and yet nevertheless continued to take part in the armed robbery, they could convict the driver of the more serious crime of armed robbery with wounding, even though there was a clear agreement between the parties that the gun was not to be loaded, and even though the third member of the group had no idea that the gun might be loaded. In such a case, the jury might convict the robber and the driver of the more serious offence involving the wounding but not the third member.

[2-770] Suggested direction — application of joint criminal enterprise to constructive murder

Last reviewed: June 2023

As to the liability of a participant in a joint enterprise for murder based upon the commission of an offence punishable by imprisonment for life or 25 years (constructive murder), see *R v Sharah* (1992) 30 NSWLR 292 at 297–298. The directions for constructive murder must address both the liability of the accused for the offence punishable by imprisonment for life or 25 years (the foundational offence) and the liability of the accused for murder based upon his or her liability for the foundational offence: see *R v Thurston* [2004] NSWCCA 98 at [3]–[9] and *Batcheldor v R* [2014] NSWCCA 252 at [80]–[82] where the judge failed to direct the jury as to the appellant's liability for the foundational offence of specially aggravated kidnapping. The judge must direct the jury that it is for them to:

(a) identify the act causing death; and

(b) decide whether the act causing death was voluntary or accidental: *Penza v R* [2013] NSWCCA 21 at [167].

See further discussion in **Voluntary act of the accused** at **[4-350]**. It has been noted that the decision in *R v Sharah*, introduced an element of knowledge on the part of the accomplice of the possibility of the discharge of the weapon, even though that knowledge was not a requirement under the common law: see the NSW Law Reform Commission, *Complicity*, Report 129, 2010 at p 148 and RA Hulme J's discussion in *Batcheldor v R* at [128]–[132].

In *IL v The Queen* [2017] HCA 27, some of the Justices passed comment about *R v Sharah*. Gordon J opined at [166] that constructive murder under s 18(1)(a) *Crimes Act* 1900 did not require any additional foresight on the part of the accomplice; Bell

and Nettle JJ noted at [89] that although *R v Sharah* has been "questioned" by the NSWCCA resolution of the issue can await another day; Gageler J at [102] said *R v Sharah* was not challenged (in *IL v The Queen*) but it is not inconsistent with Jordan CJ's explanation of felony murder in *R v Surridge* (1942) 42 SR (NSW) 278 at 282. Kiefel CJ, Keane and Edelman JJ in *IL v The Queen* did not comment on *R v Sharah*.

In *R v Sharah*, the foundational offence relied upon by the Crown was armed robbery with wounding. A suggested direction based upon *R v Sharah* for such a case follows.

Of course, the particular direction given will have to be adapted to the particular foundational crime upon which the charge of murder is based and the peculiar facts of the particular case before the jury. The person actually causing the death of the victim of the murder charge is described as "the principal offender". In *R v Sharah*, the victim of the foundational offence was different to the victim of the murder.

The Crown must first prove, beyond reasonable doubt, that the accused is criminally liable for the foundational offence of armed robbery with wounding by proving each of the following:

1. that there was a joint enterprise between the accused and [*the principal offender*] to rob [*the victim*] while [*the principal offender*] was, to the knowledge of the accused, armed with an offensive weapon, namely [*describe weapon*] (proof of these facts gives rise to criminal liability of the accused for the offence of armed robbery), and
2. that during the course of the armed robbery [*the principal offender*] wounded [*the victim*], and
3. that the accused foresaw that, in carrying out the joint criminal enterprise of armed robbery, such a wounding might occur (proof of this fact gives rise to criminal liability of the accused for armed robbery with wounding).

In order to prove that the accused is liable for murder, the Crown must further prove beyond reasonable doubt:

1. that during the course of commission of the offence of armed robbery with wounding, or immediately after the commission of that offence, [*the principal offender*] discharged the gun, causing the death of [*the deceased*], and
2. the discharge of the gun by [*the principal offender*] during, or immediately after, the armed robbery with wounding of [*the victim*] was a possibility which the accused had in mind when agreeing to participate in the armed robbery. It does not matter whether the gun was fired intentionally or whether it was necessary for the gun to be fired for the purpose of carrying out the armed robbery.

[2-780] Notes

1. The application of the doctrine of extended joint criminal enterprise (or extended common purpose) to constructive murder was considered in the South Australian context in *Mitchell v The King* [2023] HCA 5. It was held that combining the doctrine with the statutory provision of constructive murder (s 12A of the *Criminal Law Consolidation Act* 1935 (SA)) was impermissible as it amounted to creating

a new doctrine of "constructive, constructive murder", where no such doctrine has ever existed. Section 12A is drafted in somewhat similar terms to s 18 of the *Crimes Act* 1900 (NSW).

[2-790] Suggested direction — withdrawal from the joint criminal enterprise

Last reviewed: June 2023

As to withdrawal from a joint criminal enterprise, see *R v Tietie* (1988) 34 A Crim R 438 at 445–447 applying *White v Ridley* (1978) 140 CLR 342 at 348–351. It is a question of fact to be decided by the jury whether a co-accused has withdrawn from a criminal enterprise: *Tierney v R* [2016] NSWCCA 144 at [19]. The jury must be satisfied beyond reasonable doubt that the accused did not intend to withdraw or did not take reasonable steps to prevent the co-accused from committing the crime: *Tierney v R* at [19]. There is no obligation to direct jury specifically in the terms of *R v Sully* (2012) 112 SASR 157: *Tierney v R* at [19].

A person who is part of a joint criminal enterprise to commit a particular crime may withdraw from that enterprise. If [*he/she*] does withdraw, [*he/she*] ceases to be criminally responsible for that crime if the other members of the enterprise go on to commit the offence after the withdrawal.

To withdraw from a joint criminal enterprise to commit a crime, a person must take such action as [*he/she*] can reasonably perform to undo the effect of [*his/her*] previous encouragement or participation in the joint enterprise and thereby to prevent the commission of the crime. What is reasonable depends upon all the circumstances.

[Where applicable, add

Usually, this will involve, if it is reasonable and practicable to do so, the person communicating the fact of [*his/her*] withdrawal, verbally or otherwise, to the other members of the joint enterprise, in sufficient time before the crime is committed, trying to persuade the other members not to proceed, and notifying the police or the victim of the intended crime.]

[[Where applicable, add

Where an accused decides to withdraw at the last minute, that is, immediately before the offence is committed, [*he/she*] must take all reasonable and practicable steps to prevent the commission of the crime and to frustrate the joint enterprise of which [*he/she*] had been a member. Otherwise [*he/she*] may have left it too late to withdraw. The example which is often given is that, if the enterprise is to dynamite a building, it is not enough for a member of the enterprise simply to declare an intent to withdraw from the enterprise. If the fuse has been lit, the person must attempt to put out the fuse.]

There is no onus placed upon the accused to establish that [*he/she*] withdrew from the joint criminal enterprise. As part of its overall onus of proof, the Crown must prove beyond reasonable doubt that the accused did not withdraw. It will do so by proving beyond reasonable doubt that the accused either:

1. did not intend to withdraw from the joint enterprise, or
2. if [*he/she*] did so intend, the accused did not take such action as [*he/she*] reasonably could to prevent the others from proceeding to commit the crime.

