**Judicial Commission of New South Wales**

# CRIMINAL TRIAL COURTS BENCH BOOK

**Update 76**

**April 2024**

**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 76**

## Update 76, April 2024

Update 76 amends the *Criminal Trial Courts Bench Book* to incorporate recent case law and legislative developments. The following chapters have been revised:

**Causation**

- **[2-305] Causation generally** to add a reference to *Baker v R* [2023] NSWCCA 262 which held that causation can be established where the accused's act or omission accelerates death, even where death was inevitable because of a pre-existing condition. The suggested direction has also been amended to provide for this factual circumstance.

**Complicity**

- **[2-755] Notes** to suggested direction for joint criminal enterprise to add reference to *The King v Rohan (a pseudonym)* [2024] HCA 3 regarding the Crown's obligation to establish knowledge of offence elements only and not additional "essential facts".

**Joint trials**

- The chapter at **[3-350]**ff has been substantially revised and rewritten to incorporate the principles governing joint trials contained in *McNamara v The King* [2023] HCA 36.

**Onus and standard of proof**

- **[3-615] Notes** to suggested direction regarding essential Crown witness ("*Murray* direction") (in cases other than prescribed sexual offences) to include discussion of multiple accused and add reference to *Huxley v The Queen* [2023] HCA 40.

**Complaint evidence**

- **[5-020] Suggested direction — where complaint evidence admitted under s 66(2)** to update the suggested direction.

**Maintain unlawful sexual relationship with a child**

- **[5-720] Suggested direction — maintain unlawful sexual relationship with child** updated to address scenarios where either the unlawful sexual acts are also alternately charged as separate offences, or where they are not alternately charged.

**Sexual intercourse without consent — until 31 May 2022**

- **[5-820] Suggested direction — sexual intercourse without consent (s 61I) where alleged offence committed on or after 1 January 2008 and before 1 June 2022** to update the suggested direction.

**Manslaughter**

- **[5-6250] Manslaughter by criminal negligence** to add reference to *Baker v R* [2023] NSWCCA 262 regarding causation in cases of manslaughter by criminal negligence.

**Judicial Commission of New South Wales**

# CRIMINAL TRIAL COURTS BENCH BOOK

**Update 76**

**April 2024**

**FILING INSTRUCTIONS OVERLEAF**

*Judicial Commission of New South Wales*

*Level 5, 60 Carrington Street, Sydney NSW 2000*

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# FILING INSTRUCTIONS

## Update 76

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# Causation

## [2-300] Introduction

Last reviewed: April 2024

Causation can arise in two distinct but related issues:

(a) Did the act of the accused cause the harm the subject of the charge?

(b) Was there an act of the accused that caused the harm?

See the discussion in *R v Katarzynski* [2005] NSWCCA 72 at [17].

In (a) there is no dispute as to the act of the accused but the issue is whether it caused the harm occasioned to the victim. In (b) the issue is whether there was any act of the accused that caused the harm occasioned to the victim. In relation to this aspect of causation see **Voluntary act of the accused** at **[4-350]**ff.

## [2-305] Causation generally

Last reviewed: April 2024

Causation is a question of fact. There can be more than one cause of the injury suffered by the victim. It is wrong to direct the jury that they should search for the principal cause of death: *R v Andrew* [2000] NSWCCA 310 at [60].

As to causation generally see: *Royall v The Queen* as summarised in *Cittadini v R* [2009] NSWCCA 302 at [81]–[83]; *Burns v The Queen* (2012) 246 CLR 334 at [86]–[87]; *Reynolds v R* [2015] NSWCCA 29 at [41]–[43]; *Criminal Practice and Procedure NSW* at [6-900]; *Criminal Law (NSW)* at [CLP.380]ff.

In a murder trial, proof of the element that the act of the accused caused death requires the jury to be satisfied beyond reasonable doubt that the act of the accused was a "substantial or significant cause of death" or a "sufficiently substantial" cause: *Swan v The Queen* (2020) 269 CLR 663 at [24].

In many cases of murder, however, particularly where a single act such as a shooting or stabbing is alleged, it may be unnecessary to elaborate the requirement that the victim's death should have been caused by the accused: *Royall v The Queen* at 412 per Deane and Dawson JJ.

Where appropriate the jury should be directed to consider whether there is any act of the victim that broke the chain of causation between the act of the accused and the injury inflicted upon the victim: *McAuliffe v The Queen* (1995) 183 CLR 108. In *Burns v The Queen* it was said at [86]: "Absent intimidation, mistake or other vitiating factor, what an adult of sound mind does is not in law treated as having been caused by another."

As to cases where the act of the deceased in fleeing the accused resulted in death, see *Royall*, above, *McAuliffe*, above, *Adid v R* (2010) VR 593, *R v RIK* [2004] NSWCCA 282. In such cases the question is whether the act of the deceased broke the chain of causation by responding to the threat posed by the accused in an unreasonable or irrational manner. Where there are a number of causes of death as a result of more

than one life-threatening injury including that allegedly inflicted by the accused or where there have been a number of persons who have inflicted injuries upon the victim the terminology more appropriately used is whether an act of the accused was an "operating and substantial" cause of death: see *R v Lam* (2008) 185 A Crim R 453. The suggested direction has been framed accordingly.

It is not necessary to establish the accused's acts were "the only cause of death, the most important cause of death or even the only important cause of death": *Swan v The Queen* (2020) 269 CLR 663 at [27]. Causation can be established where the accused's act or omission accelerates death, even where the deceased would have died in any event from a pre-existing disease or condition: *Baker v R* [2023] NSWCCA 262 at [55], [58]; *R v Evans (No 2)* [1976] VR 523 at 527–528; *Krakouer v Western Australia* (2006) 161 A Crim R 347 at [32]–[33], [39].

## [2-310] Suggested direction — causation generally

Last reviewed: April 2024

There is an issue as to whether the accused's [*acts/omissions*] caused the [*nature of harm*] suffered by [*the victim*]. This is a question of fact for you to decide. The Crown must prove beyond reasonable doubt that the accused caused this harm to [*the victim*].

The Crown says the accused caused this injury because [*indicate Crown allegations*]. The accused says you would not be satisfied beyond reasonable doubt of this because [*summarise defence arguments*].

In deciding whether the Crown has proved this fact, you will apply your common sense to all the facts surrounding the infliction of [*the harm*] to [*the victim*]. But you should appreciate that you are deciding whether to attribute legal responsibility to an accused person for the harm suffered by another person in what is a criminal prosecution. This is not an issue of philosophical or scientific proof. You are deciding a more practical issue, that is, whether an accused person has committed a crime involving the causing of the harm alleged to another person.

The Crown will have proved this fact if you are satisfied beyond reasonable doubt that an [*act/omission*] of the accused substantially or significantly contributed to [*the harm*] allegedly suffered by [*the victim*]. It is not sufficient if the [*act/omission*] was merely coincidental with the suffering of [*the harm*] by [*the victim*] or was insignificantly connected with it. Whether the [*act/omission*] of the accused relied upon by the Crown substantially or significantly contributed to [*the harm*] suffered by [*the victim*] is a matter of fact for you to decide on a common sense basis.

**[*If appropriate — where evidence of more than one cause of harm***

There can be more than one cause for [*the harm*] suffered by [*the victim*] arising from the facts before you. You may find [*the harm*] to [*the victim*] was a result of [*list possible causes*]. You do not have to determine what, if any, was the major or direct cause of that harm. It is sufficient that you find beyond reasonable doubt that an [*act/omission*] of the accused remained an operating and substantial cause of [*the harm*] allegedly suffered by [*the victim*] despite the other injuries they suffered. You make this decision applying your common sense but appreciating that you are concerned with the determination of the criminal responsibility of an accused person for that harm.**]**

**[*If appropriate — where it is alleged the victim had a prior existing physical injury*

The accused relies on evidence that at the time of the accused's alleged [*act/omission*] [*the victim*] suffered from a physical condition of which the accused was then unaware … [*identify the evidence relied upon by the accused and any evidence on this issue relied upon by the Crown*].

Even if you find [*the victim*] suffered from such a physical condition and that the accused was not aware of it at the time of the alleged [*act/omission*], it would still be open to you to find that the Crown has established beyond reasonable doubt that the [*act/omission*] of the accused caused [*the harm*] allegedly inflicted upon [*the victim*] provided the accused's [*act/omission*] substantially or significantly contributed to that [*harm*]. The law is that, if a person [*does an act/omits to do an act*] such as is alleged here, then they must take or accept the victim as they were at the time of the [*act/omission*]. That is to say an accused person cannot seek to excuse themself from responsibility for the harm inflicted upon another person only because the harm was due to some physical condition or weaknesses from which the victim suffered at the time and of which the accused person was unaware.**]**

**[*If appropriate – where it is alleged the accused accelerated the victim's death*

The accused relies on evidence that at the time of the accused's alleged [*act/omission*] [*the victim*] suffered from a pre-existing [*condition/disease*] that made death inevitable [*identify the evidence presented about the condition/disease*].

Even if you find [*the victim*] suffered from a pre-existing fatal [*condition/disease*] from which they would have died in any event, it would still be open to you to find the Crown has established beyond reasonable doubt the [*act/omission*] of the accused caused [*the victim's*] death provided you are satisfied the [*act/omission*] accelerated [*the victim's*] death, and that it was a substantial and significant cause.**]**

**[The next page is 233]**

# Complicity

## [2-700] Introduction

Last reviewed: September 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; LexisNexis, *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: September 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 identity of the principal offender is not an element of the offence; nor does it need to be proved the accessory knew the personal identity of the principal offender: *Jaghbir v R* [2023] NSWCCA 175 at [195]–[196]; *King v The Queen* (1986) 161 CLR 423 at 434.

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 they 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, the person 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 they are 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 they encourage and/or assist [*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 the accused must believe that what they are 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 they 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) the accused 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 their [*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: September 2023

As to the distinction between an aider and abettor, and a principal: see *R v Stokes* (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* 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 they 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: September 2023

As to accessory after the fact, see s 347 *Crimes Act 1900* 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 they assisted [*the principal offender*] after they 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 themself 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 they 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 them.

**[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 they have not witnessed the occurrence of that event personally. A person can accept what they are 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 they are 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 they believe 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 them.

## Joint criminal enterprise and common purpose

### [2-740] Joint criminal liability

Last reviewed: September 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 they foresee 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: April 2024

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 elements 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 the accused 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.

## [2-755] Notes

Last reviewed: April 2024

1. The common law principle of joint criminal enterprise was abolished in Victoria and replaced by statutory versions contained in ss 323(1)(c) and 324 of the *Crimes Act 1958* (Vic). It was held in *The King v Rohan (a pseudonym)* [2024] HCA 3 that complicit liability under these provisions did not require the Crown to prove beyond reasonable doubt any "essential facts" of the offence that were not actual elements of the offence. Although NSW continues to rely on common law principles of complicit liability (see *TWL v R* [2012] NSWCCA 57 at [30]–[40]), this aspect of *Rohan* does not contradict NSW decisions.

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

Last reviewed: April 2024

**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 elements 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 the accused 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 they 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 they 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/she or they 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: April 2024

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) 262 CLR 268, 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

Last reviewed: April 2024

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: April 2024

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 they do withdraw, they cease 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 they can reasonably perform to undo the effect of their 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 their 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, they must take all reasonable and practicable steps to prevent the commission of the crime and to frustrate the joint enterprise of which they had been a member. Otherwise they 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 they 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 they did so intend, the accused did not take such action as they 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 they 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]**

# Joint trials

***Criminal Procedure Act 1986* (NSW), s 21(2)**

## [3-350] Introduction

Last reviewed: April 2024

Section 21 provides that a court can order separate trials if it is of the opinion an accused may be prejudiced or embarrassed in their defence by being charged with more than one offence in the same indictment, or for any other reason it is desirable the accused be tried separately for any one or more offences charged in an indictment. Sections 21 and 29 (which provides for when more than one offence may be heard at the same time) have different provenances and distinct operations and should not be conflated. Section 21 applies to proceedings on an indictment, however s 29 does not: *McNamara v The King* [2023] HCA 36 at [30]–[33].

Some risk of forensic prejudice to an accused in a joint trial is inherent and is not of itself inconsistent with the overall interests of justice supporting a joint trial. Prejudice to a co-accused will not result in the ordering of a separate trial if it is amenable to nullification by jury directions: *McNamara v The King* at [42]; [101]; *R v Henry* [2008] NSWCCA 248 at [12]. Given matters of public policy and principle, even substantial prejudice to a co-accused of a kind not readily cured by directions will not result in the ordering of a separate trial "as a matter of course": *McNamara v The King* at [42]; [99]. To justify the ordering of a separate trial, the particular prejudice to a co-accused must occasion "positive injustice": *McNamara v The King* at [42]; *Caleo v R* [2021] NSWCCA 179 at [137]–[138].

The relevant prejudice is the danger the jury may misuse the evidence on a basis logically unconnected with the issues at trial, by way, for example, "appealing to the jury's sympathies, arousing a sense of horror or provoking an instinct to punish": *DS v R* [2023] NSWCCA 151 at [85]; *Castagna v R* [2012] NSWCCA 181 at [67]. Once the court determines an accused may be prejudiced or embarrassed in their defence, the discretion to order separate trials is affected by a number of considerations such as the likely degree of prejudice or embarrassment, the ability to cure or mitigate any prejudice by judicial direction; the extent of the severance required; the cross-admissibility of evidence; the impact of severance on witnesses who may be required to give evidence on two or more occasions; the complexity of directions required in order to ameliorate any prejudice or embarrassment, and the nature of the offence or offences to be severed: *DS v R* at [86]; *Allen v R* [2020] NSWCCA 173 at [55].

As to the public policy considerations favouring joint trials, see *Webb v The Queen* (1994) 181 CLR 41 per Toohey J and *McNamara v The King* at [37]–[41]; [99]. Generally, there will or should be a joint trial when co-accused raise "cut-throat" defences — when each seeks to blame each other for their liability in the joint criminal enterprise: *Webb v The Queen* at [89]; *R v Hawkins* [2023] NSWSC 1201 at [82]. For the principles to be applied in deciding to grant a separate trial, see *Ross v R* [2012] NSWCCA 207 at [24]–[26] and *R v Middis* (unrep, 27/3/1991, NSWSC) at 5; *McNamara v The King* at [42].

See generally *Criminal Practice and Procedure NSW* at [2-s 21.15] and *Criminal Law (NSW)* at [CPA.21.20]ff.

Where the evidence at the trial is admissible against each accused, it is not necessary for the judge to address the case against each separately: *Huynh v The Queen* [2013] HCA 6 at [51].

