30. References to a co-offender

30.1 Legislation

[Last reviewed: March 2025]

Nil.

30.2 Commentary

[Last reviewed: March 2025]

Where evidence is adduced from a co-offender (which will usually not occur unless they have been dealt with for the offence), it may be necessary to refer to their plea.

Reference to the *existence* of a co-offender who is not on trial with the present Defendant may be necessary if the jury is properly to understand the proceedings. In such a case, the jury need to be warned not to speculate on the reasons for the co-offender's absence but to try the case on the evidence.

However, any reference to the *plea* of a co-offender who is not on trial with the present defendant, or the *outcome* of the co-offender's separate trial (for the same offence) ought to be the exception, not the rule.

Sometimes, an issue arises about the incontrovertibility of a verdict of a co-accused.

Meaning of incontrovertible verdict

In *R v Jobling* [2011] QCA 31, Jobling and his co-accused (Hinschen) were charged with the murder of Jobling's former partner. They were tried separately. The Crown proceeded first against Hinschen. He was convicted of murder on the basis that he intentionally killed the deceased at Jobling's urging under s 7(1)(a).

The Crown then proceeded against Jobling on a s 7(1)(d) basis (consistent with the case prosecuted against Hinschen) and on a s 7(1)(a) and s 7(1)(c) basis. These last two alternatives were based on Hinschen's evidence at Jobling's trial, which was different from his earlier account to police (in which he confessed to the intentional killing at Jobling's urging).

At trial, Jobling's barrister argued that the jury should be directed that he could only be convicted on a s 7(1)(d) basis. The trial judge refused the application.

Jobling was convicted of murder. He appealed against his conviction arguing *inter alia* that the prosecution ought not to have been permitted to invite the jury to convict him on a s 7(1)(a) basis because that was inconsistent with the principle that the verdict in Hinschen's trial was incontrovertible and was an abuse of process.

That argument failed. McMurdo P, with whom White JA and Jones J agreed, explained, quoting from *R v Carroll,* that decisions of courts, unless set aside or quashed, are to be accepted as incontrovertibly correct: the principle of incontrovertibility. Her Honour explained that whether a particular case offended the doctrine of incontrovertibility involved questions of the interests of justice and public policy considerations.

To determine whether the principle had been offended in a criminal law context requires a comparison of the elements of the offences in the decision said to be controverted and the elements of the offence said to controvert the earlier decision.

In *Jobling*, Her Honour was:

> *'…unpersuaded that the means and path to conviction in the Crown's action against Hinschen has resulted in the means and path to conviction in the Crown's action against Jobling becoming an abuse of process. It is true that one of the particularised paths to conviction in Jobling's trial was inconsistent with the sole particularised path to conviction in Hinschen's trial. But it was not an element of the count of murder brought by the Crown in its action against Hinschen that Hinschen killed the deceased because Jobling procured him to do so. Neither the verdict of guilty of murder in the Crown's action against Hinschen nor the elements of the offence of murder of which Hinschen was convicted in that case, were controverted by the conduct of the prosecution in the Crown's action against Jobling …'*

This decision was applied by Rafter J in the trial preceding *R v Spencer* [2023] QCA 210, a case in which the appellant (Spencer) was charged with murder. He was co-accused with Mark Crump and Stephen Crump. At Spencer's trial, his barrister submitted that it was highly relevant for the jury to be informed that Stephen Crump had been found not guilty of murder. His Honour ruled at trial that the jury ought not to be so informed. His Honour said:

> Generally, the outcome of the trial of a co-offender is not relevant: see R v Howard (1992) 29 NSWLR 242; Hui Chi-Ming v R [1992] 1 AC 34. The principle of the incontrovertibility of an acquittal clearly applies to the person who is found not guilty but is not extended to an alleged co-offender: see R v Jobling […]
>
> The acquittal of Stephen Crump is binding between the parties to that proceeding: Washer v Western Australia […] The verdict of acquittal in Stephen Crump's trial has no relevance to the trial of the present accused. The decision of the English Court of Appeal in R v Cooke […] involved the credibility of a common witness to that trial and earlier trials. The conduct of the Crown case here does not involve any attempt to undermine the acquittal of Stephen Crump. To introduce evidence of the acquittal in Stephen Crump's case would complicate this trial and involve speculation on the part of the jury as to the reasons for that acquittal.

> Mr Eberhardt submitted that quite apart from relying on the acquittal to undermine the Crown case, the jury may well wonder about Stephen Crump's position. The jury are generally told not to speculate. If the jury are informed of the outcome of Stephen Crump's trial it may well involve speculation about the outcome of the other alleged participants. Whilst Mr Eberhardt said he would not oppose the [jury] being informed that Mark Crump pleaded guilty to murder, I see that as being irrelevant. The application by the accused to adduce evidence of the acquittal of Stephen Crump is dismissed.

The ruling referred to above was not challenged on appeal (*R v Spencer* [2023] QCA 210, [153]). However, it was argued that a miscarriage of justice occurred by reason of:

> (a) the trial judge failing to direct the jury that a formal admission in respect of Mark Crump was not evidence against the appellant; and
>
> (b) the trial judge failing to direct the jury not to speculate about Stephen Crump.

As to (b), it was submitted at [155] that the jury should have been directed to the effect that:

> *'You have heard about the existence and role of Stephen Crump to give context to the evidence in this case. Obviously, he is not on trial here. There are all sorts of reasons why co-offenders are not tried together. You must not speculate about why he is not here. You are to decide this case only the evidence before you.'*

The Court held that the trial judge's directions not to speculate; consider the case based only on the evidence; and not speculate about what might have happened at a previous trial or why there was a re-trial, were adequate (see [154], [158]). A direction of the type sought would have drawn attention to the fact that Stephen Crump could be regarded as a co-offender, rather than simply being referred to as part of the narrative of events (see [157]).

30.3 Suggested Direction

[Last reviewed: March 2025]

(Co-offender not on trial**):**

You have heard about [the existence of/role of co-offender**] to give full context to the evidence in this case. Obviously, [**he/she**] is not on trial here. There are all sorts of reasons why alleged co-offenders are not tried together. You must not**

speculate about why [he/she**] is not here. As I have said, you are to decide this case only on the evidence before you.**

(Evidence that co-offender witness has pleaded guilty**):**

You have heard the evidence that [name**] has pleaded guilty to a crime which arose out of the same events for which the Defendant is on trial here. You must not consider that guilty plea as any evidence of this Defendant's guilt. You may consider [**name's**] guilty plea only for the limited purpose of determining how much, if at all, to rely upon [**his/her**] testimony.**