

Dismissal During the Trial of Some Charges Against Single Defendant

Legislation

Nil.

Commentary.

The proper occasion for delivering a direction similar to that in the second part of the sample direction will only arise where, for whatever reason, the fact the prosecution has not proven, or elects to otherwise discontinue, a charge betrays a change in account from a witness. It will usually be limited to those cases where a complainant has failed to come up to proof on one or more of multiple charges and where that evidence is critical to the proof of the charge. The appropriateness of such a direction will be governed by considerations of fairness in the overall context of the trial, and may also be affected by the degree of precision with which the evidence was opened by the prosecution.

In *The Queen v Storey* ([1978](#)) [140 CLR 364](#) the High Court held that on a re-trial, where there had been an acquittal on some but not all charges at the earlier trial, the admissibility of evidence at the later trial was governed by a recognition that the defendant must be given the full benefit of the earlier acquittal. In *R v FAR* [[2018](#)] [QCA 317](#), the Court of Appeal applied the principle of affording the full benefit of an earlier acquittal to the need to ensure that the directions in the later trial afforded that benefit to the defendant also. There is no reason in principle why it should be limited to occasions where a re-trial is held as opposed to the acquittal on, or discontinuance of, a charge in the one trial.

Suggested Directions

At the beginning of the trial, I told you that the defendant was accused of (insert number) separate offence/s: (if appropriate, briefly describe those offences). Since then, however, (insert number) of these charges has/have been discontinued by the prosecution (or, where appropriate, been the subject of a verdict/s of not guilty at my direction), namely (describe the offence/s no longer being proceeded with). That charge (or those charges)

is/are no longer before you (*where appropriate*, and has/have no relevance to your consideration of the case.) The only offence/s that the defendant is now charged with is/are (describe remaining offence/s) and it is on that/those charge/s that you must return your verdict/s.

Where appropriate: **In the circumstances of this trial, there is potentially another use that can be made by you of the fact of the discontinuance (*or where appropriate*, directed acquittal) on that/those charge/s.**

You will recall that the Crown Prosecutor opened the prosecution case on the basis that you would hear from the complainant that (*here summarise the complainant's expected testimony for the discontinued charge/s*). As you know, the complainant did not give any such evidence, and you are no longer required to return a verdict/s on that/those charge/s.

You can assume that the Crown Prosecutor acted on an expectation that the complainant would testify along the lines that were opened, and you can assume that expectation came from something previously communicated by the complainant, whether in a written statement or a conversation. The failure to testify to that effect can be considered by you to be an inconsistent statement given on an earlier occasion. Whether it affects your assessment of his/her credibility or reliability is a matter for you to determine, just as you will with any inconsistency you find in the evidence.