It is convenient to approach the admissibility of evidence on the basis that the jury should assume that the evidence is admissible against all of the accused unless told otherwise. See relevant sections of **Suggested (oral) directions for the opening of the trial following empanelment** at **[1-490]**. The Crown should be required to indicate to the jury, when calling a particular piece of evidence or a particular witness, if it is not tendered against all the accused and the limited basis upon which it is being tendered. The trial judge should direct the jury as to the limited use to be made of evidence tendered against an individual accused, see *R v Masters* (1992) 26 NSWLR 450 at 455. This is particularly so where the evidence is of an admission implicating a co-accused. Where evidence tends to inculpate one accused and exculpate another, see **[3-615] Notes**, note 10. As to the admissibility of evidence adduced by one accused in the trial of another see *McNamara v The King* at [1], [53]–[75].

It is suggested that directions as to the admissibility of evidence against a particular accused and the limited use that can be made of the evidence be given at the time the particular evidence is led before the jury. Later the summing up should make it clear what is the particular case against each of the accused and direct the jury against using evidence admitted against one accused as evidence against another accused.

It has not been thought inappropriate to refer to multiple accused's as "co-accused" who are "jointly charged" on a "joint indictment" and to refer to the resultant trial, in the event of pleas of not guilty, as a "joint trial". It is also appropriate to refer to the Crown "case" against each co-accused and the defence "case" for each co-accused: *McNamara v The King* at [35]–[36].

## [3-360] Suggested direction — joint trial

As you are well aware by now this is a joint trial of [*number*] accused. I told you at the outset of the trial that this was simply a matter of administrative convenience. But I also told you that you have to consider the case against each accused person separately when considering your verdicts. You will be required to return a separate verdict in respect of each individual accused. You should not, in your deliberations, try to determine whether [*both/all*] of the accused are guilty without considering them as individuals and giving each separate consideration. Simply because the Crown allegation is that they are [*each/all*] guilty of the same offence, it does not follow that you approach your deliberations in the same way.

*[If appropriate add*

There is nothing in law, or for that matter in common sense, which requires you to return the same verdict in respect of each individual accused.]

*[Where the evidence against each accused is different add*

You should understand by now that the evidence relied upon by the Crown to prove the guilt of each accused differs. You must not during the course of your deliberations take

into account in deciding whether the Crown has proved its case against one accused, use evidence that was tendered only against the [*other/another*] accused. It would be a breach of your duty to decide the case according to law, as well as grossly unfair, to use evidence against an accused which the Crown did not rely upon in proof of its case against [*him/her*].

*Detail how the case against the individual accused differs by indicating what evidence is, or is not, admissible against a particular accused.*]

**[The next page is 481]**

# Onus and standard of proof

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

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

Last reviewed: September 2023

**Onus of proof**

As this is a criminal trial the burden or obligation of proof of the guilt of the accused is placed squarely on the Crown. That burden rests upon the Crown in respect of every element or essential fact that makes up the offence charged. That burden never shifts to the accused. There is no obligation on the accused to prove any fact or issue that is in dispute. It is not for the accused to prove their innocence but for the Crown to prove their guilt.

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

[***Note**: For situations where there is an onus of proof on the accused see specific instances, such as supplying drugs at [5-6700], substantial impairment at [6-570], mental illness at [6-230].*]

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

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

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

**Standard of proof**

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

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

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

The burden of proof on the Crown does not mean the Crown must prove beyond reasonable doubt every single fact that is in dispute but the Crown must prove the elements of the charge and must prove those elements beyond reasonable doubt.

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

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

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

It is important you understand that the accused must be found not guilty if their guilt has not been proved beyond reasonable doubt and that they are entitled to the benefit of any reasonable doubt you may have at the end of your deliberations.

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

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

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

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

## [3-603] Notes

Last reviewed: September 2023

1. There is longstanding authority for the proposition that, except in certain limited circumstances, no attempt should be made to explain or embellish the meaning of the phrase "beyond reasonable doubt": *Green v The Queen* (1971) 126 CLR 28 at 32–33; *La Fontaine v R* (1976) 136 CLR 62 at 71; *R v Reeves* (1992) 29 NSWLR 109 at 117; *Raso v R* [2008] NSWCCA 120 at [20]. If, in an address, counsel suggests that fantastic or unreal possibilities should be regarded by the jury as affording a reason for doubt, the judge can properly instruct the jury that fantastic or unreal possibilities ought not to be regarded by them as a source of reasonable doubt: *Green v The Queen* at 33; or as put in *Keil v The Queen* (1979) 53 ALJR 525, "fanciful doubts are not reasonable doubts". It is generally undesirable to direct a jury in terms which contrast proof beyond reasonable doubt with proof

beyond any doubt: *The Queen v Dookheea* (2017) 262 CLR 402 at [28]. However, an effective means of conveying the meaning of the phrase "beyond reasonable doubt" to a jury may be by contrasting the standard of proof beyond reasonable doubt with the lower civil standard of proof on the balance of probabilities: *The Queen v Dookheea* at [41].

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

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

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

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

Last reviewed: September 2023

1. In *Liberato v The Queen* (1985) 159 CLR 507 at 515, Brennan J in his dissenting judgment (Deane J agreeing) spoke of a case in which there is evidence relied upon by the defence conflicting with that relied upon by the Crown. In such a case, a jury might consider "who is to be believed". His Honour said it was essential to ensure

the jury were aware that deciding such a question in favour of the prosecution does not conclude the issue as to whether guilt has been proved beyond reasonable doubt. The jury should be directed that:

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

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

2. In *De Silva v The Queen* (2019) 268 CLR 57, the High Court noted that there were differing views as to whether a *Liberato* direction was appropriate in a case where the conflicting defence version of events was not given on oath by the accused, but was before the jury, typically in the accused's answers in a record of interview and said such a direction should be given:

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

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

3. The *Liberato* direction in the suggested direction at **[3-600]** is modelled on what was proposed by the High Court in *De Silva v The Queen* at [12]. A *Liberato* direction should be given in any case where the trial judge perceives there is a real risk the jury may be left with the impression the evidence the accused relies on will only give rise to a reasonable doubt if they believe it is truthful, or that a preference for the complainant's evidence is sufficient to establish guilt: at [9]; see also *Haile v R* (2022) 109 NSWLR 288 at [1] per Bell CJ (Ierace J agreeing) and [73] per Bellew J (Bell CJ , Ierace J agreeing).

4. The *Liberato* direction covers three points on the spectrum of belief regarding what the accused has said — positive belief (first aspect), positive disbelief (third aspect), and neither actual belief nor rejection of the accused's account (second aspect): *Park v R* [2023] NSWCCA 71 at [102]–[103]. In *Park v R*, the second aspect of the direction was defective as it was not framed in terms of a jury, though not positively believing the accused's account, thinking the account might be true. Nor did the direction make it clear there was a command to acquit in such circumstances: at [103]–[104].

5. It is never appropriate to frame the issue for the jury's determination as one which involves making a choice between conflicting Crown and defence evidence. The issue is always whether the Crown has proved its case beyond reasonable doubt: *Haile v R* at [72]. See [76]–[78] as an example of how the failure to give a *Liberato* direction can result in error.

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

Last reviewed: September 2023

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

> The Crown seeks to prove the guilt of the accused with a case based largely or exclusively on the evidence of [*essential Crown witness*].
>
> Accordingly, unless you are satisfied beyond reasonable doubt [*essential Crown witness*] is both an honest and accurate witness in the account they have given, you cannot find the accused guilty. Before you can convict the accused, you should examine the evidence of [*essential Crown witness*] very carefully to satisfy yourselves you can safely act upon that evidence to the high standard required in a criminal trial.
>
> I am not telling you to be cautious because of any personal view I have of the [*essential Crown witness*]. I told you at the outset of this summing-up that I would not express my personal opinions on the evidence. But in any criminal trial, where the Crown case relies solely or substantially upon the evidence of a single witness, a jury must always approach that evidence with particular caution because of the onus and standard of proof placed upon the Crown.
>
> I am not suggesting that you are not entitled to convict the accused upon the evidence of [*essential Crown witness*]. Clearly you are entitled to do so but only after you have carefully examined the evidence and satisfied yourself that it is reliable beyond reasonable doubt.
>
> In considering [*essential Crown witness'*] evidence and whether it does satisfy you of the accused's guilt, you should of course look to see if it is supported by other evidence.

## [3-615] Notes

Last reviewed: April 2024

### General direction

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

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

   *R v Murray* was decided when s 405C(2) (rep) *Crimes Act 1900*, which stated a judge was not required to give a warning in prescribed sexual offence trials that it would be unsafe to convict on the complainant's uncorroborated evidence, was in force. In 2007, this was replaced by s 294AA *Criminal Procedure Act 1986* which prohibits such a warning being given at all in such cases.

2. The High Court has held that a *Murray* direction should be given in appropriate cases where there is a perceptible risk of miscarriage of justice if the jury is not warned of the need to scrutinise the evidence of a complainant with care before

arriving at a conclusion of guilt: *Robinson v The Queen* (1999) 197 CLR 162 at [25]–[26]. The direction "emphasises what should be clear from the application of the onus and standard of proof: if the Crown case relies upon a single witness then the jury must be satisfied that the witness is reliable beyond reasonable doubt": *Smale v R* [2007] NSWCCA 328 at [71] per Howie J.

3. This does not mean that in cases where there is one principal witness in the Crown case a *Murray* direction is automatically required — if that witness' evidence is corroborated by other evidence in the trial, such as documentary evidence, forensic evidence or other physical evidence (for example, DNA results implicating the accused) there is no basis for a direction: *Gould v R* [2021] NSWCCA 92 at [134], [136]; cf *Ewen v R* [2015] NSWCCA 117 at [104].

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

**Direction in prescribed sexual offence matters**

5. The application of *Murray* to prescribed sexual offences (defined in s 290 *Criminal Procedure Act*) has been significantly modified by s 294AA *Criminal Procedure Act*. This was considered in *Ewen v R* [2015] NSWCCA 117 (see point 7 below). Cases decided before the enactment of s 294AA, where the appellant was charged with a prescribed sexual offence, are no longer good law.

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

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

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

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

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

8. This does not mean that directions appropriate to the circumstances of the individual case cannot be given as envisaged in *Longman v The Queen* (1989) 168 CLR 79: *Ewen v R* at [143]. A direction would not contravene s 294AA if

it concerned specific evidence in the case, including weaknesses or deficiencies as described in *Longman v The Queen*; *Robinson v The Queen* (1999) 197 CLR 162 and *Tully v The Queen* (2006) 230 CLR 234 — particularly weaknesses or deficiencies that are apparent to the judge but may not be so apparent to the jury. Neither would a direction concerning delay in bringing the case (although note s 165B *Evidence Act 1995* regarding delay). Nor would a direction which addressed a scenario where the evidence indicated that others were present and were or may have been in a position to observe what took place, and were not called to give evidence: *Ewen v R* at [143]–[144]. The latter direction would, however, have to be consistent with *Mahmood v Western Australia* (2008) 232 CLR 397 at [27]. See further **Witnesses — not called** at **[4-370]**, **[4-375]**.

9. In *Williams v R* [2021] NSWCCA 25, the Court held that the trial judge (in a judge-alone trial) correctly gave a *Murray* direction without breaching s 294AA because no mention was made of the complainant's evidence being uncorroborated, only that the tribunal of fact had to be satisfied beyond reasonable doubt that the complainant was an honest and reliable witness whose evidence was "accurate in vital respects": [143]. See also *AB v R* [2022] NSWCCA 104, where the Court concluded there was no error in the trial judge's direction to consider other evidence, including evidence of complaint, that may "support" the complainant's evidence and that, in that context, her Honour's reference to *Ewen* rather than *Murray* was correct: at [62]–[63].

**Multiple accused**

10. Where two or more accused are tried together and the evidence of a witness inculpates one accused and exculpates another, the trial judge should give directions which distinguish between the approach to be taken in each of the two cases. In respect of the case against the accused for which the evidence is *inculpatory* and constitutes the only evidence of an element of the offence, it is generally necessary to direct the jury that they should only act on the evidence if they are satisfied beyond reasonable doubt that the evidence is truthful, reliable and accurate. However, in respect of the case against the accused for which the evidence is *exculpatory*, the judge should generally direct the jury that they only need to decide whether the witness' evidence gives rise to a reasonable doubt. For an example of a case where this issue arose see *Huxley v The Queen* [2023] HCA 40 (where although the appeal was dismissed, it was accepted that there was an important distinction to be drawn between the two instances).

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

Last reviewed: September 2023

**Crown witnesses**

1. A motive to lie or to be untruthful, if it is established, may "substantially affect the assessment of the credibility of the witness": ss 103, 106(2)(a) *Evidence Act 1995*. Where there is evidence that a Crown witness has a motive to lie, the jury's task is to consider that evidence and to determine whether they are nevertheless satisfied that the evidence given is true: *South v R* [2007] NSWCCA 117 at [42]; *MAJW v R* [2009] NSWCCA 255 at [31]. The jury's task does not include speculating whether

there is some other reason why the Crown witness would lie: *Brown v R* [2008] NSWCCA 306 at [50]. Nor does it include acceptance of the Crown witness's evidence unless some positive answer to that question is given by the accused: *South v R* at [42].

2. If the defence case directly asserts a motive to lie on the part of a central Crown witness, the summing-up should contain clear directions on the onus of proof, including a direction that the accused bears no onus to prove a motive to lie and that rejection of the motive asserted does not necessarily justify a conclusion that the evidence of the witness is truthful: *Doe v R* [2008] NSWCCA 203 at [58]; *Jovanovic v R* (1997) 42 NSWLR 520 at 521–522 and 535. The jury should also be directed not to conclude that if the complainant has no motive to lie then they are, by that reason alone, telling the truth: *Jovanovic v R* at 523.

3. Where the defence does not directly raise the issue, it is impermissible for the prosecutor to submit (for the purpose of promoting the acceptance of a Crown witness as a witness of truth) that the accused did not advance a motive to lie. The jury should not be given the impression that the accused bears some onus of proving the existence of a motive for the fabrication of the allegations against them: *Doe v R* at [59]–[60].

**The accused**

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

5. The evidence of an accused person is subject to the tests which are generally applicable to witnesses in a criminal trial: *Robinson v The Queen* (1991) 180 CLR 531 at 536. However, the trial judge should refrain from directing the jury that the accused's interest in the outcome of the proceedings is a factor relevant to assessing his or her credibility as a witness: *Robinson v The Queen* at 535–536; *MAJW v R* [2009] NSWCCA 255 at [37]–[38]. *Robinson v The Queen* did not create a new rule. It applied a more general principle that directions should not deflect the jury from its fundamental task of deciding whether the prosecution had proved its case beyond reasonable doubt: *Hargraves v The Queen* (2011) 245 CLR 257 at [46]. Nevertheless trial judges must not instruct juries in terms of the accused's interest in the outcome of the proceedings whether as a direction of law or as a judicial comment on the facts: *Hargraves v The Queen* at [46]. A direction of that kind seriously impairs the fairness of the trial and undermines the presumption of innocence: *Robinson v The Queen* at 535.