It is sufficient if the Crown has proved one of these alternatives. Unless the accused did what [*he/she*] reasonably could to prevent the commission of the crime, the accused remains criminally responsible for that crime even though the accused took no further part. It is sufficient if the action taken by the accused was capable of being effective, even though the action failed to frustrate the commission of the crime.

[The next page is 319]

Expert evidence

[2-1100] Introduction

Last reviewed: June 2023

As to the admissibility of expert evidence, see generally: Pt 3.3 *Evidence Act* 1995 and note the effect of s 60 of the Act; see also *HG v The Queen* (1999) 197 CLR 414; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [30]–[32]; *Wood v R* (2012) 84 NSWLR 581; *Honeysett v The Queen* (2014) 253 CLR 122 at [23]–[25]; *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [85]; *Taub v R* [2017] 95 NSWLR 388 at [19]ff; *Criminal Practice and Procedure NSW* annotations to [3–s 76]ff; *Uniform Evidence Law* [1.3.4060]ff; and *New Law of Evidence* at [76.2]ff.

As to DNA evidence: see *Aytugrul v The Queen* (2012) 247 CLR 170 at [23]–[24], [30] where it was held that it was not erroneous to direct a jury on the basis of an exclusion percentage where a frequency ratio had also been given and where the relationship between the two figures had been explained. The "prosecutor's fallacy" is discussed in *R v GK* (2001) 53 NSWLR 317; *R v Keir* [2002] NSWCCA 30 and cf *Keir v R* [2007] NSWCCA 149. The method by which fingerprint evidence is admitted is discussed in *JP v DPP (NSW)* [2015] NSWSC 1669 at [39]ff.

As to the role of the jury in relation to expert evidence: see *Velevski v The Queen* [2002] HCA 4 where there is a discussion as to when it is open to a jury to make a determination between conflicting expert evidence. However, there was no majority decision in respect of whether there was a category of expert evidence that a jury could not resolve: see *Velevski v The Queen* at [38], [85], [182]. The case does indicate that careful directions need to be given to the jury about expert evidence especially where it is in conflict.

[2-1130] Suggested direction — expert witnesses

Last reviewed: June 2023

In this case, [*CD and EF*] have been called as expert witnesses. An expert witness is a person who has specialised knowledge based on their training, study or experience. Unlike other witnesses, a witness with such specialised knowledge may express an opinion on matters within his or her particular area of expertise. Other witnesses may speak only as to facts, that is, what they saw or heard, and are not permitted to express their opinions.

The value of any expert opinion very much depends on the reliability and accuracy of the material which the expert used to reach his or her opinion. It also depends on the degree to which the expert analysed the material upon which the opinion was based and the skill and experience brought to bear in formulating the opinion given. Experts can differ in the level and degree of their experience, training and study, yet each can still be an expert qualified to give an opinion where that opinion is based on that witness's specialised knowledge.

Expert evidence is admitted to provide you with … [*specify, for example, scientific/medical/accountancy/etc*] information and an opinion on a particular topic which is within the witness's expertise, but which is likely to be outside the experience and knowledge of the average lay person.

The expert evidence is before you as part of all the evidence to assist you in determining … [*set out the particular aspect(s), for example, the mental condition of the accused; whether the accused's act was voluntary; the nature and effect of a series of financial transactions; the properties of a particular drug and its effects; the mechanical condition of a truck, etc, as the case may be*]. You should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the [*expert(s)*], you do not have to act upon it. This is particularly so where the facts upon which the opinion is based do not accord with the facts as you find them to be. You are also, to a degree, entitled to take into account your common sense and your own experiences if they are relevant to the issue upon which the expert evidence relates.

[Where there is a conflict between the experts, add

In this case, there is a conflict between the expert evidence of [*AB*] called on behalf of the Crown and [*CD*] who was called on behalf of the accused. It goes to the issue of … [*specify the issue(s)*]. It is not a case of simply choosing between their evidence as a matter of simple preference. [*Where the accused has the onus of proof, emphasise the relevant standard of proof and how it operates in relation to the expert evidence*].

It is for you to decide whose evidence and whose opinion you accept in whole or in part, or whose evidence you reject altogether. You should remember that this evidence relates only to part of the case, and that while it may be of assistance to you in reaching a verdict, you must reach your verdict having considered all the evidence.

[*There has been no challenge to the qualifications of any of the expert witnesses, all of whom you may think are well qualified*].**]**

[*Summarise the arguments of the parties as to why a particular expert should be preferred or discuss with the jury, matters relevant to the resolution of the evidence, such as the reliability of the information relied upon and the level of expertise of a particular witness.*]

In resolving the conflict in the expert evidence, you are entitled to consider that particular evidence in the context of all of the evidence that is before you, and especially that part of the evidence which may have a bearing on the acceptance or otherwise of a particular opinion.**]**

[Where there has been no challenge to the expert evidence either in cross-examination or by calling evidence to the contrary, add

The expert evidence has not been challenged. Accordingly, if it is not inherently unbelievable, you would need to have a good reason to reject it — for example, because it does not fit with other facts which you have found proved.**]**

[Where there is conflict as to the facts or assumptions underlying the opinion, add

The expert evidence of [*AB*], called on behalf of the Crown, relating to … [*specify points*], appears to be based on facts which [*AB*] has been told, or on assumptions which [*AB*] has been asked to make [*specify the facts or assumptions*]. You should analyse the evidence of [*AB*] and determine the extent to which [*his/her*] opinion depends upon the facts or assumptions being correct.

If the opinion is based upon facts which you are satisfied have been proved, or assumptions that you are satisfied are valid, then it is a matter for you to consider

whether the opinion based upon those facts or assumptions is correct. On the other hand, if you decide the facts have not been proved, or the assumptions are not valid, then any opinion based upon them is of no assistance because it has no foundation. If that is the case, the opinion should be disregarded.

[*This direction can be modified where the opinion is relied upon by the defence, bearing in mind which party bears the onus of proof in respect of the issue, the subject of the evidence*].**]**

[Where the expert witness relies on statements by the accused and/or others, and they do not give evidence, and no direction is given under s 136 limiting the use to be made of that material, add

The expert [*CD*] recounted what [*he/she*] had been told by [*the accused and/or members of [his/her] family*] and that formed part of the history on which [*the person*] relied to form [*his/her*] opinion. That is why that material was admitted despite the fact that it was hearsay evidence, that is, evidence of statements made outside the courtroom by persons not called as witnesses before you. However, that material is evidence before you and you are entitled to rely on it, not merely as statements made to the expert and upon which to evaluate [*his/her*] opinion, but also as evidence of the truth of the facts contained in those statements. However, I warn you that as those statements are hearsay they may be unreliable. The person or persons making those statements did not give evidence before you and, therefore, could not be tested by cross-examination [*give other reasons for the possible unreliability of the statements depending upon the facts and circumstances of the particular case*].**]**

[2-1140] Notes

Last reviewed: June 2023

1. In *Al-Salmani v R* [2023] NSWCCA 83 at [64]–[67] it was held that it will be a rare case where responsive answers by an expert to a cross-examiner's questions would be objectionable, and it is incumbent on counsel to raise any objections to an expert straying from their expertise at the trial. This is because cross examining counsel can confine questioning to the field of the witness's expertise and choosing to go beyond that field is a forensic choice which necessarily implies an acceptance the expert is capable of answering the questions within the expert's field of expertise.
2. In *Dirani v R* [2021] NSWCCA 202, it was held that while a police expert witness could give evidence of surveillance techniques generally, his mere descriptions of the accused's behaviour depicted in video recordings and his speculation as to what it meant was not based on any identified expertise and hence was inadmissible: [77]–[92]. At [91]–[92], the court distinguished *Kingswell v R* (unrep, 2/9/98, NSWCCA), in which an expert police witness gave permissible evidence of an accused's behaviour by describing the features that gave rise to the opinion.

