

## The role of counsel in seeking directions

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### Introduction

I have been asked to give a presentation to counsel from the DPP and LAQ on the issue of counsel's role concerning directions at trial.

In this paper I will cover the following topics:

1. The duty to request directions
2. The requirements of a summing up
3. Particular examples
4. Redirections
5. The future
6. Conclusion

### Duty to request directions

In all trials the judge usually asks counsel whether there are any particular directions to be given to the jury or any redirections.

There is no doubt a duty on counsel to raise any directions or objections. This is particularly so if this is to be argued on appeal.

In *R v Lavery (No 2)*<sup>1</sup> the South Australian Full Court considered a situation where the appellant was convicted of armed robbery. It was noted that many of the grounds of appeal complained of passages in the summing up.

Wells J at page 436 noted that it was a cause of regret that counsel abdicated their responsibilities. While it was the duty of counsel to advance their client's cause, it was also the duty of counsel to assist the Trial Judge in the conduct of the trial. It is the duty of counsel to mention at the first moment any misgivings counsel has about the

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<sup>1</sup> (1979) 20 SASR 430.

summing up on questions of law and fact. Indeed the failure of [defence] counsel to raise such issues goes against the possibility of a miscarriage of justice.

Walters J at page 431 noted it was the duty of counsel to “assist the trial Judge and to attend carefully to the Judge’s charge to the jury. If, in the course of the charge, any matter arises that requires correction or, at least, suggests a call for correction, then counsel should invite the Judge’s attention to it so that he may have the opportunity of making a correction or of amplifying the charge.”

His Honour made the point that although a failure to make objection does not deprive the appellate court from interfering if there has been a miscarriage of justice, the failure of counsel to object will have an important bearing on the question of whether a miscarriage of justice has occurred.

Referring to *Stirland v DPP*<sup>2</sup> His Honour noted that if no objection is taken then it is not unreasonable to infer that that matter did not impress counsel of being of sufficient importance to raise.

In *Pate v R*<sup>3</sup> the Victorian Court of Appeal considered a case where the appellant was convicted of child sexual offences. The failure of trial counsel to object to evidence lead was seen as a “complete waiver” of any objection to the evidence.

Finally in *Singleton v French*<sup>4</sup> McHugh JA noted the duty of counsel was to:

- Specify at the trial the portion of the summing up which he (or she) requires to be withdrawn; and
- Specify with precision what direction is contended for.

Usually the time for raising directions to be sought is prior to the commencement of the summing up. In *R v Cocks*<sup>5</sup> the Court of Criminal Appeal noted that save in the most exceptional circumstances a judge should not embark on discussions of the law with counsel after the conclusion of the summing up.

### Duty of the trial judge

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<sup>2</sup> [1944] AC 315 at p 328.

<sup>3</sup> [2015] VSCA 110; 250 A Crim R 425.

<sup>4</sup> (1986) 5 NSWLR 425 at p 440.

<sup>5</sup> (1976) 63 Cr App R 79 at p 82.

In order to consider the topic more generally it is useful to examine the duty of the trial judge when one considers the summing up as this provides the framework of appropriate directions to be given.

- The summing up is to inform the jury of the role of the judge and jury<sup>6</sup> and of the standard and burden of proof.
- It will detail the elements of the offence, and stipulate which elements are in issue. It will analyse the main evidential matters and summarise the arguments made by the parties.<sup>7</sup>

In *Fingleton v R*<sup>8</sup> McHugh J said at [77]-[80]:

[77] Section 620 of the *Criminal Code* declares that, after the evidence has concluded and counsel have addressed the jury, “it is the duty of the court to instruct the jury as to the law applicable to the case, with such observations upon the evidence as the court thinks fit to make.” The court does not discharge that duty by merely referring the jury to the law that governs the case and leaving it to them to apply it to the facts of the case. The key term is “instruct”. That requires the court to identify the real issues in the case, the facts that are relevant to those issues and an explanation as to how the law applies to those facts<sup>[31]</sup>. As McMurdo P said in *Mogg*<sup>[32]</sup>, ordinarily the duty imposed on a trial judge in respect of a summing-up requires the judge to identify the relevant issues and relate those issues to the relevant law and facts of the case. In the same case, after referring to s 620 Thomas JA said<sup>[33]</sup>:

“The consensus of longstanding authority is that the duty to sum up is best discharged by referring to the facts that the jury may find with an indication of the consequences that the law requires on the footing that this or that view of the evidence is taken.” (footnote omitted)

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<sup>6</sup> *RPS v R* (2000) 199 CLR 620; [2000] HCA 3.