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

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

Last reviewed: September 2023

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

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

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

**[The next page is 531]**

# Complaint evidence

## [5-000] Introduction

Last reviewed: September 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 themself 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 s 66 as relevant to any offence provided it is first-person hearsay under s 62.

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.

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: September 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* 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: April 2024

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 1995*, 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 1986* as suggested at **[5-050]** may be incorporated where indicated. A judge may give a direction under s 293A or s 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 [*a person or people*] about the alleged assault by the accused. This is referred to as "complaint evidence".

[*Set out the evidence of complaint.*]

It is for you to determine whether there was complaint by the complainant.

If you determine that complaint was made, the following direction/s 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 they described. So, not only would you have the complainant's evidence before you about being assaulted by the accused, you would also have the description of the assault that was given to [*witness*].

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

**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 complainant complained to [*witness*] when the complainant did **[*add if relevant:* *and in the circumstances in which the complainant did*]** makes it more likely the complainant is telling you the truth about having been assaulted by the accused.

The defence disputes this [*set out defence arguments*].

**[*Where the evidence is limited to solely 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*].**]**

**[*If appropriate add:*** 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*].**]**

**[*Where the offence is a prescribed sexual offence (see [5-045] Direction where difference in complainant's account — prescribed sexual offences only – s 293A Criminal Procedure Act 1986) add:***

The defence case is that [*witness*] was not telling the truth, that there were gaps in the account [*witness*] gave, and that there were differences and inconsistencies between the witness's accounts.

[*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 their truthfulness and reliability.**]**

[*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: September 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: September 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: September 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: September 2023

The defence case is that [*name of witness*] was not telling the truth, that there were gaps in the account [*the witness*] gave, and that there were differences and inconsistencies between the witness's accounts.

[*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 their truthfulness and reliability.

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

Last reviewed: September 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 complainant*] claims the accused did to them until they 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 complainant*] claims the accused did to [*the complainant*].]

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 complainant*] 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 complainant*] 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 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*].

This is a matter which you should consider.]

## [5-060] Notes

Last reviewed: September 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].

Section 294(2)(c) does not require the giving of a direction that delay in complaint is *not* relevant to a complainant's credibility. Whether delay is relevant to that issue is open for a jury to consider, subject to any specific direction that may be given under s 294(2)(c): *Park v R* [2023] NSWCCA 71 at [118].

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

Last reviewed: September 2023

Where s 165B *Evidence Act 1995* 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: September 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 themself by testing prosecution evidence [*or bringing forward evidence*] in their own case, to establish a reasonable doubt about 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 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 themself to establish a reasonable doubt about their 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 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 their evidence by pointing to circumstances which may contradict [*the complainant*]. Had the accused learned of the allegations at a much earlier time [*the accused*] may have been able to recall relevant details which could have been used by their counsel in cross-examination of the complainant.

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

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 accused*] has been prejudiced in the conduct of their 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 their defence.

**[The next page is 731]**

# Maintain unlawful sexual relationship with a child

***Crimes Act 1900* (NSW), s 66EA**

## [5-700] Introduction

Last reviewed: September 2023

Under s 66EA(1) of the *Crimes Act 1900*, it is an offence for an adult to maintain an unlawful sexual relationship with a child. Section 66EA, in its current form, commenced on 1 December 2018. It is in the form recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse and is largely modelled on the Queensland offence found in s 229B of the *Criminal Code* (Qld).

The new s 66EA extends to relationships existing wholly or partly before 1 December 2018, provided the accused's acts were unlawful sexual acts during the period of the relationship: s 66EA(7). "Unlawful sexual act" is defined as any act that constitutes, or would constitute, one of the numerous sexual offences listed in s 66EA(15).

## [5-710] Suggested procedure before empanelling jury and formally arraigning accused

Last reviewed: September 2023

Given the nature of this offence, it is expected the Crown would adopt the preferable, and more straightforward, course of including any alternative counts on the indictment as it is anticipated the question of alternative verdicts will arise in every case. It is also anticipated that the unlawful sexual acts making up the s 66EA offence would be particularised in the indictment.

However, if the indictment only contains a substantive s 66EA count, parties must be asked, preferably before arraignment, whether, and what, alternative verdicts will be relied on because the directions at the end of the trial must address the elements of those offences comprising the unlawful sexual acts the subject of the charge.

It is also good practice to identify with the parties precisely what is in issue in the trial, as the content of the summing-up may vary significantly.

Whether or not separate tendency directions may be required in an individual case should also be discussed with the parties as such a direction may be necessary when addressing alternative verdicts.

## [5-720] Suggested direction — maintain unlawful sexual relationship with child

Last reviewed: April 2024

The following direction is suggested largely on the basis of the text of s 66EA and the five-judge bench decision of *MK v R* [2023] NSWCCA 180. The suggested direction should be modified as considered appropriate.

The accused is charged with maintaining an unlawful sexual relationship with the complainant between the dates identified on the indictment.

Before you can find the accused guilty of the offence, the Crown must prove beyond reasonable doubt each of the following elements:

1. that the accused, being an adult
2. maintained an unlawful sexual relationship with the complainant
3. who was a child.

If you are not satisfied the Crown has proved each of these elements beyond reasonable doubt then you must find the accused not guilty.

The law says an adult is a person of or above the age of 18 years and that a child is a person who is under the age of 16 years. In this case, there is no dispute that the accused was an adult and the complainant was a child under 16 during the period specified on the indictment. [*This will require adaptation if the complainant's age is in dispute*].

A relationship is a way of describing the nature of the connection between two or more people such as parent and child, teacher and student or coach and player. [*Where applicable*: In the present case there is no dispute the relationship that existed between the complainant and the accused was one of eg, father and daughter.]

An unlawful sexual relationship is a relationship that involves two or more unlawful sexual acts over any period. An "unlawful sexual act" means an act that constitutes an offence of a sexual nature.

The critical issue is whether the relationship of [*for example, father and daughter which the Crown submits existed*], included an unlawful sexual relationship. To answer that question, you must be satisfied beyond reasonable doubt that the accused committed two or more unlawful sexual acts with or towards the complainant during the period identified in the indictment.

The Crown case is that the unlawful sexual acts in this case are [*summarise the evidence the Crown relies on to prove the alleged unlawful sexual acts and summarise the elements of each of those offences*]. **See s 66EA(2)**.

[*If the circumstances of the particular case require it*: Some sexual offences require the Crown to prove that the complainant was not consenting. But where the alleged offence involves a child, consent is irrelevant. The law says that children cannot consent to sexual activity.]

[*If the Crown has charged alternate sexual acts*: All of the unlawful sexual acts in this case have been charged in the alternative to Count 1 as separate offences. Each alternate count has elements which I have identified in my directions (or will identify in my directions).]

[*If the Crown has not charged alternate sexual acts*: None of the unlawful sexual acts in this case have been charged (in the alternative to Count 1) as separate offences.

Therefore, although you need to be satisfied that two or more of these acts occurred, you do not need to be satisfied that each unlawful sexual act occurred at a specific time or place. However, you must be satisfied that the accused committed at least one unlawful sexual act in New South Wales.]

You also do not need to be satisfied that the Crown has proved that every unlawful sexual act alleged against the accused occurred. All you need to be satisfied of beyond reasonable doubt is that the accused committed two or more of the unlawful sexual acts with or towards the complainant. Further, you do not all need to agree about which two unlawful sexual acts constitute the unlawful sexual relationship. This means **[***give examples from Crown case such as*: some of you might be satisfied beyond reasonable doubt that the acts described in 1 and 3 took place, while some of you might be satisfied beyond reasonable doubt that the events described in 4 and 5 took place**]**. In other words, provided you are all satisfied that at least two unlawful sexual acts took place, even if you do not agree on which two (or more) acts have been proved beyond reasonable doubt, that is sufficient to prove the element of unlawful sexual relationship. If you have to consider whether the Crown has established one of the alternative counts on the indictment then the situation is different and I will talk to you about the approach you must take then. **See s 66EA(5).**

[*Where applicable if certain of the unlawful sexual acts were committed outside of NSW*]: In this case, the Crown case is that some of the unlawful sexual acts did not occur in New South Wales but in [*identify the different location/s of unlawful sexual acts*]. Before you can find the accused guilty, you must be satisfied beyond reasonable doubt that *at least* one unlawful sexual act occurred in New South Wales. You cannot find the accused guilty if all the unlawful sexual acts you are satisfied occurred took place outside New South Wales. **See s 66EA(3)**]

[*Summarise the defence case on the unlawful sexual acts*. *For example, none of these acts happened at all. There was no unlawful sexual relationship at all. At no time did the accused sexually assault the complainant in any way*].

**Alternative verdicts – s 66EA(13)**

**See note 11 below which addresses issues for consideration when determining the appropriate direction with respect to alternative verdicts**

If the Crown has failed to prove one of the essential elements of the offence, then you must find the accused not guilty and will be required to return verdicts in respect of the alternative charges. I will now explain what the Crown must prove before you can return a verdict of guilty in relation to those charges.

## [5-730] Notes

Last reviewed: September 2023

1. An offence against s 66EA is a "prescribed sexual offence": see s 3, *Criminal Procedure Act 1986*. Accordingly, those provisions of the *Criminal Procedure Act* and the *Crimes Act* concerning how complainants may give evidence apply: see further **Evidence given by alternative means** at **[1-360]**ff, and **Closed court, suppression and non-publication orders** at **[1-349]**.
2. An "unlawful sexual relationship" is defined as a relationship in which an adult engages in two or more unlawful sexual acts with or towards a child over

any period: s 66EA(2). See *DPP (NSW) v Presnell* (2022) 108 NSWLR 407 for a discussion of the phrase "with or towards" in the context of sexual act offences under *Crimes Act*, s 66DC(a). As the suggested direction indicates, the summing-up must also address the elements of the offences which comprise the alleged unlawful sexual acts: *JJP v R* [2021] SASCA 53 at [157].

3. An "unlawful sexual act" is comprehensively defined in s 66EA(15) as an act that constitutes, or would constitute, one of the many offences listed and includes former sexual offences which are identified in Column 1 of Sch 1A of the Act.

4. Section 66EA requires proof of the existence of a relationship "in which" two or more unlawful sexual acts were committed: *MK v R* [2023] NSWCCA 180 at [6], [99]–[100]; *R v Mann* (2020) 135 SASR 457 at [21]. The offence may involve an established relationship such as parent and child, teacher and student or coach and player which is corrupted by the commission of two or more unlawful sexual acts within that relationship. In some cases, the "relationship" might be something that arises from the facts and circumstances of the commission of the unlawful sexual acts themselves so that the provision excludes from the scope of the offence a person who commits unlawful sexual acts with a child with whom they have no relationship: *MK v R* at [18], [95].

5. The word "maintains" in s 66EA(1) does not add anything to the actus reus of the offence beyond satisfaction of s 66EA(2): *MK v R* at [18], [79], [95]. Previous authorities requiring the existence of a sexual relationship over and above the unlawful sexual act (see *RW v R* [2023] NSWCCA 2 at [166]–[169], [173]–[174]; [180], *R v RB* [2022] NSWCCA 142 at [62]) are plainly wrong: *MK v R* at [6].

6. An adult is defined as someone 18 years or older and a child is a person under 16 years old: s 66EA(15).

7. Consent is not a defence: s 80AE. Notwithstanding the operation of s 80AE, in certain circumstances it may be prudent to direct a jury that a child cannot consent to an unlawful sexual act. In *R v Nelson* [2016] NSWCCA 130 at [23], Basten JA explained why consent was not an element of an offence against s 66C of the *Crimes Act* : see also *R v McClymont* (unrep, 17/12/92, NSWCCA); *R v Woods* [2009] NSWCCA 55 at [53]. Although those are sentencing cases, the way the issue has been articulated is uncontroversial as they explain the legislative policy underpinning offences of this type.

8. The jury must be satisfied beyond reasonable doubt that there was an unlawful sexual relationship but are *not* required to be satisfied of the particulars of any unlawful sexual act that they would have to be satisfied of if the act, or acts, were charged as separate offences: s 66EA(5). Particulars in this sense refers to particulars as to time and place: *JJP v R* at [145], [154]. However, it is still necessary to prove the general nature or character of those acts by reference to the elements of the relevant sexual offences; merely establishing the relevant acts were of a sexual or indecent nature is not sufficient: *JJP v R* at [154]

9. The jury is not required to agree about which two unlawful sexual acts constitute the unlawful sexual relationship: s 66EA(5)(c).

10. A separate tendency direction may be necessary when giving a jury an alternative verdict direction: see **Tendency, coincidence and background evidence** at **[4-200]**ff.

11. The direction to be given with respect to alternative verdicts depends on the issues in the particular trial. The importance of identifying the issues with the parties before the trial commences has been dealt with above at **[5-710]**.

12. Generalised offences such as this create the potential for unfairness to an accused. It is therefore necessary to ensure the summing up includes whatever directions are necessary to ensure the accused's trial is fair: *KRM v The Queen* (2001) 206 CLR 221 at [97]–[101] (dealing with a similar Victorian provision); see also *ARS v R* [2011] NSWCCA 266 at [35]–[37] per Bathurst CJ (James and Johnson JJ agreeing) with respect to the previous form of s 66EA.

**[The next page is 811]**

# Sexual intercourse without consent — until 31 May 2022

***Crimes Act 1900* (NSW), ss 61I–61J**

**Important note:** The directions in ss 292–292E *Criminal Procedure Act 1986* apply to proceedings for these offences which commence from 1 June 2022, regardless of when the offence was committed: Sch 2, Pt 42. See further [5-200] **Directions — misconceptions about consent**. The procedure for filing a Crown or Defence Readiness Hearing Case Management Form requires the parties to identify, amongst other matters, which directions under ss 292A–292E may be required at trial. It would be prudent to commence a discussion early in the trial concerning which of these directions, if any, might be required.

1. It is good practice to provide the elements of the offence to the jury in written form. The list of elements in the suggested directions could form the basis of this document.
2. It is suggested that consideration be given to whether it is more helpful to explain the competing cases of the parties overall for the jury after identifying the separate elements of the offence or as the directions are given for each element.
3. It is unnecessary and unhelpful to direct the jury about elements of consent not relevant to issues in the case: *R v Mueller* (2005) 62 NSWLR 476 at [3]–[4], [42].
4. The suggested directions are framed in terms of what the Crown is required to prove. It is a matter of discretion as to how often it is appropriate to remind the jury that the accused is not obliged to prove anything.

