

25. Evidence of Defendant in Respect of a Co-Defendant

25.1 Legislation

[Last reviewed: January 2025]

Nil.

25.2 Commentary

[Last reviewed: January 2025]

An express direction should be given where the evidence of a Defendant could be used for or against a Co-Defendant (see *R v Nessel* ([1980](#)) [5 A Crim R 374](#), [383]).

There are difficulties in formulating a direction where an accomplice testifies in the defence case. It is contrary to *Robinson v The Queen* ([1991](#)) [180 CLR 531](#), [6] to direct that a Defendant's evidence may be subjected to particular scrutiny because of his/her interest in the outcome. To do so is to undermine the presumption of innocence. Accordingly, when a Defendant who gives evidence implicates a Co-Defendant, the nature and extent of an accomplice warning, *if any*, cannot be answered without reference to the circumstances of the particular case (*Webb v The Queen* ([1994](#)) [181 CLR 41](#), [65]-[66], [92]-[95]). But if some warning is to be given, the judge must not permit the jury to believe that it might attach to the Defendant's evidence in his own case (*Webb v The Queen* ([1994](#)) [181 CLR 41](#), [165]; see also *R v Skaf, Ghanem, and Hajeid* [[2004](#)] [NSWCCA 74](#), [159]-[168]; *R v Johnston* [[2004](#)] [NSWCCA 58](#), [141]; *R v Lewis & Baira* [[1996](#)] [QCA 405](#); *R & G v The Queen* ([1995](#)) [63 SASR 417](#); and *R v Rezk* [[1994](#)] [2 Qd R 321](#), [330]).

25.3 Suggested Direction

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What the Defendant [insert name] has said while giving evidence may be used not only for or against them but also for or against the other Defendant[s] [refer to other Defendant/s].

(Warning: do not give the direction in the second paragraph without giving the direction in the third).

However, to the extent to which that evidence implicates [name of other/s] in the [describe offences], scrutinize it carefully. There is a danger that, in implicating [name of other(s)], [Defendant witness] may have been concerned to shift the blame.

This warning is restricted to those parts of the evidence of [Defendant witness] which inculcate [name of other/s] in the offence: it does not apply to the evidence as it relates to [name of witness's] own case.