Witnesses Whose Evidence May Require a Special Warning ("Robinson" direction)

Legislation

Section 632(3) of the Criminal Code prohibits the giving of any warning or suggestion that the law regards any class of persons as unreliable witnesses.

Section 632:

> **Corroboration**
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> (1) A person may be convicted of an offence on the uncorroborated testimony of 1 witness, unless this Code expressly provides to the contrary.
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> (2) On the trial of a person for an offence, a judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated testimony of 1 witness.
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> (3) Subsection (1) or (2) does not prevent a judge from making a comment on the evidence given in the trial that it is appropriate to make in the interests of justice, but the judge must not warn or suggest in any way to the jury that the law regards any class of persons as an unreliable witnesses.

Commentary

The judge's "comment" referred to in section 632(3) is colloquially referred to as a *Robinson direction.*

Whether a *Robinson direction* is required depends on the nature of the case *and also* the danger of a miscarriage of justice if the warning is not given.

Robinson v R (1999) 197 CLR 162 is a unanimous decision of the High Court which explained the intended operation of the section as follows:

> [20] Once it is understood that s 632(2) is not aimed at, and does not abrogate, the general requirement to give a warning whenever it is necessary to do so in order to avoid a risk of miscarriage of justice arising from the circumstances of the case, but is directed to the warnings required by the common law to be given in relation to certain categories of evidence, its relationship to the concluding words of s 632(3) becomes clear, although the symmetry between the two provisions is not perfect.
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> [21] Subsection (2) negates a requirement, either generally or in relation to particular classes of case, to warn a jury 'that it is unsafe to convict the accused on the uncorroborated testimony of 1 witness.' That does not mean, however, that in a particular case there may not be matters personal to the uncorroborated witness upon whom the Crown relies or matters relating to the circumstances, which bring into the operation the general requirement considered in *Longman*.

R v Reynolds [2015] QCA 111 at [39] explains when a *Robinson direction* should be given –

> The functional purpose of the Robinson direction is to convey to the jury the importance of cautiously scrutinising the evidence of the complainant. As the Robinson direction is of a special and exceptional nature, it will generally only be required in circumstances where the factual matrix giving rise to the "perceptible risk" is outside the ordinary experiences of the jury. Accordingly, although not a substitute for the "perceptible risk" test, a cogent indicator of the need for a Robinson direction is the existence of a forensic disadvantage to the accused emanating from the factual matrix which is perspicuous to the trial judge, but not necessarily to lay members of the community.

In *R v Pollard* [2020] QCA 188, Sofronoff P explained the context for such a direction:

> [27] …[The expression "a *Robinson* direction"] has come to comprehend a direction to the effect that, for particular reasons that a judge would identify, a jury must "scrutinize the evidence of [a witness] with care" or, as is sometimes insisted, "with great care".
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> [28] The problem presented when this argument is raised is the problem that a jury has when invited to convict upon the evidence of, usually, a single witness. At issue is the degree of reliability that the jury ought to demand from the evidence before announcing itself satisfied beyond a reasonable doubt of the guilt of the accused. The long experience of judges and lawyers who practice criminal law … teaches that there are recurring factors in the cases that can render testimony suspect. When factors exist in a case that affect the reliability of evidence, whether for reasons to do with the possible dishonesty of a witness or for reasons to do with sheer reliability, it is the duty of the judge to give the jury the benefit of judicial experience by instructing a jury about the known risks.
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> [29] The real question for a trial judge is whether, in the case at hand, there are such features and whether these features warrant judicial instruction. If such features exist and the conduct of the case dictates such a course, the judge ought to warn the jury about the existence of these factors so that the jury is armed with the necessary knowledge to consider the evidence in its true forensic context. This is simply a matter of ensuring that the jury has the necessary mental equipment with which to deal rationally with the evidence.

In *R v VM* [2022] QCA 88, Sofronoff P reinforced the point that a warning is not required in every case where a complainant is uncorroborated or inconsistent (see at [39]): "The reason that a warning is required is to ensure against the possibility of a miscarriage of justice. Sometimes that is because judicial experience has given a judge an advantage in the reasoning involved in assessing credibility which a jury lacks."

In *R v Tichowitsch* [2007] 2 Qd R 462 (considering *Tully v The Queen* (2006) 230 CLR 234) it was held that s 632 makes it clear that a warning is not required solely because a complaint is uncorroborated, or a child, or the alleged offence is sexual. But those features *may* result in a need for a warning.

Whether a warning is necessary to avoid a perceptible risk of a miscarriage of justice depends upon the circumstances of the case and the warning should refer to and identify those circumstances: see *MBX* [2013] QCA 214, and *Nguyen* [2013] QCA 133.

The mere possibility of mistakenness is not enough: *Brooks* (1999) 103 A Crim R 234 at 244.

A trial judge is required to identify to the jury the features which the judge considers warrant a specific warning, the reasons for the warning, and the proper response to it (that is, to scrutinize the evidence with care): see *Tully* per Crennan at [179]. The reason for the warning is often that the particular evidence is the critical evidence in the case.

The judge should not simply repeat counsel's arguments, but "express the unmistakable authority of the Court": *JJB* (2006) 161 A Crim R 187 at 195.

The evidence of certain types of witness is likely to be driven by motivations which are not immediately obvious to a jury.