## [5-800] Suggested direction — sexual intercourse without consent (s 61I) for offences committed before 1 January 2008

Last reviewed: April 2024

The following suggested direction must be adapted to the issues in the case.

The accused is charged with sexual intercourse without consent knowing the complainant was not consenting to the sexual intercourse.

The Crown case is [*briefly outline the incident/s to which the charge/s relate*].

To prove the accused is guilty, the Crown must prove beyond reasonable doubt each of the three elements which make up the offence:

1. that, at the time and place alleged, the accused had sexual intercourse with the complainant,
2. without the complainant's consent,
3. knowing the complainant did not consent.

You can only find the accused guilty if the Crown proves each element beyond reasonable doubt. If the Crown fails to prove any one of these elements, you must find the accused not guilty.

**1. The accused had sexual intercourse with the complainant**

This element concerns the nature of the act alleged in the indictment. The Crown must prove beyond reasonable doubt that, at the time and place alleged, the accused had sexual intercourse with the complainant … [*here make some reference to the allegations of time and place, to the extent relevant*].

Sexual intercourse means … [*describe the relevant part of the definition of sexual intercourse, as defined in s 61H(1) Crimes Act 1900 and summarise the evidence relied upon by the Crown*].

***[If applicable***

The Crown does not have to prove that full penetration occurred or that the accused ejaculated or that the sexual intercourse was for the accused's sexual gratification.]

[*Summarise the evidence and arguments of the parties*.]

**2. Without the complainant's consent**

This element concerns the complainant's state of mind. The accused does not have to prove the complainant consented. The Crown must prove beyond reasonable doubt that the complainant did not.

Consent involves a conscious and voluntary agreement on the part of the complainant to engage in sexual intercourse with the accused. It can be given verbally, or expressed by actions. Similarly, absence of consent does not have to be in words; it also may be communicated in other ways such as the offering of resistance although this is not necessary as the law specifically provides that a person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse … [*see repealed s 61R(2)(d) Crimes Act 1900*]. Consent which is obtained after persuasion is still consent provided that ultimately it is given freely and voluntarily.

***[If applicable — circumstances where consent is vitiated — repealed s 61R(2)***

A person who consents to sexual intercourse with another person under a mistaken belief —

[*refer to applicable mistaken belief in repealed s 61R(2), for example: a mistaken belief about the identity of the other person (s 61R(2)(a)(i)), or that the other person is married (s 61R(2)(a)(ii)); or that the sexual intercourse is for medical or hygienic purposes (s 61R(2)(a1))*]

— is taken not to consent to the sexual intercourse …]

[*refer to the evidence*].**]**

***[If applicable — threats of terror — repealed s 61R(2)(c)***

A person who submits to sexual intercourse with another person as a result of threats or terror is, by law, not to be regarded as consenting to the sexual intercourse

[*refer to the relevant arguments by the parties*].]

**3. The accused knew the complainant did not consent**

This element concerns the accused's state of mind. The Crown must prove beyond reasonable doubt that the accused knew the complainant did not consent.

You might ask how the Crown can prove that the accused knew the complainant did not consent without an admission from them. The Crown asks you to infer or conclude from other facts which it has set out to prove, that the accused must have known and in fact did know … [*summarise the relevant evidence and arguments of the parties*].

[*Give direction as to inferences* [*see [3-150]*] *or remind jury if already given.*]

In a situation where the complainant does not in fact consent, the accused's state of mind at the time of the act of intercourse might be that the accused actually knew that the complainant was not consenting. That is a guilty state of mind. If the Crown satisfies you beyond reasonable doubt that that was the accused's state of mind at the time of the act of intercourse, then the third element of the charge has been made out.

On the other hand, you may decide on the basis of the evidence led in the trial [*or if applicable* and relied upon by the accused] that the accused's state of mind might be that the accused genuinely, though wrongly, believed the complainant was consenting to intercourse. That is not a guilty state of mind. It is for the Crown to prove that the accused had a guilty mind, and so if the Crown has failed to prove that, at the time of intercourse, the accused did not genuinely believe that the complainant was consenting, then you would have to say that this third element of the offence is not made out, and return a verdict of "not guilty" of this charge … [*refer to relevant arguments by the parties*].

***[If applicable — where recklessness is relied upon to prove the accused knew the complainant did not consent — repealed s 61R***

If the Crown proves beyond reasonable doubt that the accused was reckless as to whether the complainant consented to the sexual intercourse, then the accused will be taken to know that the complainant did not consent to the sexual intercourse … [*see repealed s 61R(1) Crimes Act 1900*].

To establish that the accused had a reckless state of mind, the Crown must prove, beyond reasonable doubt, that either:

(a) the accused simply failed to consider whether or not the complainant was consenting at all, and just went ahead with the act of sexual intercourse, even though the risk the complainant was not consenting would have been obvious to someone with the accused's mental capacity if the accused had turned their mind to it, or

    [*The above direction should only be given when the evidence calls for it.*]

(b) the accused realised the possibility the complainant was not consenting but went ahead regardless of whether the complainant was consenting or not.

    [*This is a wholly subjective test. This has been referred to as advertent recklessness.*]**]**

***[If applicable — accused's knowledge of mistaken belief scenarios***

The law says that a person who knows that another person consents to sexual intercourse under a mistaken belief [*refer to relevant mistaken belief in ss 61R(2)(a) or 61R(2)(a1) listed above*] is taken to know that the other person does not consent to the sexual intercourse.]

***[If applicable — relevance of accused's intoxication***

When considering proof of the accused's state of mind (that is, whether the Crown has proved beyond reasonable doubt element 3), you must ignore any effects of intoxication. If you think that their ability to think or understand what was going on was affected by alcohol, then you must put that to one side. You have to look at the accused and ask what would have been going on in their mind if the accused had not ingested alcohol and/or drugs.

But apart from that qualification, it is the accused's mind you should consider. It's not a question of what you would have realised, or thought, or believed. It's not a question of what a reasonable person would have thought or believed. You look at what was going on in the mind of the accused, or to be more precise, what would have been going on in the mind of the accused if the accused was unaffected by alcohol and/or drugs.]

[*If the accused is charged with aggravated sexual assault under s 61J refer to the additional direction for circumstances of aggravation* [*at [5-840]*] *after dealing with the s 61I elements.*]

## [5-810] Notes

1. For alleged ss 61I, 61J and 61JA offences committed before 1 January 2008, the Crown must establish that the accused knew that the complainant was not consenting, and that, if the issue is raised in evidence, the Crown must negate any belief by the accused that the complainant was consenting; the Crown does not succeed in doing so on the basis that the accused's belief was not based on reasonable grounds: *South v R* [2007] NSWCCA 117 at [30]. The joint Justices in *Banditt v The Queen* (2005) 224 CLR 262 said at [37]:

   > … [i]t was not the reaction of some notional reasonable man but the state of mind of the appellant which the jury was obliged to consider and that this was to be undertaken with regard to the surrounding circumstances, including the past relationship of the parties.

2. For an offence under s 61J, the Crown must prove the absence of consent and knowledge of that absence of consent beyond reasonable doubt "irrespective of the victim's age": *McGrath v R* [2010] NSWCCA 48 at [11]. It is a misdirection to simply say the complainant is incapable of consenting to sexual intercourse by reason of their age: *McGrath v R* at [11]. The reasoning in *McGrath v R* would also apply to an offence against s 61I.

3. Evidence that the accused was intoxicated where it is self-induced cannot be taken into account for offences under s 61I: *R v Gulliford* [2004] NSWCCA 338 at [127] and s 61J: *R v DJB* [2007] NSWCCA 209 at [68] on the basis that neither are offences of specific intent: see s 428D *Crimes Act 1900*. See also *R v Petersen* [2008] NSWDC 9.

4. In *Banditt v The Queen* the High Court considered the meaning of "reckless as to whether the other person consents" in the repealed s 61R(1) *Crimes Act 1900*. The court held that it was proper for the trial judge to have directed the jury: "If he is aware that there is a possibility that she is not consenting but he goes ahead anyway, that is recklessness". The court accepted at [38] that in a particular case one or more of the expressions used in *R v Morgan* [1976] AC 182 (outlined

at [27]) and by Professor Smith (outlined at [35]), as well as those recorded in the respondent's submission (outlined at [16]), may properly be used in explaining what is required by the repealed s 61R(1). The trial judge properly emphasised that it was the state of mind of the appellant that the jury had to consider. A discussion of the concept of recklessness can be found in *Gillard v The Queen* (2014) 88 ALJR 606 at [26].

5. The issue whether a direction on recklessness will be required is discussed in *Bochkov v R* [2009] NSWCCA 166 at [93]–[106]; *R v Murray* (1987) 11 NSWLR 12 at 15 and *R v Kitchener* (1993) 29 NSWLR 696 at 700. A direction may be appropriate if the circumstances of the case are such that, despite rejecting the accused's version, a question of recklessness is still open to be considered on the Crown case: see *CTM v The Queen* (2008) 236 CLR 440 at [38], [84], [191] and the High Court's approach to directions for honest and reasonable mistake of fact. A direction may be appropriate where the accused's version is that the complainant in fact consented, and to their knowledge the accused honestly but wrongly believed that the complainant was consenting: *Bochkov v R* at [93]. Where the jury accepts the accused had an honest though wrong belief and that the accused was not reckless as to consent, the Crown will have failed to prove the accused knew the complainant did not consent. It is incorrect to refer to such a wrong belief as a "defence" or as exculpation on the basis of an honest and reasonable mistake of fact: *Bochkov v R* at [102]–[105]. Knowledge (of the accused) is an element the Crown must prove beyond reasonable doubt.

6. Section s 61R(2)(b) (rep) *Crimes Act 1900* set out grounds on which it may be established that consent to sexual intercourse for offences under ss 61I, 61J and 61JA is vitiated. For the purposes of proving "a person knows that another person consents to sexual intercourse under a mistaken belief" under the repealed s 61R(2)(b), it is not enough for the Crown to prove the accused was reckless: *Gillard v The Queen* (2014) 88 ALJR 606 at [28]–[29]. The Crown must prove the accused knew the other person consented to sexual intercourse on the various grounds (of vitiation) set out in s 61R(2)(b): *Gillard v The Queen* at [29]. In *Gillard v The Queen*, the High Court was dealing with ACT legislation expressed in similar terms to s 61R(2)(b).

## [5-820] Suggested direction — sexual intercourse without consent (s 61I) where alleged offence committed on or after 1 January 2008 and before 1 June 2022

The accused is charged with sexual intercourse without consent knowing the complainant was not consenting.

The Crown case is that [*briefly outline the incident/s to which the charge relates*].

To prove the accused is guilty, the Crown must prove beyond reasonable doubt each of the following three elements of the offence:

1. that, at the time and place alleged, the accused had sexual intercourse with the complainant
2. without the complainant's consent
3. knowing the complainant did not consent.

You can only find the accused guilty if the Crown proves each element beyond reasonable doubt. If the Crown fails to prove any one of them, you must find the accused not guilty.

1. **The accused had sexual intercourse with the complainant**

   [This element element concerns the act of sexual intercourse. The Crown must prove beyond reasonable doubt that an act of sexual intercourse occurred. The meaning of sexual intercourse includes [*describe the relevant act of intercourse from the definition in s 61HA, as in force before 1 June 2022*]:

   (a) penetration to any extent of the complainant's genitalia (where complainant is female) or anus by any part of the accused's body or by an object manipulated by the accused.

   (b) the introduction of the accused's penis into the complainant's mouth.

   (c) cunnilingus.

   (d) the continuation of any of the above acts.

   [*Summarise the evidence and relevant arguments of the parties.*]

   [*Where appropriate: penetration of a person's genitalia or anus for genuine medical or hygienic purposes is not sexual intercourse. As that is what the accused says was the reason for the penetration in this case, the Crown must prove beyond reasonable doubt that it was not done for such a purpose.*]

2. **The sexual intercourse occurred without the complainant's consent**

   The second element concerns the complainant's state of mind. The Crown must prove that the sexual intercourse occurred without the complainant's consent.

   Consent means that a person freely and voluntarily agrees to something. So, the Crown must prove the complainant did not freely and voluntarily agree to the sexual intercourse.

   You are concerned with whether the complainant did not consent to the sexual intercourse when it occurred. What the complainant's state of mind was before or after the sexual intercourse might prove a guide, but the question is whether the Crown has proved that the complainant was not consenting at the time the sexual intercourse occurred.

   [*Where appropriate*: The complainant said in evidence that they did not consent to sexual intercourse. If you accept that evidence, then you could be satisfied the Crown has proved this element.]

   In deciding whether you accept that the complainant was not consenting, you may also take into account any of the following:

   (a) consent obtained after persuasion is still consent, provided that ultimately it is given freely and voluntarily.

   (b) consent, or lack of consent, may be indicated by what the complainant said or did. In other words, the complainant's words or actions, or both, may indicate whether or not there was consent.

(c) a person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to that intercourse. There is no legal requirement for a person to physically resist before a jury can find that the person did not consent.

**[*If applicable, add one or more of the following* (*s 61HE(5)–(6)*):**

The law provides that a person does not consent to sexual intercourse:

- if the person does not have the capacity to consent to the sexual intercourse, including because of age or cognitive incapacity, or
- if the person does not have the opportunity to consent to the sexual intercourse because the person is unconscious or asleep, or
- if the person consents to the sexual intercourse because of threats of force or terror (whether the threats are against, or the terror is instilled in, that person or any other person), or
- if the person consents to the sexual intercourse because the person is unlawfully detained, or
- if the person consented under a mistaken belief:
  - as to the other person's identity, or
  - that the other person is married to the person, or
  - that the sexual activity is for health or hygienic purposes, or
  - about the nature of the activity that has been induced by fraudulent means.]

**[*If applicable, add one or more of the following* (*s 61HE(8)*):**

It may be established that the complainant did not consent to sexual intercourse if:

- The complainant consented while substantially intoxicated by alcohol or any drug, or
- The complainant consented because of intimidatory or coercive conduct, or other threat, even though that conduct does not involve a threat of force, or
- The complainant consented because of the abuse of a position of authority or trust.

If you are satisfied the complainant consented in that circumstance, it does not necessarily follow that you should be satisfied beyond reasonable doubt the complainant did not consent. The essential matter the Crown must prove is that the complainant did not consent in the sense that the complainant did not freely and voluntarily agree to the sexual intercourse.]

3. **The accused knew the complainant did not consent**

The third element concerns the accused's state of mind. The Crown is required to prove the accused knew the complainant did not consent to the sexual intercourse.

This is a question about what the accused's state of mind actually was. It is not a question about what you or anyone else would have known, thought or believed in the circumstances. It is what the accused knew, thought or believed.