[The next page is 401]

Complaint evidence

[5-000] Introduction

Last reviewed: June 2023

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.

[5-010] Evidence of complaint where witness available to give evidence — s 66(2)

Last reviewed: June 2023

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* (16th edn, 2021) at [EA.66.60]ff; *Uniform Evidence in Australia*, (3rd edn, 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* (16th edn, 2021) at [EA.136.60]ff; *Uniform Evidence in Australia*, (3rd edn, 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* (16th edn, 2021) at [EA.165.90]ff; *Uniform Evidence in Australia*, (3rd edn, 2020) at 165-9ff.

[5-020] Suggested direction — where complaint evidence admitted under s 66(2)

Last reviewed: June 2023

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 *Criminal Procedure Act* as suggested at **[5-050]** may be incorporated where indicated. A judge may give a direction under ss 293A or 294 at any time during the trial and may give the same direction more than once: ss 293A(2A); 294(2A). See further at **[5-060]** below.

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 [*the person*] 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 [5-050].]

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 [*the person*] complained to [*witness*] when [*the person*] did **[*add if relevant: and in the manner in which the person did*]** makes it more likely [*the person*] 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 [*the person*] act in the way you would expect [*the person*] to act if [*the person*] had been assaulted as [*the person*] 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 [*the person*] reacted to the experience [*the person*] says [*the person*] 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.*]

[5-030] Evidence of complaint where witness not available under s 65(2)

Last reviewed: June 2023

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.

The mere fact a complainant refuses to answer questions will not always satisfy the requirement of "all reasonable steps" in the definition of "unavailability of persons" in Pt 2, cl 4(g) of the Dictionary to the Act for the purpose of s 65(1). What constitutes "all reasonable steps" will depend upon the circumstances of the case but some relevant considerations include: the nature of the case; the importance of the evidence; the higher standard of proof in a criminal trial; and the importance of the liberty of the individual: *RC v R* [2022] NSWCCA 281 at [114]–[115]. The serious consequences of the successful invocation of s 65 emphasises the need for compliance with the conditions of admissibility prescribed by the section: at [116]; *Sio v The Queen* (2016) 259 CLR 47 at [60]–[61].

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* 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* (16th edn, 2021) at [EA.65.150]ff; *Uniform Evidence in Australia*, (3rd edn, 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* (16th edn, 2021) at [EA.65.150]ff; *Uniform Evidence in Australia*, (3rd edn, 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 [5-020].

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

[5-040] Evidence of complaint as a prior consistent statement under s 108(3)

Last reviewed: June 2023

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* (16th edn, 2021) at [EA.108.150]ff; *Uniform Evidence in Australia*, (3rd edn, 2020) at 108-3ff.

[5-045] Direction where difference in complainant's account — prescribed sexual offences only

Last reviewed: June 2023

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 *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 directed 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).

This direction may be given at any time during the trial, and the same direction may be given on more than one occasion: s 293A(2A).

[5-050] Suggested direction

Last reviewed: June 2023

The defence case is that [*name of witness*] was not telling the truth, that there were gaps in the account [*the person*] gave, and that there were differences and inconsistencies between [*her/his/their*] 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/their*] truthfulness and reliability.

[5-055] Suggested direction — delay in, or absence of, complaint

Last reviewed: June 2023

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 directing that delay is relevant to the complainant's credibility "unless there is sufficient evidence to justify such a direction": s 294(2)(c).

You have heard evidence that the complainant did not complain about what [*the person*] claims the accused did to [*the person*] until [*the person*] 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 [*the person*] claims the accused did to [*the person*].]

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 [*the person*] 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 [*the person*] 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. [*The person*] 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.]

[5-060] Notes

Last reviewed: June 2023

1. The statutory basis for the direction is found in s 294(1)–(3) *Criminal Procedure Act* 1986. The section is headed "Direction 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 direct 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 direct 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 direct the jury that delay in complaining is relevant to the victim's credibility unless there is sufficient evidence to justify such a direction.

   (2A) A judge may, as the judge sees fit—

   (a) give a direction in this section at any time during a trial, and

   (b) give the same direction on more than 1 occasion during a trial.

   (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) provided, until 1 June 2022, that a judge could not give a "warning" about delay "unless there is sufficient evidence to justify such a warning". Section 294(2) was amended by the *Crimes Legislation Amendment (Sexual Consent Reforms) Act* 2021 to replace the words "warn" or "warning" with "direct" or "direction": Sch 2[9]–[12]. These amendments apply to proceedings the hearing of which commence on and from 1 June 2022.

The Court of Criminal Appeal considered an earlier version of s 294(2) in *Jarrett v R* (2014) 86 NSWLR 623 and expressed its reasons using the then language of the provision. However, the Court's conclusions concerning the operation of the provision are unaffected by these amendments.

2. The addition of s 294(2)(c) significantly recasts s 294(2): *Jarrett v R* at [38]. It is complemented by s 294AA (inserted at the same time) which prohibits the judge from directing 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 direction will vary from case to case; the test of "sufficient evidence" must be the basis of the direction 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].

[5-070] Delay in complaint and forensic disadvantage to the accused

Last reviewed: June 2023

Where s 165B *Evidence Act* applies, a direction 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 direct a jury, or make any suggestion to a jury, that complainants as a class are unreliable witnesses". This prohibition includes "a direction 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.

[5-080] Suggested direction — delay in complaint and forensic disadvantage to the accused

Last reviewed: June 2023

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 direction 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/themself*] by testing prosecution evidence [*or bringing forward evidence*] in [*his/her/their*] own case, to establish a reasonable doubt about [*his/her/their*] 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/their*] 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/themself*] 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/their*] 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/their*] evidence by pointing to circumstances which may contradict [*the person*]. Had the accused learned of the allegations at a much earlier time [*the person*] 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 [*the person*] learned of the allegations at a much earlier time [*the person*] may have been able to find witnesses or items of evidence that might have either contradicted the complainant or supported [*his/her/their*] case, or both. [*The person*] may have been able to recall with some precision what [*the person*] was doing and where [*the person*] was at particular times on particular dates and to have been able to bring forward evidence to support [*the person*].

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 [*the person*] has been prejudiced in the conduct of his defence. As a result, I direct 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 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/their*] defence.

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Expert evidence — specialised knowledge of child behaviour

[5-300] The operation of ss 79(2) and 108C Evidence Act 1995

Last reviewed: June 2023

Section 79(2) *Evidence Act* 1995 provides that "specialised knowledge" based on a person's "training, study or experience" in s 79(1) extends to "specialised knowledge of child development and behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse": s 79(2)(a). The opinion of such a person includes an opinion relating to the development and behaviour of children generally and/or the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences: s 79(2)(b).

Section 108C(1) also permits a party to call evidence from an expert but when it is relevant to the credibility of their own, or the other party's, witness. Section 108C(2) is in identical terms to s 79(2).