<sup>7</sup> *Alford v Magee* (1952) 85 CLR 437.

<sup>8</sup> [2005] HCA 34; (2005) 153 A Crim R 503.

[78] The statements of the learned President and Thomas JA show that the law concerning a summing-up in trials under the *Criminal Code* is no different from the law in trials at common law. Their Honours' statements are consistent with the statements of Gaudron ACJ, Gummow, Kirby and Hayne JJ in *RPS v The Queen*[34] concerning the duty of a trial judge in jurisdictions that have no counterpart to s 620:

"The fundamental task of a trial judge is, of course, to ensure a fair trial of the accused. That will require the judge to instruct the jury about so much of the law as they need to know in order to dispose of the issues in the case. No doubt that will require instructions about the elements of the offence, the burden and standard of proof and the respective functions of judge and jury. Subject to any applicable statutory provisions it will require the judge to identify the issues in the case and to relate the law to those issues. It will require the judge to put fairly before the jury the case which the accused makes." (footnotes omitted)

[79] As Diplock LJ pointed out in *R v Mowatt*[35], the "function of a summing-up is not to give the jury a general dissertation upon some aspect of the criminal law, but to tell them what are the *issues of fact* on which they must make up their minds in order to determine whether the accused is guilty of a particular offence." (Emphasis added)

[80] A summing-up is radically defective unless it adequately explains "to the jury the nature and essentials of" the offence with which a person is charged[36]. Where the offence involves statutory terms, it is usually "imperative that the jury be specifically directed as to the criteria to be applied and the distinctions to be observed in determining" whether particular conduct is within the terms of the section[37].

In summary in *R v AJS*<sup>9</sup>, the Court stated it is the responsibility of the trial Judge in every jury trial –

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<sup>9</sup> (2005) 12 VR 563; 159 A Crim R 327; [2005] VSCA 288.

- (a) to decide what are the real issues in the case;
- (b) to direct the jury on only so much of the law as is necessary to enable the jury to resolve those issues;
- (c) to tell the jury, in the light of the law, what those issues are;
- (d) to explain to the jury how the law applies to the facts of the case;  
and
- (e) to summarise only so much of the evidence as is relevant to the facts in issue, and to do so by reference to the issues in the case.

It is to noted that the summing up is not a function which can be delegated by the Trial Judge to counsel. While a judge can expect assistance from counsel, the content of the summing up is to be determined by the trial judge.<sup>10</sup>

#### Particular examples

It is worthwhile looking at some examples where the failure to seek appropriate directions has led to successful appeals.

The first case I want to look at is *R v Wells*.<sup>11</sup> This case involved a failure of the trial judge to give a “lies” direction.

In this case, the appellant was convicted of one count of rape. During the prosecutor’s address the prosecutor suggested to the jury that the appellant lied in the witness box. The trial judge gave no direction to the jury on the question of lies.

The appellant argued that despite the fact there was no request for direction of the question of lies, an *Edwards* or *Zoneff* direction should have been given. The court found that the jury was left to consider the prosecutor’s submission without any adequate guidance on how they could use the lies against the appellant. There was a risk the jury impermissibly reasoned the appellant was guilty based on the prosecutor’s address.

If the prosecutor had raised this issue with the judge before the addresses then a direction may well have been given.

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<sup>10</sup> *Hamilton (a Pseudonym) v R* [2020] NSWCCA 80 at [84].

<sup>11</sup> [2013] QCA 289.

The next case I want to look at is *R v Brock*.<sup>12</sup> This case involved alleged admissions by the accused.

The appellant was convicted of sexual offences against a child. The evidence was that the appellant spoke to the mother after she had written a letter of complaint concerning the matter and the appellant said “I thought you would have wanted me to do that” which she assumed related to the alleged sexual activity.

The trial judge left the statement as evidence of an admission. It was held that it was not an admission. Again if the issue had been the subject of discussion before the directions then the trial may have been “saved.”

Another area is the area of defences to be left to the jury. The High Court made it clear in *Pemble v R*<sup>13</sup> and *Stevens v R*<sup>14</sup>.

In *R v SAX*<sup>15</sup> the appellant was convicted of rape. It was common ground the appellant and the complainant had sexual intercourse. She gave evidence she was intoxicated and blacked out and awoke to find the appellant having sex with her. The appellant gave evidence that she consented to the sex. It was held that the Trial Judge erred in failing to leave section 24 of the Code as a defence.