You must consider all of the circumstances, including any steps taken by the accused to make sure the complainant consented to the sexual intercourse.

[*Add, if appropriate*: The law is that any intoxication of the accused that was self-induced must be ignored. If you consider that the accused was intoxicated by voluntarily drinking alcohol [or taking drugs], you must ignore that and decide this element by considering what the accused's state of mind would have been if the accused had not been intoxicated.]

The law says the Crown will have proved the accused knew the complainant did not consent to sexual intercourse if: [*refer only to those of the following matters that arise from the evidence*]

(a) the accused knew the complainant did not consent; or

(b) the accused was reckless as to whether the complainant consented because the accused realised there was a possibility the complainant did not consent but went ahead not caring, or considering it was irrelevant whether the complainant consented; or

(c) the accused was reckless as to whether the complainant consented because the accused did not even think about whether the complainant consented; or

(d) the accused may have actually believed the complainant consented, but the accused had no reasonable grounds for that belief; or

(e) the accused knew the complainant consented under a mistaken belief about [*refer to those parts of s 61HE(6) that may apply*].

To repeat what I said at the beginning of these directions, you can only find the accused guilty if the Crown proves each of the three elements beyond reasonable doubt. If the Crown fails to prove any of them you must find the accused not guilty.

[*If the accused is charged with aggravated sexual assault under s 61J refer to the additional direction for circumstances of aggravation at [5-840] after dealing with the s 61I elements.*]

## [5-830] Notes

1. The *Crimes Amendment (Consent — Sexual Assault Offences) Act 2007* commenced on 1 January 2008 and applies to offences under ss 61I, 61J and 61JA committed on or after 1 January 2008. Under that Act, s 61R (consent) was repealed and replaced with a definition of consent, whereby a person consents to sexual intercourse "if the person freely and voluntarily agrees to the sexual intercourse": s 61HA(2) (now repealed and replaced with s 61HE(2)). A person who does not offer physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting: s 61HA(7) (now repealed and replaced with s 61HE(9)), previously found in repealed s 61R(2)(d).

2. Further amendments were made to Div 10 of the *Crimes Act 1900* through the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* which commenced on 1 December 2018. The consent provisions contained in the former s 61HA were renumbered under new s 61HE. There are some differences between

the repealed s 61HA and the replacement s 61HE, such as the expansion of offences to which s 61HE applies (eg, sexual touching offences: s 61K), and expansion of the term "sexual intercourse" to also include sexual touching and a sexual act. However, although care must be taken to ensure the applicable provisions are referred to, depending on the date of the allegations, the substance of the provisions remains the same and can be addressed with the same directions. See *Beattie v R* [2020] NSWCCA 334 at [48]–[53].

3. The *Crimes Legislation Amendment Act 2014* extended the statutory definition of consent to attempts to commit the offences under ss 61I, 61J and 61JA *Crimes Act*. It had been held that the objective test for consent in s 61HE did not apply to offences of attempting to commit those offences: *WO v DPP (NSW)* [2009] NSWCCA 275 at [80], [83]; *O'Sullivan v R* [2012] NSWCCA 45 at [112]. As there was no transitional provision for the amendment, it may be taken to apply to attempt offences alleged to have occurred on or after the date of commencement on 23 October 2014.

4. For the purpose of determining knowledge of lack of consent, the jury is to have regard to all the circumstances of the case, including any steps taken by the accused to ascertain whether the complainant consents, but excluding any self-induced intoxication on the part of the accused. The Crown does not have to show the complainant communicated their lack of consent to prove the accused knew that the complainant did not consent: *R v XHR* [2012] NSWCCA 247 at [47]. Section 61HE(3)(c) requires the Crown to prove beyond reasonable doubt that there were "no reasonable grounds" for the accused to believe the other person consented. It is a significant departure from the subjective test found in the common law and in repealed s 61R(1), as it imports an objective test requiring a jury to apply current community standards. Although a sentencing case, *Saffin v R* [2020] NSWCCA 246 at [50] discusses the three levels of "knowledge" (actual, reckless, belief on unreasonable grounds) and the extent to which there may be a difference between knowledge and recklessness.

5. A judge must take special care in directing the jury in relation to s 61HE(3)(c). The jury is to proceed on the assumption that if the accused honestly believed the complainant consented, the law requires it to test that belief by asking whether there were reasonable grounds for it in the circumstances of the case: *Lazarus v R* [2016] NSWCCA 52 at [155]. It is erroneous to instruct the jury or imply that the jury should ask what a reasonable person might have concluded about consent, rather than what the accused might have believed in all the circumstances and then test that belief by asking whether there might have been reasonable grounds for it: *Lazarus v R* [2016] NSWCCA 52 at [155]. The belief is that of the accused and not that of the hypothetical reasonable person in the position of the accused, which has to be reasonable: *O'Sullivan v R* [2012] NSWCCA 45 at [124]–[126].

6. If the accused knows the complainant is labouring under a mistaken belief as set out in s 61HE(6), the accused is taken to have known that the complainant was not consenting. As with consideration of the repealed s 61R(2), the Crown must prove the accused actually knew the other person consented due to a mistaken belief; mere recklessness about that fact will be insufficient: *Gillard v The Queen* (2014) 88 ALJR 606 at [28]–[29]; *Beattie v R* [2020] NSWCCA 334 at [90].

7. Substantial intoxication of a complainant under s 61HE(8)(a) is not determinative of consent being vitiated; it is a factor for a jury to consider in assessing whether the Crown has established lack of consent: *Tabbah v R* [2017] NSWCCA 55 at [142]; *Beattie v R* [2020] NSWCCA 334 at [71].

8. For further commentary on recklessness and intoxication: see **Notes** at **[5-810]**.

9. Where a person is charged with being an accessory to sexual intercourse without consent, the relevant state of mind as to the complainant's lack of consent is knowledge; recklessness is insufficient: *Carlyle-Watson v R* [2019] NSWCCA 226 at [59].

10. Cunnilingus need not involve penetration and refers to oral stimulation of the female genitals with the mouth or tongue: *BA v R* [2015] NSWCCA 189 at [9].

11. Sexual intercourse includes sexual connection occasioned by the penetration of the genitalia except where the "penetration is carried out for proper medical purposes": s 61HA(a). The need for the judge to give a direction in relation to "proper medical purposes" only arises if the issue was raised by the evidence and the parties: *Zhu v R* [2013] NSWCCA 163 at [78]–[79]. The exception may be excluded when the relevant acts giving rise to the offence occurred during a medical examination: *Decision Restricted* [2020] NSWCCA 138 at [51]–[65]. There is no requirement that the sole purpose of penetration in such a context be for sexual gratification. The exception is only engaged when the relevant act is carried out for proper medical purposes: at [51]. The exception will be excluded if a proper medical purpose is accompanied by a sexual purpose either from the outset of the conduct or after commencement: [99].

## [5-840] Suggested direction — s 61J circumstance(s) of aggravation

The final element the Crown must prove beyond reasonable doubt is that the offence was aggravated because [*specify circumstance of aggravation*]. You only need to consider this element if you are satisfied the Crown has proved the first three elements of the offence beyond reasonable doubt.

**In company — s 61J(2)(c)**

[*This direction is based upon the sexual intercourse being carried out by the accused in the presence of an alleged co-offender in their company. Modification will be required if the roles are different.*]

It is an aggravating circumstance if the offence was committed in the company of another person or persons. The Crown alleges the accused committed the offence when the accused was in the company of [*alleged co-offender*]. The Crown case is that when the accused had sexual intercourse with the complainant, [*alleged co-offender*] was [*specify nature of presence*].

The Crown will prove the offence was committed "in company" if it proves beyond reasonable doubt:

(a) the accused and [*alleged co-offender*] shared a common purpose that the accused would have sexual intercourse with the complainant;

and

(b) [*alleged co-offender*] was physically present when the sexual intercourse occurred.

For [*alleged co-offender*] to be "physically present", the Crown must prove [*alleged co-offender*] was sufficiently close [*refer only to those of the following the Crown relies on*]:

(a) to intimidate or coerce the complainant in relation to the sexual intercourse;

or,

(b) to encourage or support the accused in having sexual intercourse with the complainant.

It is not enough for the Crown to prove either the accused shared a common purpose with [*alleged co-offender*] that the accused would have sexual intercourse with the complainant, or that [*alleged co-offender*] was physically present. The Crown must prove both of these beyond reasonable doubt before you can conclude the offence was committed in company.

[*If appropriate, add*: It is not enough [*alleged co-offender*] shared a common purpose with the accused that the accused would have sexual intercourse with the complainant, but was not physically present in the way in which I have defined that concept. For example, it would not be enough if [*alleged co-offender*] was somewhere else acting as a look-out, or had provided encouragement to the accused at some time before the sexual intercourse occurred.]

[*Summarise the evidence relied on by the Crown and the defence case.*]

**Under authority — s 61J(2)(e)**

The Crown alleges the aggravating circumstance that the offence was committed when the complainant was under the authority of the accused. To establish this, the Crown must prove the complainant was under their care, supervision or authority [*whether generally or at the time of the offence*]. It is a matter for you to determine whether the evidence establishes the complainant was under the care, supervision or authority of the accused.

[*Summarise the evidence relied on by the Crown and the defence case*].]

**Complainant has serious physical disability or cognitive impairment — 61J(2)(f), (g)**

It is an aggravating circumstance if the offence was committed while the complainant had a [*serious physical disability* OR *cognitive impairment*].

The law recognises a variety of forms of "cognitive impairment", including where a person has a [*nominate the form of cognitive impairment according to the list in s 61HD and in accordance with the evidence relied on in the particular case*].

**OR**

The law does not define what a "serious physical disability" is. That is a matter for you to decide. However, it is an ordinary English phrase, and you should give it its ordinary English meaning. It obviously focuses on disability of the body, as opposed to the mind and requires you to evaluate whether there was a disability that was a serious one.

To prove this element, the Crown relies upon the evidence of [*summarise relevant evidence*].

That evidence [*has/has not*] been disputed. [*Summarise defence case as necessary.*]

**Conclusion**

If you are satisfied the Crown has proved all four elements of the aggravated offence of sexual intercourse without consent in the indictment beyond reasonable doubt you must find the accused guilty. When asked for the verdict [*for this count*], your foreperson would simply announce, "guilty".

If you are satisfied the Crown has only proved the first three elements of the basic offence of sexual intercourse without consent, but has not proved the element of aggravation, then you would acquit the accused of the aggravated offence and return a verdict of guilty for the basic offence. When asked for the verdict [*for this count*], your foreperson would announce, "not guilty of aggravated sexual touching but guilty of sexual touching".

If you are not satisfied the Crown has proved any one of the three elements of the basic offence of sexual intercourse without consent, then you would acquit the accused completely. When asked for the verdict [*for this count*], your foreperson would simply announce, "not guilty".

[*see s 80AB Crimes Act 1900 regarding alternative verdicts*].

## [5-850] Notes

1. In *R v Button* (2002) 54 NSWLR 455 at [120] the court outlined a number of propositions about the aggravating circumstance of being in company under s 61J(2)(c), including that there must be a shared common purpose to commit the offence and both accused must be physically present. The perspective of the victim (being confronted by the combined force or strength of two or more persons) is relevant, although not determinative. If two or more persons are present, and share the same purpose, they will be "in company", even if the victim was unaware of the other person.
2. In *KSC v R* [2012] NSWCCA 179 at [124]–[126], the court held that it was not necessary for the judge to provide the jury with dictionary definitions of "care", "supervision" and "authority" for the purposes of determining if a complainant was under the accused's authority under s 61J(2)(e). They are ordinary English words which a jury would understand. The judge provided the jury with assistance as to the evidentiary matters relevant to the issue.
3. "Serious physical disability" under s 61J(2)(f) is not defined but is capable of encompassing a vast array of different conditions: *JH v R* [2021] NSWCCA 324 at [38]. In *JH v R*, it was held this term did not require explication as the words mean what they say and are capable of being applied by a jury: [24]–[25].

**[The next page is 831]**

# Sexual intercourse without consent — from 1 June 2022

## [5-900] Introduction

Last reviewed: April 2024

The *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (the amending Act) commenced on 1 June 2022 and replaces the definition of consent in the former *Crimes Act 1900*, s 61HE with Pt 3, Div 10, Sub-div 1A (ss 61HF–61HK).

These provisions apply to basic and aggravated offences of sexual assault (*Crimes Act*, ss 61I, 61J, 61JA), sexual touching (ss 61KC, 61KD) and carrying out a sexual act (ss 61KE, 61KF) committed on and from 1 June 2022: s 61HG.

The amending Act is largely based on recommendations made by the New South Wales Law Reform Commission in *Report 148: Consent in relation to sexual offences*, September 2020.

The Act also inserted new jury directions on misconceptions about consent in sexual assault trials, for trials commencing on and from 1 June 2022, into the *Criminal Procedure Act 1986* in ss 292–292E: see further **[5-200] Directions — misconceptions about consent in sexual assault trials**.

Section 61HF provides that a purpose of Sub-div 1A is to recognise that:

(a) every person has a right to choose whether or not to participate in a sexual activity

(b) consent to a sexual activity is not to be presumed

(c) consensual sexual activity involves ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity.

"Sexual activity" in Sub-div 1A means sexual intercourse, sexual touching or a sexual act: s 61HH.

Of the concepts addressed in s 61HF, the Attorney General said that while these were not new, expressly stating them in the legislation "enhances the communicative model of consent that is embodied in the criminal law, guiding the application of the law and aiding the understanding of consent in the general community": Second Reading Speech, Legislative Assembly, *Debates*, 20 October 2021, p 7508.

## [5-910] Suggested direction — basic offence — sexual intercourse without consent (s 61I) — offences from 1 June 2022

Last reviewed: April 2024

**Notes:**

1. It is good practice to provide the elements of the offence to the jury in written form. The list of elements below could form the basis of this document.
2. It is suggested that consideration be given to whether it is more helpful to explain the competing cases of the parties overall for the jury after identifying the separate elements of the offence or as the directions are given for each element.

3. It is unnecessary and unhelpful to direct the jury about elements of consent not relevant to the issues in the case: *R v Mueller* (2005) 62 NSWLR 476 at [3]–[4] and [42].
4. The suggested direction is framed in terms of what the Crown is required to prove. It is a matter of discretion as to how often it is appropriate to remind the jury that the accused is not obliged to prove anything.

The accused is charged with sexual intercourse without consent knowing the complainant was not consenting. The Crown case is [*briefly outline the incident/s to which the charge/s relate*].

**Elements**

To prove the accused is guilty, the Crown must prove beyond reasonable doubt each of the following three elements which make up the offence:

1. at the time and place specified in the indictment, the accused had sexual intercourse with the complainant;
2. without the complainant's consent to that act of intercourse; and
3. the accused knew the complainant did not consent.