Although the concept of "study" has limits, this limb of ss 79(1) and 108C(1) expressly contemplates a person giving evidence of an opinion that is wholly or substantially based on specialised knowledge based on "study" which necessarily involves scrutinising the work of others: *Decision Restricted* [2022] NSWCCA 136 at [73].

Leave is required for evidence under s 108C but not under s 79(2).

[5-310] Notes

Last reviewed: June 2023

1. In child sexual assault cases it is likely the Crown may seek to rely upon expert evidence regarding children's behaviour. This will be indicated on the Crown Readiness Hearing Case Management Form filed with the District Court. If the defence proposes to rely upon such evidence this will be indicated on the corresponding defence Case Management Form. In such cases, it is prudent to raise this with the parties at the earliest opportunity to ensure any questions related to expertise, relevance and admissibility are dealt with before the trial commences.
2. Where reliance is placed on lengthy expert reports, and a ruling on admissibility is sought, the trial judge should require the adducing party to identify the parts of the report it seeks to adduce in oral evidence. A determination can then be made as to the facts in issue with respect to which the evidence is tendered: *Aziz (a pseudonym) v R* [2022] NSWCCA 76 at [94].
3. Evidence of this kind may not be required if the parties reach agreement as to the trial judge informing the jury of uncontroversial propositions, such as that "victims of child sexual abuse may respond [in ways] contrary to how we might expect victims to respond". General evidence of this kind in an expert report is not calibrated to the issues in the trial, whereas a direction by a trial judge can be: *Decision Restricted* at [69]; see also Fagan J at [165]–[168].

4. Expert evidence generally will be admissible where it addresses the relationship between a child and a perpetrator (such as "familial situations" compared to non-familial or stranger perpetrators) and the effect on the child's behaviour during and after the abuse. Such evidence is of a type approved in *Decision Restricted* [2022] NSWCCA 136 at [64]–[66]: *BQ v R* [2023] NSWCCA 34 at [233]–[239].

5. Section 108C [*Evidence Act* 2008 (Vic)] was considered in *MA v R* (2013) 40 VR 564. The provision is materially similar to the NSW provision. The court held that general opinion evidence concerning how a child may react to sexual abuse was admissible. However, it would be a rare case that an expert should be invited to express an opinion as to the actual behaviour of the alleged victim: *MA v R* at [100].

   In *Aziz (a pseudonym) v R* [2022] NSWCCA 76 expert evidence regarding the behaviour of child sexual abuse victims was found to be opinion evidence and admissible under s 108C even though, unlike in *MA v R*, the expert did not express an opinion about the particular complainant's credibility. The evidence was relevant as it was capable of assisting the jury in making its own assessment of the truthfulness of the complainant's account: [92]. In the circumstances of that case, where the evidence was admitted without objection, the expert's evidence was "opinion evidence" because it drew conclusions based on the published research of others in that particular field and was not simply a "literature review": [77], [80]. However, an expert cannot express an opinion about a topic merely because they have read and reviewed the work of others. They must have their own qualifications (that is, training, study or experience) before they can do so: *Decision Restricted* at [74]–[75], [77]; see also *BI (Contracting) Pty Ltd v University of Adelaide* [2008] NSWCA 210 at [23].

6. In *Clegg v R* [2017] NSWCCA 125 at [122], it was held the judge correctly directed the jury that evidence admitted under s 108C could not be used to decide the truth of charges. The content of a direction for evidence adduced under s 108C will depend on the nature of the opinion evidence led by the Crown. The direction at **[2-1130] Suggested direction — expert witnesses** should be adapted accordingly.

7. The jury does not always need to be instructed the expert evidence says nothing about the credibility of the particular complainant. The need for such a direction will depend on the way the evidence is led, whether it was challenged in cross-examination, the approach taken by defence counsel at trial, and how the Crown uses the evidence in closing address: *BQ v R* at [268]–[269].

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Break, enter and commit serious indictable offence

***Crimes Act* 1900 (NSW), s 112**

[5-5100] Suggested direction

Last reviewed: June 2023

The suggested direction has been designed to fit the most commonly found offence of break, enter and steal but can be adapted for other serious indictable offences.

See also **Larceny [5-6100]** and s 4 *Crimes Act* 1900.

The Crown must satisfy you beyond reasonable doubt that —

1. the accused broke and entered the premises described;
2. [*those premises were a dwelling house/building*]; and
3. having entered the premises, the accused stole … [*specify the property*].

"Broke" means "forcibly gained access". It is not a "breaking" to walk through an open door.

"Entered" means what it says, that is, "went inside" … [*or inserted some part of [his/her] body or some implement that [he/she] was holding*].

[*Where applicable:* The accused says [*he/she*] had a right to enter the premises because [*state the reason from the defence case*]. A person who has lawful authority to enter the premises, such as by being a leaseholder, will not be guilty of "breaking and entering", even if they use force to gain entry. The Crown must prove beyond reasonable doubt the accused had no lawful authority to enter the premises.]

A "dwelling house" is a house, flat or apartment where somebody dwells, that is to say, where somebody lives or resides. It may include a place that is designed for that purpose even when nobody is actually living in it at the time.

To "steal" somebody's property means to "take it away, without consent and intending to deprive them of it permanently".

It need not be shown that the accused actually removed the property from the premises but it must be shown that [*he/she*] moved it to some extent, and that when the accused did so [*he/she*] had the intention of stealing it.

Here it is alleged by the Crown that the accused … [*state the offence alleged, for example, opened a locked window, went inside, took an ipod*]. If the Crown proves beyond reasonable doubt that the accused did those things, then you should return a verdict of "guilty".

[5-5110] Notes

Last reviewed: June 2023

1. There is no definition of "breaking" in the *Crimes Act* 1900. In *Stanford v R* (2007) 70 NSWLR 474, the court held that there is no "breaking" involved in further opening an already opened window: at [38]; see also *R v Galea* (1989) 46 A Crim R 158 at 161. However, to open a closed but unlocked door could amount to "breaking" for the purposes of s 112 *Crimes Act* since the definition of

breaking includes pushing open a closed but secured door or opening a closed but unfastened window: *DPP (NSW) v Trudgett* [2013] NSWSC 1607 at [15]. Other acts which have been held to constitute a "breaking" at common law include the raising of a flap door: *R v Russell* (1833) 1 Mood 377; or lifting a latch or loosening any other fastening: *R v Lackey* [1954] Crim L R 57. There may be a constructive breaking where an accused gains entry by trick: *R v Boyle* (1954) 38 Cr App R 111 at 112.

Ghamrawi v R (2017) 95 NSWLR 405 includes an extensive survey of the history of the concept of "breaking" at common law. Leeming JA, applying *Stanford v R*, held at [84]–[85] that the term "break" in s 112 had the same meaning it had at common law and accordingly that there can be an "actual" and a "constructive" breaking. On the facts of the case at hand, his Honour held that there is no actual breaking if the person has express or implied permission to enter through a closed, but unlocked, door, even if they had felonious intent at the time they entered. In *Singh v R* [2019] NSWCCA 110, Payne JA held that knocking on a door of a house with intent to rob its occupants and, upon the door being opened, rushing into the house constituted a "constructive breaking".