Bear in mind each case depends on its own facts and in some cases the defence may not be raised.<sup>16</sup>

Other cases of relevance are:

- Directions to the jury as to the use to be made of previous acquittals- *R v FAR* [2018] QCA 317.
- Section 21AW directions- *R v TAC* [2013] QCA 283.
- Reminding the jury of the cross-examination as well as the evidence in chief- *R v Ali* [2015] QCA 191.
- The jury should be reminded of the other evidence aside from the complainant’s where the complainant’s evidence is replayed – *R v FAE* [2014] QCA 69; *R v LAK* [2018] QCA 30.

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<sup>12</sup> [2018] QCA 185.

<sup>13</sup> [1971] HCA 20; (1971) 124 CLR 107.

<sup>14</sup> [2005] HCA 65; (2005) 227 CLR 319.

<sup>15</sup> [2006] QCA 397.

<sup>16</sup> See e.g. *R v Ross* [2007] QCA 244.

- The jury should be directed not to place undue weight on certain evidence- *R v Halliday* [2018] QCA 279; *R v SDL* [2022] QCA 207.
- Instructing the jury that DNA may have been innocently deposited- *R v Hasrouny* [2020] QCA 163.
- Instructing the jury as to the use of the section 132B evidence- *R v FBA* [2021] QCA 142.
- Instructing the jury to ignore non-responsive evidence given by a witness- *R v GAZ* [2016] QCA 229.
- Instructing the jury re motive to lie- *R v Coss* [2016] QCA 44.
- Post-offence conduct directions must be given- *R v Oth* [2022] QCA 53.
- Propensity direction as to charged acts- *R v LAS* [2021] QCA 65.
- Uncharged acts direction- *R v Douglas* [2018] QCA 69; *R v SDU* [2022] QCA 176.
- Directions as to the failure of the accused to give evidence i.e. no adverse inference can be drawn- *R v Smallwood* [2021] QCA 132.

The point I am really making is that it is crucial to raise relevant issues before the summing up and preferably before the addresses. Listen carefully to the summing up so that all appropriate directions have been given and the directions are accurate.

Make sure you have the relevant provisions of the Bench Book with you. Make sure they are covered off.

I can recall once prosecuting where the Judge forgot to tell the jury of the elements of the offence. I had to remind him after the summing up was completed!

### Redirections

It is important to know that where a jury seeks redirections they must be given the directions sought. In *R v JX*<sup>17</sup> the jury requested a redirection but before it was given the jury indicated it had reached a verdict and verdicts were taken. It was held that ordinarily the redirection should be given before verdicts are taken.

One aspect which I want to mention is an issue relating to majority verdicts.

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<sup>17</sup> [2016] QCA 240.

It is permissible for a judge to tell the jury before the expiry of 8 hours that it is possible to take a majority verdict.<sup>18</sup>

When it comes to the majority verdict stage make sure the judge has turned his or her mind to the statutory requirements under section 59A of the *Jury Act*.

In order to determine whether the jury is unlikely to reach a unanimous verdict the *Black* direction should be given first.<sup>19</sup>

### The future

In Victoria in 2015 the *Jury Directions Act* was passed. This codified the giving of jury directions in that state. The purpose of the Act is to reduce the complexity of Jury directions and to clarify the duties of the trial judge. An obligation is placed on counsel to inform the judge what is or is not in issue. The prosecution and the defence are required to tell the judge what particular directions they seek. The trial judge must give the direction unless there are good reasons for not doing so.

There is no present bill in Queensland providing for the giving of jury directions. The QLRC however has considered the issue previously.<sup>20</sup>

It remains to be seen whether there will be any change although in recent years the parliament has changed the fresh complaint direction<sup>21</sup> and the *Longman* direction.<sup>22</sup>

### Conclusion

I hope that I have assisted you in understanding your role concerning directions and redirections and the importance of listening to the summing up and raising crucial issues which should be directed upon.

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<sup>18</sup> *R v BCG* [2012] QCA 167.

<sup>19</sup> *R v McClintock* [2010] 1 Qd R 354.

<sup>20</sup> QLRC report, A Review of Jury Directions Report No 66 December 2009.

<sup>21</sup> Section 4A of the *Criminal Law (Sexual Offences) Act 1978 (Qld)*.

<sup>22</sup> Section 132BA of the *Evidence Act 1977 (Qld)*.