You can only find the accused guilty if the Crown proves each element beyond reasonable doubt. If the Crown fails to prove any one of these elements, you must find the accused not guilty.

**1. The accused had sexual intercourse with the complainant**

This element concerns the nature of the act alleged in the indictment. The Crown must prove beyond reasonable doubt that an act of sexual intercourse occurred.

Sexual intercourse includes [*describe the relevant act of intercourse from the definition in s 61HA(1) and summarise the evidence relied upon by the Crown*

(a) the penetration to any extent of the genitalia or anus of a person by—

(i) any part of the body of another person, or

(ii) any object manipulated by another person, or

(b) the introduction of any part of the genitalia of a person into the mouth of another person (often referred to as an act of fellatio), or

(c) the application of the mouth or tongue to the female genitalia (often referred to as an act of cunnilingus), or

(d) the continuation of sexual intercourse [as I have outlined]].

**[*If applicable — where part of body involved in act of intercourse is surgically constructed (s 61H(4))***

It is not relevant that a part of the body involved in the act of intercourse was surgically constructed or not.**]**

**[*If applicable — lack of full penetration (s 61HA(1)(a)), ejaculation or sexual gratification***

The Crown does not have to prove that full penetration occurred and/or that the accused ejaculated and/or that the act of intercourse was for the accused's sexual gratification.**]**

**[*If applicable — penetration solely for proper medical or hygienic purposes (s 61HA(2))*

Penetration carried out solely for a proper [*medical and/or hygienic*] purpose is not sexual intercourse. The Crown must prove beyond reasonable doubt that the penetration was not solely for a proper [*medical and/or hygienic*] purpose and may do so by proving either that there was no proper [*medical and/or hygienic*] purpose or that, in addition to any proper [*medical and/or hygienic*] purpose, the penetration was also for another purpose. Examples of where penetration would *not* be solely for a [*medical and/or hygienic*] purpose would be if it was also for sexual gratification, and/or to inflict humiliation upon the complainant. *Summarise the evidence and relevant arguments of the parties*.**]**

**2. Without the complainant's consent**

This element concerns the complainant's state of mind. The Crown must prove beyond reasonable doubt that the complainant did not consent [*to the act of intercourse*].

Everyone has a right to choose whether or not to participate in sexual intercourse. A person cannot presume that another person is consenting. Consensual sexual intercourse involves ongoing and mutual communication and decision-making and free and voluntary agreement between the persons participating in the sexual intercourse. [s 61HF].

**[*If required — (s 292A Criminal Procedure Act 1986 — circumstances in which non-consensual activity occurs):* *However, you should bear in mind that non-consensual activity can occur in many different circumstances and between different kinds of people including people who know one another, or are married to one another, or who are in an established relationship with one another.*] [*See [5-200]*]**

A person consents to sexual intercourse if, at the time of the act of intercourse, they freely and voluntarily agrees to that act of intercourse. [s 61HI(1)] Consent can be given verbally or it can be expressed by actions. However, a person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity. [s 61HI(4)]

**[*If applicable — Circumstances in which there is no consent – s 61HJ*

The law provides that circumstances in which a person does not consent to sexual intercourse include if you are satisfied beyond reasonable doubt that the person [*refer only to those that apply*]:

(a) does not say or do anything to communicate consent,

(b) does not have the capacity to consent to the act of intercourse,

(c) is so affected by alcohol or another drug as to be incapable of consenting to the act of intercourse,

(d) is unconscious or asleep,

(e) participates in the act of intercourse because of force, fear of force or fear of serious harm of any kind to themself, another person, an animal or property (regardless of when the force or the conduct giving rise to the fear occurred or whether it occurred as a single instance or as part of an ongoing pattern),

(f) participates in the act of intercourse because of coercion, blackmail or intimidation (regardless of when the coercion, blackmail or intimidation occurred or whether it occurred as a single instance or as part of an ongoing pattern),

(g) participates in the act of intercourse because they or another person is unlawfully detained,

(h) participates in the act of intercourse because they are overborne by the abuse of a relationship of authority, trust or dependence,

(i) participates in the act of intercourse because they are mistaken about the nature of the act of intercourse,

(j) participates in the act of intercourse because they are mistaken about the purpose of the act of intercourse (including about whether the act of intercourse is for health, hygienic or cosmetic purposes),

(k) participates in the act of intercourse with another person because they are mistaken about the identity of the other person or because they are mistaken that they are married to the other person, or

(l) participates in the act of intercourse because of a fraudulent inducement. [*If appropriate:* A misrepresentation about a person's income, wealth or feelings [*refer only to that or those which apply*] is not a "fraudulent inducement"].

*Summarise the evidence and relevant arguments of the parties*.**]**

**[*If applicable — persuasion:*** Consent that is obtained after persuasion is still consent provided that ultimately it is given freely and voluntarily.**]**

**[*If applicable — withdrawal of consent:*** A person may withdraw consent to an act of intercourse at any time: [s 61HI(2)]. If the act of intercourse occurs, or continues, after consent has been withdrawn then it occurs without consent: [s 61HI(3)]. If the Crown has proved beyond reasonable doubt that the complainant withdrew consent and that the act of intercourse occurred or continued after that point in time, then you would find the occurrence or continuation of the act of intercourse was without the complainant's consent.

*Summarise the evidence and relevant arguments of the parties*.**]**

**[*If applicable — Consent to a different act of intercourse* (s 61HI(5)):** A person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity. There is evidence the complainant may have consented to [*describe relevant sexual activity*]. If you decide they may have consented to that activity, it does not follow that for that reason only that they consented to the act of intercourse alleged by the Crown. [*Summarise the evidence and relevant arguments of the parties.*]**]**

**[*If applicable — Consent to sexual activity with accused on a different occasion* (s 61HI(6)(a)):** A person who consents to a sexual activity with a person on one occasion is not, by reason only of that fact, to be taken to consent to a sexual activity with that person on another occasion. There is evidence the complainant may have consented to [*describe sexual activity and occasion*] with the accused. If you decide they may have consented to that activity, it does not follow that for that reason only that they consented to the act of intercourse alleged by the Crown. *Summarise the evidence and relevant arguments of the parties*.**]**

**[*If applicable — Consent to sexual activity with another person on same or another occasion* (s 61HI(6)(b)):**

A person who consents to a sexual activity with a person is not, by reason only of that fact, taken to consent to a sexual activity with another person on that or another occasion. There is evidence the complainant may have consented to [*describe sexual activity and occasion*] with [*name of person*]. If you decide they may have consented to that activity, it does not follow that for that reason only they consented to the act of intercourse with the accused alleged by the Crown. *Summarise the evidence and relevant arguments of the parties*.**]**

**3. The accused knew the complainant did not consent**

This element concerns the accused's state of mind. The Crown must prove beyond reasonable doubt that the accused knew the complainant did not consent to the act of intercourse alleged.

The Crown has no direct evidence about what the accused's state of mind was at that time. The Crown asks you to infer or conclude that the accused knew the complainant was not consenting on the basis of the facts and circumstances which it has sought to prove occurred.

[*Give direction as to Inferences [see [3-150] or remind jury if already given.*]

For the purpose of deciding whether the Crown has proved this element, you must consider all the circumstances of the case, including what, if anything, the accused said or did: [s 61HK(5)(a)]. [*Add, if appropriate — self-induced intoxication*: However, intoxication of the accused that was self-induced must be ignored. If you consider the accused was intoxicated by voluntarily drinking alcohol [or taking drugs], you must decide if the Crown has proved this element by considering what their state of mind would have been if they had not been intoxicated: [s 61HK(5)(b)]].

The Crown will have proved the accused knew the complainant did not consent if it proves that [*refer only to those of the following that arise from the evidence*]:

1. the accused actually knew the complainant did not consent to the act of intercourse; or

2. the accused was reckless as to whether the complainant consented to the act of intercourse; or

3. any belief the accused had, or may have had, that the complainant consented to the act of intercourse was not reasonable in the circumstances.

It is important to bear in mind that it is for the Crown to prove this. As you are well aware, there is no obligation upon the accused to prove anything.

**[*Actual knowledge — s 61HK(1)(a):* *Summarise the evidence and relevant arguments of the parties*.**]**

**[*Recklessness — s 61HK(1)(b)*]**

To establish that the accused was reckless as to whether the complainant consented to the act of intercourse, the Crown must prove, beyond reasonable doubt, either:

(a) that the accused failed to consider whether or not the complainant was consenting at all, and just went ahead with the act of intercourse, even though the risk the complainant was not consenting would have been obvious to someone with the accused's mental capacity had they turned their mind to it, or

(b) the accused realised the possibility that the complainant was not consenting but went ahead with the act of intercourse regardless of whether the complainant was consenting or not.

[*Summarise the evidence and relevant arguments of the parties*.]

**[*Belief in consent that was not reasonable in the circumstances — s 61HK(1)(c)*]**

If, on the basis of the evidence led in the trial, you decide there is a possibility the accused had, or may have had, a belief that the complainant consented, the Crown must prove beyond reasonable doubt that the belief was not reasonable in the circumstances. The Crown case is that you would find that any such belief was not reasonable in the circumstances because [*state Crown's contention*].

**[*If appropriate* (s 61HK(2)):** A belief that the complainant consented to the act of intercourse is not reasonable if the Crown satisfies you beyond reasonable doubt the accused did not, within a reasonable time before, or at the time of, the act of intercourse, say or do anything to find out if the complainant consented.

Whether it was reasonable in the circumstances for the accused to believe the complainant was consenting to the act of intercourse is judged according to community standards. You ask yourself what would an ordinary person in the accused's position have believed at the relevant time having regard to all the circumstances of the case [*If appropriate: other than the accused's self-induced intoxication*]

[*Summarise the evidence and relevant arguments of the parties.*]

[***If applicable — cognitive or mental health impairment as a substantial cause of the accused not saying or doing anything (s 61HK(3)–(4))*:**

If the Crown has proved beyond reasonable doubt that the accused did not say or do anything to ascertain whether the complainant consented to the act of intercourse, then that would establish that the belief of the accused that the complainant was not consenting was not reasonable. However, this would not be the case if the accused was suffering from a [*cognitive/mental health*] impairment at the time of the act of intercourse and that impairment was a substantial cause of them not saying or doing anything to ascertain whether the complainant consented to that act of intercourse.

[*Adopt so much of the definitions of mental health impairment and cognitive impairment from ss 4C and 23A(8) and (9) Crimes Act as appropriate — see further [4-304]*.]

This is a matter where the accused must prove on the balance of probabilities both that:

1. The accused was suffering from a [*cognitive/mental health*] impairment at the time of the act of intercourse; AND
2. Their [*cognitive/mental health*] impairment was a substantial cause of the accused not saying or doing anything to ascertain whether the complainant consented to the act of intercourse.

[*Summarise the evidence and relevant arguments of the parties*.]

If the accused has not proved both these matters on the balance of probabilities, then the Crown will have established beyond reasonable doubt that their failure to say or do anything to ascertain whether the complainant consented to the act of intercourse was such that their belief the complainant was not consenting was not reasonable in the circumstances.

If the accused has proved both these matters on the balance of probabilities, then you cannot use the fact the accused did not do or say anything to ascertain whether the complainant consented to the act of intercourse in considering whether the Crown has proved beyond reasonable doubt that the accused's belief in consent was not reasonable. You must put that fact to one side and consider whether the Crown has proved beyond reasonable doubt that the accused's belief in consent was not reasonable because of other facts and circumstances.

[*For aggravated forms of the offence add from [5-840] as appropriate.*]

## [5-920] Notes related to consent

Last reviewed: April 2024

1. Although in the following notes reference is made to the NSWLRC's Report and to the Second Reading Speech for the amending Act, it is not suggested these can necessarily be relied on to resolve issues that may arise when interpreting these provisions: *Interpretation Act 1987*, s 34(1)(b). Additionally, where the language used for particular provisions in Pt 3, Div 10, Sub-div 1A of the *Crimes Act 1900* is somewhat similar to the previous legislation, it should not be assumed the meaning ascribed will automatically conform with previous case law. See *GS v R* [2022] NSWCCA 65 at [38]–[41] and *Totaan v R* [2022] NSWCCA 75 at [78]–[83] for discussion of approaches to construction of criminal statutes.
2. Section 61HI, provides for the meaning of consent generally, and states:
   (1) A person ***"consents"*** to a sexual activity if, at the time of the sexual activity, the person freely and voluntarily agrees to the sexual activity.
   (2) A person may, by words or conduct, withdraw consent to a sexual activity at any time.
   (3) Sexual activity that occurs after consent has been withdrawn occurs without consent.
   (4) A person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity.
   (5) A person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity.

**Example**— A person who consents to a sexual activity using a condom is not, by reason only of that fact, to be taken to consent to a sexual activity without using a condom.

(6) A person who consents to a sexual activity with a person on one occasion is not, by reason only of that fact, to be taken to consent to a sexual activity with—

(a) the person on another occasion, or

(b) another person on that or another occasion.

3. The phrase "at the time of the relevant sexual activity" was added to s 61HI(1) at the recommendation of the NSWLRC (*Report 148: Consent in relation to sexual offences*, September 2020 at p xiii). It did not appear in s 61HE(2) (rep).

4. When describing how free and voluntary consent might be communicated (s 61HI(1)), the Attorney General said this may include "reciprocating body language or affirming remarks throughout a sexual encounter": Second Reading Speech, Legislative Assembly, *Debates*, 20 October 2021, at p 7507.

5. Section 61HJ(1) provides that a person *does not* consent to a sexual activity in the circumstances listed in s 61HJ(1)(a)–(k). This differs from, for example, s 61HE(8)(rep) which provided for grounds where it "may be" established that a person does not consent to a sexual activity. The list of circumstances in s 61HJ(1) is not exhaustive: s 61HJ(2).

6. There is a distinction between the circumstances listed in ss 61HJ(1)(a)–(d) and the balance. Section 61HJ(1)(a)–61HJ(1)(d) does not contain a causal component. For example, s 61HJ(1)(d) provides that a person does not consent to a sexual activity if "the person is unconscious or asleep". Accordingly, if the Crown proves beyond reasonable doubt, for example, that the complainant was unconscious, then there is no consent. By comparison, there is a causal component for each of the circumstances listed in s 61HJ(1)(e)–61HJ(1)(k).