2. Break and enter offences under s 112 *Crimes Act* require a trespass to be established, that is, entry to premises of another without lawful authority: *BA v The King* [2023] HCA 14 at [42], [62], [69]. A person who has a right to occupy premises, such as under an existing rental agreement, has lawful authority to enter, including by using force that would otherwise constitute a "break". This will be the case notwithstanding the person no longer physically occupies the premises or the current occupant (even if they are a joint tenant) does not consent to the person's entry. There will be no offence under s 112 in such circumstances, even if the person's intention in entering the premises is for a non-residential purpose: *BA v The King* at [42].

3. From 15 February 2008, s 112 *Crimes Act* refers to "any dwelling-house or other building", whereas previously it referred to a list of specifically nominated buildings. A dwelling-house is defined in s 4(1) to include:

   (a) any building or other structure intended for occupation as a dwelling and capable of being so occupied, although it has never been so occupied,

   (b) a boat or vehicle in or on which any person resides, and

   (c) any building or other structure within the same curtilage as a dwelling-house, and occupied therewith or whose use is ancillary to the occupation of the dwelling-house.

   A building is defined in s 105A(1) to include "any place of Divine worship".

4. The "serious indictable offence" must be committed inside the dwelling house. In *Nassr v R* [2015] NSWCCA 284, a person entered the victim's home intending to steal but was interrupted. He assaulted the victim outside the house as he attempted to flee. The court held at [10]–[11] that "dwelling-house" as defined in s 4(1) does not include the front or side yard of the property on which the relevant house, building or structure is erected.

5. For the purpose of establishing whether the accused knew a person was "in the place where the offence is alleged to have been committed" as a circumstance of

aggravation in s 105A(1), it is sufficient that the accused knew a person was on the patio or in the confined grounds of the dwelling house: *R v Rice* [2004] NSWCCA 384 per Smart J at [62]–[63]; per Hodgson JA at [4]–[6]; cf Hulme J at [13].

[The next page is 911]

Duress

[6-150] Introduction

Last reviewed: June 2023

It is for the judge to rule if there is evidence of duress to be left to the jury. Where duress is raised the onus is on the Crown to prove beyond reasonable doubt that the accused was not acting under duress.

When duress is raised in a Commonwealth matter, refer to note 9 at **[6-170]**.

[6-160] Suggested direction

Last reviewed: June 2023

In this case, the Crown has to prove beyond reasonable doubt that [*the accused*] was not acting under duress when [*outline relevant circumstances*]. It is not for [*the accused*] to prove that [*his/her*] actions were done under duress.

The law recognises that in some cases someone who commits what would otherwise be a crime should be excused for having done so. It recognises that we are human beings and that sometimes people really don't have a choice — their choices have been overborne by a serious threat to either them or their family. The law would prefer that no one commits a crime but the defence of duress is a concession to human frailty.

But it is important that you understand that it is not a concession to individual frailty. People cannot escape punishment if they give in to threats that are not serious. We expect people to act as reasonable human beings if they are threatened and also expect people to have the strength of character to be able to resist some threats. If there is some reasonable way to avoid the threat such as reporting the matter to the police then people are expected to do that and not give in to the threat and commit a crime.

There are three elements which make up duress. A person acts under duress, and therefore will not be held to be criminally responsible if that person's actions were performed:

- because of threats of death or really serious injury to [*himself/herself*] or a member of [*his/her*] family
- being threats of such a nature that a person:
  - of ordinary firmness and strength of will,
  - of the same maturity and sex as [*the accused*], and
  - in [*the accused's*] position,
- would have given in to them and committed the crime demanded of [*him/her*].

Those three elements are necessary before duress exists. If the Crown has proved beyond reasonable doubt that just one of the elements is missing then duress will be eliminated as an issue.

I will explain the three elements in some more detail.

1. Was [*the accused*] driven by [*the alleged threats*] to act as [*he/she*] did because [*the accused*] genuinely believed that if [*he/she*] did not act in this way, [*he/she/member of the accused's family etc*] would be killed or seriously injured?

   In considering this question, you will have to decide what threats [*if any*] were made and, if they were, what they led [*the accused*] to believe would happen. The threats may not be expressed, they may be implied. In this case [*describe circumstances*]. If [*the accused*] genuinely believed that there was an imminent danger of death or serious injury, it would not matter if that belief was, in fact, mistaken. What matters when you look at this question is what the accused believed would happen. Did [*he/she*] believe that [*he/she or his/her family*] would be killed or seriously injured if [*he/she*] did not do what [*he/she*] says was demanded of [*him/her*].

   [*Summarise submissions of the Crown and the accused in relation to question 1*].

2. Would those threats have forced a reasonable person to act as [*the accused*] did?

   This question is more complicated and requires you to look at the response of a reasonable person of ordinary firmness and strength of will, and of the same sex and maturity as [*the accused*], to the threats facing [*the accused*], and in the circumstances in which [*the accused*] found [*himself/herself*].

   When you come to consider this question, you must have regard not only to the nature of the threats, but also to any circumstances known to [*the accused*] concerning the person(s) making the threats, which may have affected a reasonable person's reaction to them, as well as the actual circumstances in which they were made. [*set out defence case*]

   This is something you examine in a sensible and common sense way. You have to recognise that it is one thing to consider what a reasonable person would do when you are sitting in a jury room with people around you and the ability to think through the alternatives in a relaxed way. But it is another thing for a reasonable person to think about how [*he/she*] would respond to threats in the circumstances the accused said [*he/she*] found themselves in.

   You place a reasonable person of ordinary firmness of mind and will, and of the same maturity and sex as [*the accused*], in [*the accused's*] position, that is, in the setting and circumstances in which [*the accused*] found [*himself/herself*] and you attribute to that reasonable person the knowledge [*the accused*] had of the person(s) offering the threats.

   You then ask yourselves whether, taking all those matters into account, the Crown has satisfied you, beyond reasonable doubt, that a reasonable person would not have yielded to the threats in the way [*the accused*] did.

   [*Summarise the submissions of the Crown and the accused in relation to question 2*].

3. Could [*the accused*] have rendered the threat ineffective [*for example, by going to the police and/or …*]?

   I said before that we would prefer that people did not commit crimes even in response to threats. If [*the accused*] had a choice between giving in to the threat

and rendering it ineffective then the law says the person should take the second option. Even when a person is faced with threats which [*he/she*] believes will be carried out unless they commit a crime, [*he/she*] is not acting under duress if [*he/she*] could have avoided the threats by doing something else, such as reporting the matter to police.

[*Summarise the Crown and defence submissions in relation to question 3*].

If the Crown has disproved any of these three elements beyond reasonable doubt, then the defence of duress has failed. If the Crown has failed to disprove any of them, then [*the accused*] is entitled to a verdict of "not guilty".

In short, the Crown will have succeeded in eliminating duress as an issue if it has proved beyond reasonable doubt any of these three things:

1. The accused was not forced to do what [*he/she*] did because of threats of death or really serious injury to [*himself/herself/a family member*],

   or

2. The threats were not of such a nature that a reasonable person with the attributes of [*the accused*] and who was in the position of [*the accused*] would have given in to them and done what [*he/she*] did,

   or

3. [*The accused*] could have rendered the threat ineffective by doing something else instead of doing what [*he/she*] did.