These witnesses include –

> **prison informants**: See "Out of Court Confessional Statements" (Chapter 36 of this Bench Book) and *Pollitt v The Queen* (1992) 174 CLR 558. See too the discussion in *R v Benedetto* [2003] 1 WLR 1545 at [31] – [32], [34] – [38], [48];
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> **indemnified witnesses**: The need for a warning was found to be particularly acute where the indemnity contained a condition requiring the witness to give evidence in accordance with a statement implicating the defendant: *R v Falzon (No 2)* [1993] 1 Qd R 618. Contemporary indemnities either give an undertaking not to prosecute for specified offences, subject to the giving of truthful evidence, or provide that statements made in the course of proceedings will not be used in any subsequent prosecution of the witness;
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> and
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> **witnesses who have had the benefit of a reduced sentence pursuant to section 13A *Evidence Act*.**

Where there is some other reason, such as bad character or hostility or self-interest, to question seriously the bona fides of a prosecution witness, the trial judge should give the jury such warning as is appropriate of the possible danger of basing a conviction on the unconfirmed testimony of that witness: see *R v Sinclair & Dinh* (1997) 191 LSJS 53.

A warning should be given where a witness whose evidence is important has some mental disability which may affect his capacity to give reliable evidence: *Bromley* (1986) 161 CLR 315.

It may also be appropriate, depending on the circumstances, to warn in respect of a witness whose recollection is likely to be drug-affected: See *Hickey & Komljenovic v The Queen* (1995) 89 A Crim R 554 at 567-569 (warning required) *cf R v Morgan* [1994] 1 VR 567 (no warning required).

Any directions considered necessary because of delay, and the significant forensic disadvantage which it occasioned for the defendant, must be in accordance with section 132BA of the *Evidence Act* 1977 (Qld).

In the case of sexual offence complainants, see also section 4A(4) of the *Criminal Law (Sexual Offences) Act* 1978. The jury must not be told that the law regards the complainant's evidence as more or less reliable only because of the time taken by the complainant to make a preliminary or other complaint.

Also, in the case of sexual offence complainants, a trial judge may make a comment in response to a suggestion by defence counsel to the effect that it would be inherently improbable that the complainant would have behaved as they did if they had been sexually abused.

In *R v Cotic* [2003] QCA 435, the Court of Appeal did not disapprove of a comment by a trial judge along the following lines – although the trial judge in that case told the jury that they could ignore it:

> There are no rules about how people who engage in the sexual abuse of children behave and no rules about how their victims behave. It is dangerous to make assumptions, or apply pre-conceived notions, about how abused children should behave, either generally, or in this particular case.

See also *R v MCJ* [2017] QCA 11 at 52*ff.*

Suggested Direction

There is no prescribed formula for the warning. It will often be sufficient to give it in brief and unelaborated terms.

> **[**The complainant/witness**] is the critical witness in this case. You will need to scrutinise his/her evidence with great care before arriving at a conclusion of guilt.**
>
> **That is not to say that you cannot act on his/her evidence. But you may only do so if you are convinced of its truthfulness and accuracy, bearing in mind the following matters, which may have some effect upon his/her reliability:**
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> > **[**List for the jury the circumstances which give rise to the need for the warning. These will vary from case to case but *may* include the age of the complainant/witness at the time of the alleged incident**;** their state of intoxication or consciousness; their state of mental health; significant differences between accounts of the alleged offence by the witness; and the

absence of any supporting evidence especially when it might be expected – but taking care not to offend the prohibition in 632(3)**]**

Suggested direction for certain types of "suspect" witnesses

Indemnified Witness

In this case the prosecution relies on the evidence of [Y**], whom, as you have heard, has been given an indemnity against prosecution provided that he gives truthful evidence here. There is a risk, of course, that having been protected from prosecution in that way, [**Y**] may have an incentive not to depart from the statement he gave to police, whether it is right or wrong, so as not to arouse any suspicions of untruthfulness. And he may wish to ingratiate himself with the authorities to ensure he maintains his indemnified position. You should therefore, scrutinize his evidence with great care. You should only act on it if, after considering it and all the other evidence in the case, you are convinced of its truth and accuracy.**

Witness who has given a Section 13A Statement

The prosecution relies on the evidence of [Y**], who gave a statement to the police which had the effect of reducing his own sentence. Under Queensland sentencing law, sentences may be reduced by the court where the offender undertakes to co-operate with law enforcement authorities by giving evidence against someone else. If an offender receives a reduced sentence because of that sort of co-operation, and then does not co-operate in accordance with his undertaking, the sentencing proceedings may be re-opened and a different sentence imposed. You can see therefore, that there may be a strong incentive for a person in that position to implicate the defendant when giving evidence. You should therefore scrutinize his evidence with great care. You should only act on it after considering it and all the other evidence in the case, you are convinced of its truth and accuracy.**

Witness with a Mental Disability

You have heard evidence that [Y**] has a long-standing condition of schizophrenia which disposes him to hallucinations and delusions,**

particularly if he is not keeping up with his prescribed medication. That creates a risk that his evidence might be the result of delusion rather than based in reality. Because of that risk you must approach his evidence with special care. You can act on it if you are convinced of its accuracy but it would be dangerous to convict the defendant on his evidence if you could not find other evidence to support it [supporting evidence may be found, if you accept it in…**].**