7. A number of the circumstances listed in s 61HJ(1) were previously in s 61HE(5)–(8) (rep) but not all are replicated in identical terms. The following new circumstances provide that a person does not consent to sexual activity if they:

- do not say or do anything to communicate consent: s 61HJ(1)(a). This is intended to address what is referred to as the "freeze" response, where a person may not physically or verbally resist an assault: Second Reading Speech, above, p 7507; NSWLRC Report, above, at 6.25–6.57; see also s 61HI(4). How this relates to s 61HK(2), which states that an accused's belief in consent to sexual activity is not reasonable if they did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the other person consented, may require consideration in the particular circumstances of a given case.

- are unconscious or asleep: s 61HJ(1)(d). This is intended to clarify that consent is only present if the person is awake and conscious at the time of the sexual act, regardless of anything they may have said or done in the past: Second Reading Speech, above, p 7509.

- participate in the sexual activity because of force, fear or force or fear of serious harm of any kind to the person, another person, an animal or property regardless of when the force or conduct giving rise to the force occurred, or whether it occurs as a single instance or as part of an ongoing pattern: s 61HJ(1)(e). While similar to s 61HE(5)(c) (rep), s 61HJ(1)(d) is broader in scope.
- participate in the sexual activity because of coercion, blackmail or intimidation whether it occurs as a single instance or as part of an ongoing pattern: s 61HJ(1)(f). This, and s 61HJ(1)(e), are intended to capture conduct which may amount to coercive control, not "mere begging and nagging": Second Reading Speech, above, p 7509. It is not limited to domestic and family violence.
- participate in the sexual activity because of a fraudulent inducement: s 61HJ(1)(k). See further below.

**Fraudulent inducement**

8. Section 61HJ(1)(k) is in different terms to its predecessor, s 61HE(6)(d) (rep), which stated that a person did not consent to a sexual activity if they had "any other mistaken belief about the nature of the activity induced by fraudulent means".

9. A "fraudulent inducement" is not defined. While s 61HJ(3) provides that a "fraudulent inducement" does not include a misrepresentation about a person's income, wealth or feelings, the conduct that might amount to a fraudulent inducement is otherwise unlimited. However, the Attorney-General said the relevant conduct must amount to a "very serious deceit". The example given was those cases where sex workers are fraudulently promised payment for sexual services. The Attorney said that it was unlikely that s 61HI(1)(k) would extend to "pick-up lines or white lies": Second Reading Speech, above, p 7510.

10. The use of "because of" in s 61HJ(1)(k) makes clear that there is a causal connection between the fraudulent inducement and the complainant's *participation* in the relevant sexual activity. This differs from the common law which provided that consent to an act of sexual intercourse was vitiated by fraud when the fraud concerned the nature and character of the act: see *R v Clarence* (1888) 22 QBD 23 at 43; *Papadimitropoulos v The Queen* (1957) 98 CLR 249 at 260–261; see also *Michael v Western Australia* [2007] WASCA 66 at [314]–[333] for a discussion of the common law and its application.

11. Some guidance about conduct that might constitute a "fraudulent inducement", may be found in existing Australian case law in those jurisdictions where the relevant legislation is similar to that of NSW: see for example s 319(2)(a) *Criminal Code* (WA) and s 67(1) *Crimes Act 1900* (ACT); cf s 348 *Criminal Code* 1899 (Qld) and the discussion of some of the differences by Refshauge ACJ in *R v Tamawiwy (No 2)* (2015) ACTLR 82 at [37]–[52].

12. In *Higgins v Western Australia* [2016] WASCA 142, Mazza J described a fraudulent or deceitful representation as one "which is false in fact and which the maker knows at the time of making it to be false.": at [142]. By making the representation, the accused must intend to obtain the complainant's consent to the relevant sexual activity when they would not otherwise have consented: *Higgins v Western Australia* at [142].

13. In *Michael v Western Australia*, the majority concluded that the actions of the accused, who pretended he was a police officer, to induce the complainants, who were both sex workers, to engage in sexual intercourse for a reduced, or no, fee was sufficient to negate consent: at [88] (Steytler, P); [164]–[166] (Miller JA); cf Heenan AJA at [376]. In *R v Tamawiwy (No 2)*, the accused represented to the complainant that he was a woman with two young female friends, all three of whom were willing to have sexual intercourse with the complainant provided he first engaged in sexual activity with the accused (introduced by a false name). Refshauge ACJ, who was determining a no case submission, described the representations as "a serious deception" and "elaborate hoax" and concluded that a jury might properly find they amounted to fraudulent misrepresentations: [58], [64]–[66]. *Onnis v R* [2013] VSCA 271, which concerned multiple case of procuring sexual penetration by fraud (*Crimes Act 1958* (Vic), s 57(2)), involved conduct similar to that in *R v Tamawiwy (No 2)*: see [7]–[16]. In *DPP v Macfie* [2012] VSCA 314, where the offender was charged with procuring sexual penetration by fraudulent means, he induced young girls to have sex with him by telling them he was a member of the Mafia, promising them things such as money and iPhones, also saying that a condition of them joining the Mafia was that they had sex with him.

14. The Crown should precisely identify the fraudulent inducement from the outset of the trial: *R v Tamawiwy (No 2)* at [15].

**Knowledge about consent**

15. Section 61HK(1) provides that the accused is taken to know that another person does not consent to a sexual activity if—

    (a) the accused actually knows the other person does not consent to the sexual activity, or

    (b) the accused is reckless as to whether the other person consents to the sexual activity, or

    (c) any belief that the accused has, or may have, that the other person consents to the sexual activity is not reasonable in the circumstances.

16. With the exception of the addition of the word "actually" in s 61HK(1)(a), s 61HK(1)(a) and 61HK(1)(b) are in relevantly identical terms to s 61HE(3)(a) and 61HE(3)(b) (rep).

17. Whether an accused's belief as to consent was "not reasonable in the circumstances" involves a hybrid subjective/objective test. As to the subjective aspect, the relevant belief is that of the accused: see *O'Sullivan v R* [2012] NSWCCA 45 at [124]–[126]. The onus is on the Crown to prove beyond reasonable doubt that the accused's belief was not reasonable in the circumstances. If there is something in the evidence that may give rise to a possibility the accused had a belief the complainant was consenting, a direction will be required as to the need for the Crown to prove beyond reasonable doubt that such a belief was not a reasonable one. There is no onus on the accused. Assistance with the concept of "reasonableness" might be derived from *Aubertin v Western Australia* (2006) WAR 87 at [25]–[44]; see also *Doran v Director of Public Prosecutions* [2019] NSWSC 1191 at [36]–[47].

18. In determining whether the accused's belief was "not reasonable in the circumstances", s 61HK(2) states that a belief is not reasonable if the accused:

> … did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the other person consents to the sexual activity.

19. A "reasonable time" is not defined.

20. Section 61HK(3) provides that s 61HK(2) does not apply if, at the time of the relevant sexual activity, the accused had a cognitive impairment or a mental health impairment, and the impairment was a substantial cause of the accused not saying or doing anything. "Mental health impairment" is defined in s 4C *Crimes Act*. "Cognitive impairment" is defined by reference to s 23A(8) of the *Crimes Act*: s 61HK(3)(a)(i). Both definitions are identical to those found in ss 4 and 5 *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*. See **[4-304]** "Statutory definitions of mental health and cognitive impairments" in **Procedures for fitness to be tried (including special hearings)**. The onus of establishing one of the matters referred to in s 61HK(3) is on the accused on the balance of probabilities: s 61HK(4).

**[The next page is 851]**

# Bribery

## [5-5200] Introduction

The common law offence of bribery is constituted by the receiving or offering of an undue reward by or to any person in public office, in order to influence that person's behaviour in that office, and to incline that person to act contrary to accepted rules of honesty and integrity. The offence can be constituted by the mere offer of a corrupt inducement, even if the offer is rejected.

The offence of bribery can be constituted by the making or offering of a payment with an intent to incline a person in public office to disregard his or her duty at some future time — the occasion for the disregard of duty need not have arisen at the time of the offence, and it need never arise: *R v Allen* (1992) 27 NSWLR 398 at 402.

## [5-5210] Suggested direction

Upon the assumption that the undue reward was a sum of money.

The allegation is that [*the accused*] [*paid/offered*] money to [*name*], a person in public office, to incline [*him/her*] to act contrary to [*his/her*] [*duty/accepted rules of honesty and integrity*].

The Crown must prove that money was in fact [*paid/offered*] to [*name*] by [*the accused*]. If you have a reasonable doubt as to whether such [*payment/offer*] was made, then [*the accused*] is "not guilty".

If you are satisfied beyond reasonable doubt that there was a [*payment/offer*] made by [*the accused*], then you must consider the purpose for which it was made. Before you can find [*the accused*] "guilty", you must be satisfied beyond reasonable doubt that [*the accused's*] purpose in making the [*payment/offer*] was to incline or dispose [*name*] to act contrary to [*his/her*] duty and accepted rules of honesty and integrity. It is not essential for the Crown to show that [*name*] did so act or even that [*name*] ever intended to do so. The essential feature is the intention of [*the accused*]; the intention with which [*he/she*] made the [*offer/payment*].

This involves an inquiry into the state of mind of [*the accused*]. Obviously, you cannot look inside [*his/her*] head to ascertain this — you must consider the facts that have been established and ask yourselves whether those facts demonstrate what [*the accused's*] state of mind was at the time of the [*payment/offer*]. It is alleged that [*the accused*] made certain statements which would indicate what [*his/her*] state of mind must have been.

Section 72 of the *Evidence Act* 1995 will be relevant if the accused made a contemporaneous representation about his or her intention or state of mind. See also Intention [3-200].

## [5-5220] Notes

1. For a discussion of the elements of bribery at common law, see *R v Glynn* (1994) 33 NSWLR 139 at 140 et seq.
2. Where the Crown proves that clandestine payments of money have been made to a police officer, the fact that the Crown cannot prove the nature of any expected

or desired departure from duty is of factual or evidentiary significance, but it does not mean that the prosecution must fail: *R v Webster and Jones* (unrep, 03/08/92, NSWCCA).

3. The essence of the offence of bribery is that there must be an offer which is known to the person sought to be bribed and which is capable of being rejected. What cannot be rejected is not an offer: *R v Glynn* (1994) 33 NSWLR 139 at 147.
4. Provisions relating to the bribery of a Commonwealth public official are contained in s 141.1 of the Criminal Code (Cth).
5. See Pt 4A of the *Crimes Act* 1900 for offences relating to the corrupt receipt of commissions and other corrupt practices.

**[The next page is 921]**

# Manslaughter

## [5-6200] Introduction

There are two broad categories within the offence of manslaughter: voluntary manslaughter and involuntary manslaughter. In cases of voluntary manslaughter the elements of murder are present, but the culpability of the offender's conduct is reduced by reason of provocation or substantial impairment by abnormality of mind: *The Queen v Lavender* (2005) 222 CLR 67 at [2]; *Lane v R* [2013] NSWCCA 317 at [50], [63]. Manslaughter by excessive self-defence established under s 421 *Crimes Act 1900* is also a form of voluntary manslaughter: *Lane v R* at [50]. The offender has one of the mental states for murder but a reasonable person in his or her position would not have considered a lethal response was reasonable in the circumstances: *Grant v R* [2014] NSWCCA 67 at [63]–[66].

As to **Provocation** see **[6-400]**, **Substantial impairment because of mental health impairment or cognitive impairment** see **[6-550]** and **Self-defence** see **[6-450]**.

Manslaughter may be charged as a separate count in the indictment or an accused may be convicted of manslaughter on an indictment charging murder alone: *R v Downs* (1985) 3 NSWLR 312. This chapter focuses upon involuntary manslaughter.

Where the Crown alleges the accused's liability arises from a joint criminal enterprise, see **[2-770]**. The maximum penalty for manslaughter is 25 years imprisonment: s 24 *Crimes Act*.

## [5-6210] Involuntary manslaughter

There are two categories of involuntary manslaughter at common law:

(i) manslaughter by unlawful and dangerous act, and

(ii) manslaughter by criminal negligence.

A helpful general discussion of these discrete types of manslaughter can be found in *Lane v R* [2013] NSWCCA 317 at [51]–[65].

## [5-6220] Act of the accused caused death

The act of the accused — or in the case of (ii) in **[5-6210]** above, the act or omission — must cause the death of the deceased: *Lane v R* [2013] NSWCCA 317 at [63]–[64]. For **Causation** generally, see **[2-300]** and for the **Voluntary act of the accused**, see **[4-350]**.

## [5-6230] Manslaughter by unlawful and dangerous act

Manslaughter by unlawful and dangerous act occurs where the accused causes the death of the deceased by a voluntary act that was unlawful and dangerous: a dangerous act being one that a reasonable person in the position of the accused would have appreciated was an act that exposed another person to a risk of serious injury: *Wilson v The Queen* (1992) 174 CLR 313; *Burns v The Queen* (2012) 246 CLR 334 at [75]; *Lane v R* [2013] NSWCCA 317 at [57]. A breach of the motor traffic regulations is not an unlawful act for this form of manslaughter: *R v Pullman* (1991) 25 NSWLR 89 and see *R v Borkowski* (2009) 195 A Crim R 1 where a majority

of the court at [1] and [51]–[54] applied *R v Pullman*. It is essential that the jury is directed that the relevant test is the reasonable person in the accused's position: *R v Cornelissen* [2004] NSWCCA 449 at [82]–[83] applying *Wilson v The Queen* at 334. That requires attributing to the reasonable person the accused's awareness and knowledge of the circumstances surrounding the alleged act: *R v Thomas* [2015] NSWSC 537 at [41], [71].

In assessing whether the reasonable person would have realised the act was dangerous, the fact finder can take into account, in appropriate cases, the accused's age (*DPP (Vic) v TY* (2006) 14 VR 430 at [12]), or a moderate or extreme intellectual disability. It has been held these are "objectively ascertainable attribute[s]": *R v Thomas* at [69]. The significance of these factors will of course vary from case to case and will only need to be referred to if they are in some way relevant.

Where the accused's intellectual disability is to be taken into account, the description of the degree of disability will ordinarily involve using terms used by experts (for example "moderate", "severe" or "profound"). These terms do not have the meaning a lay person might think and may without explanation be misleading. There is a helpful discussion in *Muldrock v The Queen* (2011) 244 CLR 120 at [50]. For this reason, it will be necessary to explain to the jury the meaning of the terms used by the experts to assess a person's intellectual functioning.

A transitory emotional or mental state which the accused might have had at the time cannot be taken into account: *R v Wills* [1983] 2 VR 201 at 212. The approach taken in *R v Edwards* [2008] SASC 303 at [385], of utilising the test for manslaughter by gross criminal negligence and attributing a variety of factors personal to the accused to the reasonable person, was disapproved in *R v Thomas* at [44]–[48].

As to manslaughter by unlawful and dangerous act generally, see: *Criminal Practice and Procedure NSW* at [8-s 18.55]; *Criminal Law (NSW)* at [CA.24.60]ff.