[6-170] Notes

Last reviewed: June 2023

1. In *R v Lawrence* [1980] 1 NSWLR 122, the Court of Criminal Appeal comprehensively dealt with the defence of duress, and trial judges are advised to re-read the judgments in that case before summing up in a trial where duress is raised. See also *R v Hurley and Murray* [1967] VR 526; *R v Abusafiah* (1991) 24 NSWLR 531 and *R v Pimentel* [1999] NSWCCA 401. The general principles concerning duress at common law were discussed at [28]–[29] and [32]–[36] in *Taiapa v The Queen* (2009) 240 CLR 95.

2. Duress of circumstances (that is, where a person is driven to commit a crime by force of circumstances) is considered in *R v Pommell* [1995] 2 Cr App Rep 607, and *R v Abdul-Hussain* [1999] Crim LR 570. See and compare **Necessity** at **[6-350]**.

3. Duress can extend to threats directed beyond the accused or an immediate member of the accused's family to someone for whom the accused might reasonably feel responsible. See, for example, *R v Conway* [1989] 88 Cr App Rep 159, where the threat was to a passenger in the accused's car; see also *R v Brandford* [2016] EWCA Crim 1794 at [32], [46].

4. "Battered woman syndrome" may be relevant to a defence of duress: *R v Runjanjic* (1991) 56 SASR 114.

5. It was held in *Rowan (a pseudonym) v R* [2022] VSCA 236 at [154]–[156] that a continuing or ever present threat which is subsisting at the time of the offence (as distinct from a specific threat in close temporal proximity to the offending) can be sufficient if, in all other respects, the defence of duress can be made out. The accused must have, due to the threat, lost their freedom to refrain from committing the charged offence.

6. Australian authorities suggest that duress may be available as a defence to attempted murder: *R v Goldman* [2004] VSC 291: cf *R v Gotts* [1992] 2 AC 412.

7. In *R v Bowen* [1996] 2 Cr App Rep 157, guidance is given as to the characteristics of the accused with which a reasonable person should be invested for the purposes of resolving question 2 in [6-160]. Examples are given such as youth, pregnancy, physical disability, recognised mental illness or psychiatric condition.

8. There is a limitation on the availability of the defence when a person is part of a criminal organisation or where they otherwise put themselves in a position where they may be coerced to commit criminal offences: *R v Hurley* [1967] VR 526 at 533; *Hasan* [2005] UKHL 22; *Nguyen v R* [2008] NSWCCA 22 at [40]; *R v Qaumi (No 63)* [2016] NSWSC 1216 at [30]–[35]; *R v Qaumi (No 64)* [2016] NSWSC 1269 at [40]–[43]. Note, however, that in *R v Qaumi (No 64)*, Hamill J observed that he considered that in *Nguyen v R* the court had overstated the nature of the limitation: *R v Qaumi (No 64)* at [42].

9. Although the cases use the expression "voluntariness" in relation to duress, that expression is not used in the same sense as that expression is used in automatism. If a case involves both duress and automatism, this distinction should be made clear to the jury.

Duress in Commonwealth cases

10. Section 10.2 of the *Criminal Code* (Cth) codifies the defence of duress for an accused charged with a Commonwealth offence. It is important when adapting the form of the direction in [6-160] for a Commonwealth offence, that regard is had to the precise terms of s 10.2 and also to s 13.3 of the Code. See *Mirzazadeh v R* [2016] NSWCCA 65 and *Oblach v R* (2005) 65 NSWLR 75 at [66]. As to the operation of s 13.3 see *The Queen v Khazaal* (2012) 217 CLR 96 at [74]–[78].

[The next page is 1255]

Necessity

[6-350] Introduction

Last reviewed: June 2023

The common law defence of necessity operates where circumstances (natural or human threats) bear upon the accused, inducing the accused to break the law to avoid even more dire consequences. There is, thus, some overlapping with the defence of duress. In *R v Loughnan* [1981] VR 443 at [448] it was held that the elements of the defence were that —

(i) the criminal act must have been done in order to avoid certain consequences which would have inflicted irreparable evil upon the accused or upon others whom he or she was bound to protect;

(ii) the accused must honestly have believed on reasonable grounds that he or she was placed in a situation of imminent peril; and

(iii) the acts done to avoid the imminent peril must not be out of proportion to the peril to be avoided.

The imminence and seriousness of the threat, and the question of whether there were any possible alternative courses of action available, should be treated as important factual considerations relevant to the accused's belief and the reasonableness and proportionality of the response, rather than technical legal conditions for the existence of necessity: *R v Rogers* (1996) 86 A Crim R 542 at 545–548. The availability of realistic alternative courses of action is a question of fact and not to be resolved by reference to whether the accused believed that to be the position: *Veira v Cook* [2021] NSWCA 302 at [46]. The defence relates to a response which "could not otherwise be avoided" and was the accused's "only reasonable alternative": *Veira v Cook* at [48].

In *R v Cairns* [1999] 2 Crim App Rep 137, it was held that an accused will have a defence of necessity if —

(i) the commission of the crime was necessary, or reasonably believed to have been necessary, for the purpose of avoiding or preventing death or serious injury to himself or herself, or another;

(ii) that necessity was the *sine qua non* of the commission of the crime; and

(iii) the commission of the crime, viewed objectively, was reasonable and proportionate, having regard to the evil to be avoided or prevented.

The defence of necessity involves two questions that must be addressed: first, was the accused's conduct in truth a response to a threat of death or serious injury; and second, if so, did the accused act honestly believing, on reasonable grounds, that it was necessary to do so to avoid the threatened death or serious injury: *Veira v Cook* at [24]. The defence does not extend to excuse criminal conduct undertaken otherwise than in response to an imminent threat of death or serious injury; it is insufficient if the accused merely believed the harm sought to be avoided was "not less than" any harm involved in the criminal conduct: *Veira v Cook* at [40]–[43].

The accused bears the evidentiary onus of establishing a basis for a defence of necessity and, thereafter, the Crown bears the onus of negativing the defence beyond reasonable doubt: *R v Rogers* at 547. The suggested direction for **Duress [6-150]** may conveniently be adapted to the case in which the defence of necessity is raised.

[The next page is 1285]

Summing-up format

[7-000] Suggested outline of summing-up

Last reviewed: June 2023

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] HCA 12. 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) 104 NSWLR 571 at [65]. Where written directions are provided, the trial judge is required to give oral directions which, as a minimum, oblige the trial judge to read out and explain the written directions. This allows the judge and counsel to gauge the jury's reaction to the directions and detect whether the jurors are paying attention and appreciate the gravamen and purpose of the document: *Cook (a pseudonym) v R* [2022] NSWCCA 282 at [55]–[58].

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

Last reviewed: June 2023

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*].

Each accused has pleaded "not guilty" to that charge. 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 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 any questions that you wish, as often as you like, in relation to both the legal directions and any questions of fact.

I propose to commence this summing-up with a number of general directions which, to some extent, repeat those I gave you when the trial began. 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. Aside perhaps from pointing out that something appears not to be in dispute, I do not intend to express any opinion about any matters of fact. If you think I have expressed an opinion about something that is in dispute, or if you think I have tried to give you a hint about what I think, then you will be mistaken. I do not intend to do any such thing.

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.

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 or counsel have referred.

