

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

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### Commentary

Section 632(3) Code prohibits the giving of any warning or suggestion that the law regards any class of persons as unreliable witnesses. However, it remains the case that the evidence of certain types of witness is likely to be underlain by motivations not immediately obvious to a jury.

Section 632 reads:

#### *"Corroboration*

- (1) *A person may be convicted of an offence on the uncorroborated testimony of 1 witness, unless this Code expressly provides to the contrary.*
- (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.*
- (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."*

In *Robinson v R* ([1999](#) 197 CLR 162) a unanimous High Court judgment considered s 632(3) of the Code and held (at [20]) that:

*[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.*

*[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."*

In *R v Tichowitsch* ([2007](#) 2 Qd R 462) the Court of Appeal considered s 632 and the decision in the High Court in *Tully v The Queen* ([2006](#) 230 CLR 234; [2006](#) HCA 56). The Court of Appeal 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. However, features of such cases can result in a warning being necessary.

*Robinson v R*, *Tully v R*, and *R v Tichowitsch* stressed that whether a warning was necessary to avoid a perceptible risk of a miscarriage of justice depended on the circumstances of the case, and the warning should refer to and identify those circumstances. See also *MBX* ([2013](#) QCA 214), and *Nguyen* ([2013](#) QCA 133).

In *Tully*, Crennan J referred at [179] to various intermediate appellate level distillations which required a trial judge 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 (to scrutinize the evidence with care). The judge should not simply repeat counsel’s arguments, but “express the unmistakable authority of the Court.”<sup>1</sup>

Guidance as to whether a *Robinson* direction should be given may be found in *R v Reynolds* [2015] QCA 111 at [39] –

“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.”

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

A suggested “*Robinson*” warning might be:

**You will need to scrutinize the evidence of (the complainant) with great care before you could arrive at a conclusion of guilt. That is because of (the following circumstances):**

- **the delay between the time of (each) (the) alleged incident and the time the defendant was told of the complaint, and the lack of any opportunity to prove or disprove the allegation by, for example, a timely medical examination;**
- **the age of the complainant at the time of the alleged incident;**
- **the difference between the accounts the complainant has given;**
- **these other matters (identify them).**

**You should only act on that evidence if, after considering it with that warning in mind, and all the other evidence, you are convinced of its truth and accuracy.**

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<sup>1</sup> *JJB* (2006) 161 A Crim R 187 at 195.

The evidence of prison informers has been regarded as generally requiring a warning<sup>2</sup>, as has the evidence of indemnified witnesses<sup>3</sup> and witnesses who have had the benefit of a reduced sentence pursuant to s 13A *Evidence Act*. It is not, however, inevitable that such a warning must be given in respect of every indemnified witness.<sup>4</sup>

“The general law requires a warning to be given whenever a warning is necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case”<sup>5</sup>. Thus, “where there is some particular 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.”<sup>6</sup> But the mere possibility of mistakenness is not enough.<sup>7</sup>

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.<sup>8</sup> It may also be appropriate, depending on the circumstances, to warn in respect of a witness whose recollection is likely to be drug-affected.<sup>9</sup>

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<sup>2</sup> See “Out of Court Confessional Statements” 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].

<sup>3</sup> The need for a warning was 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. However, 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.

<sup>4</sup> *R v Lovelock* [1999] QCA 501.

<sup>5</sup> *Longman v The Queen* (1989) 168 CLR 79 at 86. See also “Delay Between (Sexual) Incident and Complaint (*Longman* Direction)”.

<sup>6</sup> *R v Sinclair & Dinh* (1997) 191 LSJS 53. The passage continues: “...There is no prescribed formula for the warning and it will often be sufficient to give it in brief and unelaborated terms. Its purpose will usually be to share with the jury the courts’ ‘sharpened awareness’ of the danger of acting on the uncorroborated evidence of such witnesses.”

<sup>7</sup> *Brooks* (1999) 103 A Crim R 234 at 244.

<sup>8</sup> *Bromley* (1986) 161 CLR 315.

<sup>9</sup> 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).

## **Directions**

### **Indemnified Witness**

In this case the prosecution relies on the evidence of (Y), who, 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...].