## [5-6240] Suggested direction — manslaughter by unlawful and dangerous act

**Note:** The following suggested direction assumes that the act of the accused caused the death of the deceased and that the accused's act was intentional. Alternatives to this scenario are provided in square brackets.

The accused is charged with the offence of manslaughter. Manslaughter is the unlawful killing of another human being. Although it is an offence of homicide, it is a less serious offence than murder because the Crown does not allege that the accused acted with the intention of killing the deceased. It is not the Crown's case that the accused intended to inflict any serious harm upon the deceased.

The offence of manslaughter can be committed in a number of ways but here the Crown alleges that:

1. the death of the deceased was caused by an act of the accused
2. the accused intended to commit the act that caused death
3. the act of the accused was unlawful, and
4. the act of the accused was dangerous.

**1. The death of the deceased was caused by an act of the accused**

[*If causation is not in issue, add:*

The Crown must prove beyond reasonable doubt that the intentional act of the accused caused the death of the deceased. That is not an issue in this case and you can proceed on the basis that this fact has been proved beyond reasonable doubt.]

[*If causation is in issue, then directions need to be given as to the basis upon which the Crown alleges that an act of the accused substantially contributed to the death of the deceased: see* ***Causation*** *at [2-300]ff.*]

**2. The accused intended to commit the act that caused death**

[*If it is not in issue that the act of the accused was intentional, add:*

The Crown must prove beyond reasonable doubt that the act of the accused was intentional. This case is not in dispute. So you should find that particular ingredient of the crime to be proved beyond reasonable doubt.]

[*If there is an issue of whether the act of the accused was intentional then directions should be given according to the issues in the case. See* ***Voluntary act of the accused*** *at [4-350].*]

**3. The act of the accused was unlawful**

The Crown must prove beyond reasonable doubt that the accused's act was unlawful. The Crown asserts that the act was unlawful because … [*set out the Crown's allegation*].

[*If the question of self-defence arises, then see the suggested directions at [6-460].*]

**4. The act of the accused was dangerous**

Finally, the Crown must prove beyond reasonable doubt that the act of the accused was not only unlawful but also dangerous. An act is dangerous if a reasonable person, in the position of the accused at the time the act was committed, would have realised that the act exposed another person, whether it be the deceased or not, to a risk of serious injury. It does not matter whether the accused believed that their act was dangerous. The test is whether a reasonable person, that is, an ordinary member of the community in the position of the accused, would have realised or appreciated that the act was dangerous.

In deciding whether the reasonable person in the position of the accused would have realised that the act was dangerous you can take into account any evidence of the accused's awareness and knowledge of the circumstances surrounding the alleged act.

[*The following further directions in relation to the reasonable person need not necessarily be given and should be adapted to the circumstances of the case:*

A reasonable person in the position of the accused is one who is not subject to the peculiar eccentricities of the accused or any temporary or fleeting emotional or mental state to which the accused might have had at the time. The reasonable person is not affected by alcohol or drugs.

[*Where appropriate:* the reasonable person is to be taken as being of the age and maturity of the accused at the time of the alleged act.]

[*Where appropriate:* the reasonable person is taken to be a person with the accused's intellectual disability.]

Therefore, the reasonable person in this case is to be taken as …

[*Where appropriate: set out the relevant evidence of the accused's age and maturity/intellectual disability at the time of the act alleged. In relation to the attributes of the intellectual disability, explain any expert opinion admitted in the proceedings (see earlier discussion at [5-6230]). For example, in R v Thomas [2015] NSWSC 537, the accused had an impaired ability with the processing of information and conceptual reasoning.*]

The question is whether the Crown has proved beyond reasonable doubt that a reasonable person in the position of the accused, would have realised that the act allegedly committed by the accused exposed another person to a risk of serious harm.]

## [5-6250] Manslaughter by criminal negligence

Last reviewed: April 2024

In cases of manslaughter by criminal negligence, juries should be directed in accordance with *Nydam v R* [1977] VR 430 at 445 which the High Court approved in *The Queen v Lavender* (2005) 222 CLR 67 at [17], [60], [72], [136] and *Burns v The Queen* (2012) 246 CLR 334, per French CJ at [19]. In brief, the offence was described in *Nydam v R* as follows:

> In order to establish manslaughter by criminal negligence, it is sufficient if the prosecution shows that the act which caused the death was done by the accused consciously and voluntarily, without any intention of causing death or grievous bodily harm but in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment.

Before the offence can be committed the accused must owe a legal duty of care to the deceased, such a duty having been recognised by the common law: *Burns v The Queen* at [97], [107]; *Lane v R* [2013] NSWCCA 317 at [59]–[62]. As to where such a duty commonly exists, see *R v Taktak* (1988) 14 NSWLR 226 and *Burns v The Queen* at [97]. The question of whether a given set of facts gives rise to a duty of care is a question for the judge. It is a question for the jury whether the facts exist: *Burns v The Queen* per French CJ at [20]. It is essential that the act or omission that amounts to a breach of duty is the act or omission that causes death: *Justins v R* (2010) 79 NSWLR 544 at [97]; *Lane v R* at [61]. Causation can be established where the acts or omissions accelerate death, even where the deceased's death was inevitable from pre-existing conditions: *Baker v R* [2023] NSWCCA 262 at [55], [58]. See also **[2-305] Causation generally**.

The common law defence of honest and reasonable mistake of fact does not apply to the offence: *The Queen v Lavender* at [57]–[60].

The test for criminal negligence is objective: *The Queen v Lavender* at [60]; *Patel v The Queen* (2012) 247 CLR 531 at [88]. The court in *R v Sam (No 17)* [2009] NSWSC 803 at [14], [21], [31] articulated the personal attributes of the accused that may be assigned to the reasonable person. The standard to be applied in some cases must take account of special knowledge on the part of a person, as relevant to how a person with that knowledge would act: *Patel v The Queen* at [90].

As to manslaughter by gross criminal negligence generally, see: *Criminal Practice and Procedure NSW* at [8-s 18.50]; *Criminal Law (NSW)* at [CA.24.180]ff.

## [5-6260] Suggested direction — manslaughter by criminal negligence

**Note:** The suggested direction below assumes that the death of the victim is not a fact in dispute and that the accused's act/omission caused or accelerated that death. The direction assumes that the facts, which the Crown alleges gives rise to the existence of a duty of care, are in issue. There may be cases where there is no such issue, for example, where the offence involves a parent and child, and, therefore, it is unnecessary to direct the jury on the existence of a duty of care generally.

The accused is charged with the offence of manslaughter. Manslaughter is the unlawful killing of another human being. Although it is an offence of homicide, it is a less serious offence than murder because the Crown does not allege that the accused acted with the intention of killing the deceased. It is not the Crown case that the accused intended any harm at all to be inflicted upon the deceased let alone that the deceased should die.

The offence of manslaughter can be committed in a number of ways but here the Crown alleges that the killing of the deceased was caused by a deliberate [*act/omission*] of the accused that was so seriously negligent on the part of the accused and created such a high risk of serious injury or death to another person that it amounted to a criminal offence.

In order to prove manslaughter on this basis the Crown must prove a number of facts beyond reasonable doubt. Unless you find each of these facts proved to that standard the accused must be acquitted.

The Crown must prove each of the following beyond reasonable doubt:

1. the death of the deceased; and
2. the accused owed a legal duty of care to the deceased; and
3. the accused [*committed an act/omitted to do an act*]; and
4. the [*act/omission*] caused (that is, was a substantial cause of) or accelerated, the death of the deceased; and
5. the accused's [*act/omission*] was negligent in that the accused breached the duty of care which the accused owed to the deceased; and
6. the accused's [*act/omission*] amounted to criminal negligence and merited criminal punishment for the offence of manslaughter because:
   (a) it fell so far short of the standard of care which a reasonable person would have exercised in the circumstances; and
   (b) involved such a high risk that death or really serious bodily harm would follow as a result of the [*act/omission*].

**1. The death of the deceased**

The Crown must prove beyond reasonable doubt the death of the deceased. That is not an issue in this case and you can proceed on the basis that this has been proved beyond reasonable doubt.

**2. The accused owed a legal duty of care to the deceased**

The Crown must prove that the accused owed a legal duty of care to the deceased. Every person owes a duty to conduct himself or herself in a manner that he or she will

not cause injury to another person in circumstances where a reasonable person in his or her position would have foreseen a risk of injury from such conduct to that other person. The law recognises that one person owes a legal duty of care to another in certain situations.

[*It is suggested that any examples given to the jury concerning a legal duty of care should be relevant to the kind of case that is before the court, that is, negligence based on an omission to act (see Burns v The Queen (2012) 246 CLR 334 at [97], [107]) as opposed to negligence arising from an act of the accused such as driving. The following may be used as examples depending on the facts of the case. In the majority of cases no exposition upon legal duties of care will be necessary but the following may be added if it is thought a particular case warrants it.*

Generally speaking one citizen owes no duty of care to another citizen. Therefore, by way of example, a member of the community is under no legal duty to save a stranger from drowning, even if there were no risk to the safety of the potential life-saver. Similarly, the law does not impose a duty of care on suppliers of prohibited drugs to take reasonable steps to preserve the life of their customers.

There are other circumstances where the law does recognise one person owes a legal duty of care to another. For example, when you drive a motor vehicle on a public street then you owe a duty of care to other road users, whether they are drivers or pedestrians. When you breach that duty of care you may be driving negligently because your standard of driving has fallen short of what is expected of a reasonable, prudent driver in the particular situation in which you were driving. This is simply an example of how a duty of care arises and the consequences of breaching that duty of care.]

A duty of care owed by one person to another can normally arise in at least four situations: first, because of an obligation imposed by law, such as the driving of a motor vehicle; secondly, because of a certain relationship between the two persons, for example the relationship of a parent and child, or a doctor and patient; thirdly, where a person has assumed a duty of care over another by a contractual relationship, for example in an employment relationship; and, fourthly, where, by the person's voluntary conduct, he or she has assumed a duty of care for another person.

The Crown here asserts that the accused owed a legal duty of care to the deceased because [*set out the Crown's allegation of the way in which the duty of care has arisen*]. I direct you that, if you find beyond reasonable doubt on the evidence before you that the facts are as the Crown alleges them to be, then according to the law the accused owed a duty of care to the deceased.

[*If there is an issue as to whether the facts giving rise to a duty of care exist then set out the arguments of the parties.*]

**3. The accused [*committed an act/omitted to do an act*]**

[See ingredient 4 below.]

**4. The [*act/omission*] caused (that is, was a substantial cause of) or accelerated, the death of the deceased**

I now turn to ingredients three and four. The Crown must prove beyond reasonable doubt that the accused [*committed an act/omitted to do an act*] and that this [*act/omission*] caused (that is, was a substantial cause of) or accelerated the death of the

deceased. In this case neither ingredients three and four are in issue. Therefore, you can proceed on the basis that the Crown has proved these ingredients beyond reasonable doubt.

**5. The accused's [*act/omission*] was negligent in that they breached the duty of care which the accused owed to the deceased**

The Crown must prove beyond reasonable doubt that the accused breached the duty of care owed by the accused to the deceased. The Crown alleges that the accused [*state Crown allegation that the accused acted or omitted to act in such a way as to constitute a breach of that duty of care*].

It is for you, as the jury, to determine the standard of care required to be exercised by a reasonable person, that is an ordinary member of the community, in the situation in which the accused was placed. If the accused failed to do what a reasonable person would have done [*or did what a reasonable person would not have done*] in the situation in which the accused found themself then you would find that the accused breached the duty of care owed to the deceased. Unless you are satisfied beyond reasonable doubt that there was a breach of duty of care, then the accused cannot be guilty of manslaughter.

In deciding whether there was a breach of duty of care, you have to consider what a reasonable person would have done in the situation in which the accused was placed. A reasonable person is one who has some, but not all of the personal attributes of the accused. A reasonable person is a person of generally the same age as the accused; with their experience and [*training*] and with their knowledge of the facts. The reasonable person is a person of normal courage and resolve. So you have to put this reasonable person into the accused's shoes at the time of the incident and attribute to that person the accused's knowledge of the circumstances at the time the accused committed the act or acts, or failed to take a relevant course of action.

If the accused failed to act as a reasonable person would have done in that situation, then the accused has breached the duty of care that they owed the deceased. It does not matter whether the accused knew that they were breaching their duty of care, or whether the accused believed that they were acting in an appropriate way in the circumstances which they faced. You are not concerned with the accused's personal beliefs about the correctness or appropriateness of their conduct. You are concerned with what a reasonable person in the accused's position would have thought was appropriate and necessary.

[*If applicable:*

In deciding that issue the accused has invited you to take account of ... [*insert particular fact or circumstance which the accused knew, or thought they knew which contributed to their opinion that they were acting in an appropriate way (see The Queen v Lavender (2005) 222 CLR 67 at [59]–[60])*.]

**6. *The accused's* [*act/omission*] amounted to criminal negligence and merited criminal punishment for the offence of manslaughter**

The Crown must prove beyond reasonable doubt that the accused's [*act/omission*] amounted to criminal negligence and merited criminal punishment for the offence of manslaughter.

A mere breach of duty is not enough to amount to the offence of manslaughter. A breach of duty is often called carelessness or negligence. A breach of the duty of care may make a person liable to pay compensation to another person for damages in a civil action. However, that liability is not sufficient for the offence of manslaughter. The accused's conduct must be so gravely in error and carry with it such a high risk of serious injury that it deserves to be punished as a serious criminal offence.

The breach of duty must have a certain quality before the accused can be guilty of this offence. The accused's conduct must, first, fall so short of what was required and, secondly, must give rise to such a high risk of serious injury or death, that the conduct deserves criminal punishment. Often negligence giving rise to manslaughter is described as gross or even wicked. It is negligence of such a serious kind that it far exceeds simple carelessness or negligence that occurs frequently in our society.

If the accused's breach of duty meets this level of seriousness and carries with it a high risk of serious injury or death, it does not matter that the accused never intended, or appreciated that their actions might harm the deceased.

## [5-6270] Alternative verdicts

Section 25A(7) *Crimes Act 1900* provides that, in a trial for manslaughter, the jury can return an alternative verdict for an offence of assault causing death while intoxicated (s 25A(2)) or an offence of assault causing death under s 25A(1). Sections 52AA(4) and 52BA(4) *Crimes Act* permit the jury to return an alternative verdict for the offences under ss 52A and 52B where the accused is indicted for murder or manslaughter.

See **[5-6340]** as to the judicial requirement to leave manslaughter as an alternative to murder.

**[The next page is 1041]**

# Cases

**[References are to paragraph numbers]**

**[Current to Update 75]**

**C**

**Q**



**R**

**[The next page is Filing Instructions]**