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 a criminal trial and the burden of proving the guilt of the accused is on the Crown. That onus rests on the Crown in respect of every element of the charge. 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 beyond reasonable doubt. This does not mean the Crown has to prove every single fact in the case beyond reasonable doubt but, at the risk of repetition, it does mean the Crown must prove every element of the charge/s 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". The expression "beyond reasonable doubt" is an ancient one. It is not one that is explained by trial judges except to say that it is very different to the standard of proof in civil cases. In civil cases, matters need only be proved on the balance of probabilities, that is it is only necessary to prove something is more probable than not. The standard of proof in a criminal trial is higher. It is beyond reasonable doubt.

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

Last reviewed: June 2023

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/them*]. 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/them.*]

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

Last reviewed: June 2023

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 *The Queen v Chai* [2002] HCA 12 at [18]. In *Haile v R* [2022] NSWCCA 71 at [117], Bellew J summarised a trial judge's obligations when summing-up to the jury as follows:

(i) although there is considerable leeway in the manner in which a summing-up can be structured, it remains essential for a trial judge to summarise, fairly and adequately, the competing cases of the Crown and the accused;

(ii) the requirement to summarise the cases fairly and adequately does not oblige the trial judge to remind the jury [of] every argument advanced by counsel;

(iii) it is the case which the accused makes that the jury must be given to understand, and it is not sufficient for a trial judge to simply say to the jury that they should give consideration to the arguments which have been put by counsel;

(iv) a trial judge must hold an even balance between the Crown case and the accused's case, and fairly direct the jury's consideration to the matters raised by the accused in his defence, the detail of which will depend on the circumstances of the particular case;

(v) generally speaking, a trial judge should not put matters to the jury in the summing-up which have not been put by the Crown, but which nevertheless advance the Crown case, because such an approach has the capacity to amount to a denial of natural justice because of the absence of opportunity for the accused to respond;

(vi) the task of restoring the credit of a Crown witness, or of destroying the credit of the accused, should always be left to the Crown Prosecutor. When such a task is undertaken by a trial judge, there is a risk of losing the appearance of impartiality which is expected.

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**

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-Khalif* (2020) 271 CLR 265 at [77]; *Haile v R* at [118]. 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]. *Haile v R* is another example. In that case, the trial judge drew repeated comparisons between the evidence given by a principal Crown witness and the accused, in effect suggesting to the jury that they had to choose between the two: see [42]–[48], [54], [99]–[103]. Repeatedly asking the question "Why would she lie?", in conjunction with expressing personal views about aspects of the defence case, compounded the unfairness of the summing-up which the Court of Criminal Appeal concluded lacked balance: at [120]–[127].

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] HCA 74 at [18]. A non-exhaustive list of possible responses by a court to a breach of the rule appears in *Khamis v 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* [2004] NSWCCA 322 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*: 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 VI.26Q.1) and *Archbold* (2022) at 4-509, p 585. 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.

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Return of the jury

[8-000] Unanswered questions or requests by the jury

If the jury asks a question indicating that further directions of law are required, the trial judge should ensure that no verdict is taken before that question is answered: see *R v TAB* [2002] NSWCCA 274 at [72]; *R v Hickey* (2002) 137 A Crim R 62 at [47]; *Nguyen & Ors v R* [2007] NSWCCA 363 at [120]–[128].

All communications between the jury and the trial judge should be disclosed to counsel for both parties, except for matters pertaining to the jury's deliberations: *Ngati v R* [2008] NSWCCA 3 at [33]; *Burrell v R* (2007) 190 A Crim R 148 at [261]–[265]; *Yuill* (1994) 77 A Crim R 314 at 324. Such disclosure allows counsel to make submissions about the manner in which the question should be answered: *Nguyen & Ors v R*, above, at [127]. Voting figures should not be disclosed: *Ngati* at [34].

[8-010] Further directions may be given after jury has indicated it has reached a verdict but before delivery of verdict

In circumstances where the jury has sent a message to the judge that it has reached a verdict, it is nevertheless open to the judge to invite them to deliberate further with corrected, amended or supplementary directions: see *R v Campbell* [2004] NSWCCA 314 at [42].

[8-020] Recommended steps — Commonwealth offences requiring unanimity

Last reviewed: June 2023

After receiving a message that the jury is ready to deliver the results of its deliberation, direct the reassembly of the court, ensuring that the accused is available. The accused should always be brought in before, rather than after, the jury. It is not essential to await the attendance of counsel who have chosen to depart the court area of their own volition, and it is not desirable to undertake to counsel that you will communicate with him or her. Remember that the jury, at this stage, will probably have been confined to the jury room for many hours and their convenience and comfort should be given every consideration. Also remember there may well be other members of the public waiting.

1. Re-enter the court

Direct that the accused be brought into the court. In appropriate cases, ensure that general security is in order. Direct the jury to enter (it is not necessary to call the roll of the jury).

2. Court officer asks foreperson to rise

3. Enquires of foreperson —

Clerk of Arraigns or judge then inquires of the foreperson — "Have you agreed on your verdict(s)?"

Upon receipt of an affirmative answer, the Clerk of Arraigns then questions the foreperson — "How say you, is the accused guilty or not?"; or "How say you, on the first count, is the accused guilty or not?"

The question is then repeated, corresponding to the number of counts committed to the jury. In the case of multiple defendants, the question is — "How say you, is the first accused [*name accused, for example, John Smith*] guilty or not?"

The question is then repeated for each of the other accused. In the case of multiple defendants and multiple counts the question is — "How say you, on the first count, is the first accused [*name accused, for example, John Smith*] guilty or not?"

The question on the first count is then repeated for each of the other accused. The question is then posed on the second count for each of the accused.

Note: It is critical to receive a distinct verdict in respect of each accused on each separate count. Also, in cases where an alternative or lesser charge is available if there is a verdict of "not guilty" on the substantive charge, it must not be forgotten to put forward the alternative charge and take a verdict on it.

After the foreperson has announced the verdict(s), the associate or judge then interrogates the whole jury as follows.

4. Receipt of verdict —

If a verdict of "guilty" — "Your foreperson has said that the (first) accused is guilty of the (first) count as charged (or not guilty as charged but guilty of the alternative charge of …). So says your foreperson, so say you all?"

The above should then be repeated in respect of all accused.

If a verdict of "not guilty", follow the above with the substitution of "not guilty" for "guilty".

Note: Questions as to the basis of the verdict

Although the trial judge has power to question the jury as to the basis of their verdict(s), that power should not be exercised save in exceptional circumstances: *R v Isaacs* (1997) 41 NSWLR 374 at 377; 379–380. The High Court has said — "The course of seeking such elucidation is fraught with danger and the discretion to seek it should be exercised sparingly and with care": *Mourani v Jeldi Manufacturing Pty Ltd* (1983) 57 ALJR 825 at 826. This approach is consistent with the well established principle that a jury should not be asked to disclose their reasoning process, nor are they bound to disclose it if asked: *Mourani v Jeldi Manufacturing Pty Ltd* at 826.

To this must be added the observation by the High Court in *Kingswell v The Queen* (1985) 159 CLR 264 at 283 that "… there is strong support for the view that a jury, once it has returned a verdict, has discharged its duties and has no further function to perform." Thus, a trial judge would need convincing circumstances before he or she would question the jury as to the basis of a verdict(s). It is acknowledged, however, that difficulties will arise where, for example, a jury returns a verdict which logically cannot stand with another verdict. Examples include the case where the jury has returned verdicts of "guilty" for both an attempt to commit an offence and the completed offence: *MacKenzie v The Queen* (1996) 190 CLR 348 at 366.

5. Discharge of jury

Upon delivery of the verdict, s 55E *Jury Act* 1977 requires the immediate discharge of the jury. This is usually done by expressing the appreciation of the court for the jury's service to the community, telling them that they are discharged from further service and informing them (if necessary) of the provision for payment of their jury fees.

The judge has discretion, after a lengthy trial, to excuse the jurors from being selected for jury service for a specified period then ensuing: s 39(1) *Jury Act* 1977. Sometimes there are members of the jury who do not wish to be so excused, in which case they should be given the opportunity to serve further. The comment is therefore suggested —

> On the other hand, there may be some among you who do not wish to be so excused but prefer to be available to serve if called upon. For this reason, I suggest that those who do not wish to be so excused give their names to the sheriff's officer when you retire and the appropriate action will be taken.

(The trial judge is required by s 39(2) to notify the Sheriff of any direction given under s 39(1)). Section 55E(2) expressly provides that any members of the jury may remain in court as ordinary members of the public after being discharged.

6. Verdict of "Not Guilty"

Upon receipt of a verdict of "not guilty" on the only charge, or if more than one, all charges, the trial judge should then enquire of the Crown Prosecutor if there is any reason why the accused should be further detained. If the answer is in the negative, the accused should be discharged immediately from custody and allowed to depart, should they so wish, even before the jury is formally discharged. If the answer is in the affirmative, then the reason must be sought. Should the accused be in custody as a result only of a refusal of bail, it is open to the judge to entertain a bail application (assuming jurisdiction), but it may be undesirable to entertain the application in the absence of the file and witnesses relevant to "bail refused" matter(s).

7. Verdict of "Guilty"

A conviction only occurs when the court does some act which indicates that it has determined guilt, or, which is the same thing, that it has accepted that the accused is criminally responsible for the offence in question, for example, by the imposition of punishment; discharging a prisoner on his or her own recognisance; by release on parole; or even, perhaps, adjourning proceedings for sentence hearing: *Maxwell v The Queen* (1995) 184 CLR 501 at 531.

A conviction may be recorded by formally calling up the prisoner for sentence, the address of which is known as the "*allocutus*" and is in the following terms —

> You have been found guilty by the jury of the charge of … [*specify charge*]. Is there anything you wish to say before sentence is passed?

At common law, the allocutus was a necessary part of a trial where the accused had been convicted of treason or a felony: *R v Rear* [1965] 2 QB 290 at 292.

The *allocutus* gives the accused the opportunity of raising any legal matter against conviction and in the absence of there being any such legal matter or any realistic possibility of the application of s 10 *Crimes (Sentencing Procedure) Act* 1999 or s 19B *Crimes Act* 1914 (Cth), allowing the entry of a judgment of conviction (which is recorded on the back of the indictment), thus publicly and formally recording a conviction, so as to put the matter beyond doubt.

In the absence of such formality, difficult and important questions can arise as to whether, and if so, when, the accused has been convicted. Of particular importance, for example, may be "the day of conviction" within the meaning of s 30 *Proceeds of Crime*

Act 1987 (Cth). This question was discussed in *Della Patrona v Director of Public Prosecutions (Cth) [No 2]* (1995) 38 NSWLR 257. However, that case must now be considered in the light of the various judgments of the High Court in *Maxwell v The Queen* (1995) 184 CLR 501.

The question of whether there has been a conviction is also of importance for the purposes of a plea of "*autrefois acquit*" or "*autrefois convict*". Although the use of the allocutus has, in recent years, fallen somewhat into disuse, recent cases demonstrate the advisability of returning to its regular use to avoid unnecessary disputes regarding whether, and if so, when, the accused has been convicted both with regard to verdicts of guilty, as well as pleas of guilty.

On the question of whether there has been a conviction or not, see *DPP (Cth) v Webb* [1999] NSWSC 405 and *R v Holton* [2002] NSWSC 775.

Alternatively, the judge should expressly indicate (publicly and formally) that the accused is convicted and make the appropriate entry on the back of the indictment. Indeed, in every case, whether the *allocutus* is given or not, the conviction should be recorded on the back on the indictment.

[8-030] Recommended steps — State offences where majority verdict(s) available

When the jury have reached a verdict they should send a message to that effect but should *not* say what the verdict is or whether it is unanimous or by majority. After receiving a message that the jury is ready to deliver the results of its deliberation, direct the reassembly of the court, ensuring that the accused is available. The accused should always be brought in before, rather than after, the jury. It is not essential to await the attendance of counsel who have chosen to depart the court area of their own volition, and it is not desirable to undertake to counsel that you will communicate with him or her. Remember that the jury, at this stage, will probably have been confined to the jury room for many hours and their convenience and comfort should be given every consideration. Also remember there may well be other members of the public waiting.

1. Re-enter the court

Direct that the accused be brought into the court. In appropriate cases, ensure that general security is in order. Direct the jury to enter (it is not necessary to call the roll of the jury).

2. Court officer asks foreperson to rise

3. Enquiries of foreperson

Clerk of Arraigns or judge then enquires of the foreperson — "Have you agreed on your verdict(s) according to law, that is, according to the directions that were given?" [The foreperson should simply answer "yes" without saying whether the verdict is unanimous or by majority.] Upon receipt of an affirmative answer, the Clerk of Arraigns then questions the foreperson — "How say you, is the accused guilty or not?"; or "How say you, on the first count, is the accused guilty or not?"

The question is then repeated, corresponding to the number of counts committed, to the jury. In the case of multiple defendants, the question is — "How say you, is the first accused [*name accused, for example, John Smith*] guilty or not?"

The question is then repeated for each of the other accused. In the case of multiple defendants and multiple counts the question is — "How say you, on the first count, is the first accused [*name accused, for example, John Smith*] guilty or not?"

The question on the first count is then repeated for each of the other accused. The question is then posed on the second count for each of the accused.

Note: It is critical to receive a distinct verdict in respect of each accused on each separate count. Also, in cases where an alternative or lesser charge is available if there is a verdict of "not guilty" on the substantive charge, it must not be forgotten to put forward the alternative charge and take a verdict on it.

After the foreperson has announced the verdict(s), the associate or judge then interrogates the whole jury as follows.

4. Receipt of verdict — majority verdict scenario

If a verdict of "guilty" — "Your foreperson has said that the (first) accused is guilty of the (first) count as charged (or not guilty as charged but guilty of the alternative charge of …)."

The above should then be repeated in respect of all accused.

If a verdict of "not guilty", follow the above with the substitution of "not guilty" for "guilty".

Notes

1. Section 55F of the *Jury Act* 1977 is silent as to whether the trial judge should ask the jury whether the verdict is unanimous or by majority unlike the position in England and Wales (s 17(3), *Juries Act* 1974 (UK); *R v Pigg* [1983] 1 WLR 6; *R v Millward* [1998] EWCA Crim 1203) and Ireland (s 25(2), *Criminal Justice Act* 1984).
2. In Victoria, the recommended course is that if there has been a majority verdict direction, the jury should be asked whether the verdict is "of not less than 11 [or as the case may be] of you": *R v Muto & Eastey* [1996] 1 VR 336 at 344.

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