23. General Summing Up Directions

23.1 Legislation

[Last reviewed: March 2025]

Nil.

23.2 Commentary

[Last reviewed: March 2025]

This Chapter contains various suggested directions that may be incorporated into a summing up. Some of the issues addressed in these suggested directions are also dealt with in other chapters of this Benchbook. Where relevant, references to these chapters are included in notes to the suggested directions below. Suggested directions are provided on (in the order they appear):

- Identifying the charge.
- Alerting the jury to the summing up.
- The functions of the judge and jury.
- Unanimous verdicts.
- What is and what is not evidence.
- Primary facts and inferences.
- The burden and standard of proof.
- Evidence by the defendant.
- No sympathy or prejudicial influence.
- The acceptance of evidence in whole or part.
- Testimony accuracy indicators.
- Body of the summing up.
- Rival contentions.
- Further assistance.
- Delivering the verdict (and majority and alternative verdicts).
- Discharging reserve jury.

In complex, lengthy trials, it may be advisable to prepare a draft summing up, provide it to the parties and invite submissions upon it (see *R v Knight & Ors* [2010] QCA 372, [324]).

Comments are to be distinguished from warnings (e.g. against following impermissible paths of reasoning, and where care is needed in assessing some types of evidence such as identification evidence or the testimony of prison informers. See *Crampton v The Queen* (2000) 75 ALJR 133; [2000] HCA 60, [39]-[40], [125]-[126], [142]).

Where the observation is only a comment, the jury should be told that they may ignore it (*Azzopardi v The Queen* (2001) 205 CLR 50, [69]-[70], [49]-[50]; [2001] HCA 25). The trial judge is not bound to comment on the facts. The preferable course will often be to make no comment on the facts beyond reminding the jury of the arguments of counsel (*RPS v The Queen* (2000) 199 CLR 620; [2000] HCA 3, [42]). The exercise of the discretion to comment on the facts requires a degree of judicial circumspection. Because of the risk of unfairness to either side, a comment on the evidence should not go so far as to suggest how a disputed question of fact should be resolved (*McKell v The Queen* (2019) 264 CLR 307, 323 [46]; [2019] HCA 5).

In directing about admissions made pursuant to s 644 (in the context of discussing what evidence is), care is required in ensuring the limit of admissions is correctly identified to the jury. For example, in *R v LBG* [2024] QCA 205 there was an admission that text messages contained in a document put before the jury were sent between the Complainant and Appellant. However, the truth of the content of the text messages, which included adverse allegations about the Appellant, was not admitted. That distinction was not explained to the jury. A re-trial was ordered because the directions given were vulnerable to being misunderstood as allowing the jury to wrongly act on the truth of the contents of the text messages as if it had been admitted.

23.3 Suggested Directions

[Last reviewed: March 2025]

Charge

The Defendant is charged with the following offence[s**] [**read from indictment**]**.

[He/she**] says [**he/she**] is not guilty. Your role is to determine on the evidence whether [**he/she**] is guilty or not guilty.**

Summing-up

I must now sum-up the case to you. You will then retire to consider your verdict[s**].**

Functions of judge and jury

Our functions are different. My task is to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies. You must accept the law from me and apply all directions I give you on matters of law.

You are to determine the facts of the case, based on the evidence that has been placed before you in this courtroom. That involves deciding what evidence you accept. You will then apply the law, as I shall explain it to you, to the facts as you find them to be, and in that way arrive at your verdict[s**].**

I may comment on the evidence if I think it will assist you in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent view. You are the sole judges of the facts.

Unanimous verdict

In respect of each charge, you must reach a unanimous verdict: that is, a verdict on which you all agree, whether guilty or not guilty. (This direction may be modified where a majority verdict is permitted. See further **Chapter 55 – Majority Verdicts).**

What is evidence

You must reach your verdict on the evidence, and only on the evidence [it does not matter whether that evidence was called for the prosecution or the defence**]. The evidence is what the witnesses said from the witness box, the documents [**or photos etc**] and other things received as exhibits [**and the admission(s) made**]. The exhibits will be with you in the jury room [**and you will have facilities for playing the electronically recorded material**]. (**Where facts are admitted per s 644), the jury should be directed that the admissions are sufficient proof of the facts admitted without other evidence. Where there is a risk the admitted facts may be misunderstood as carrying a broader meaning than actually admitted, their limit should be clearly explained. **)**

What is not evidence

If you have heard, or read, or otherwise learned anything about this case outside this courtroom, you must exclude that information from your consideration. Have regard only to the testimony and the exhibits put before you [and the admission(s) made**] in this courtroom since this trial began. Ensure that no external influence plays a part in your deliberations. (**This point may bear further emphasis in cases involving pre-trial publicity**).**

A few things you have heard are not evidence. This summing-up is not evidence. And statements, arguments, questions and comments by the lawyers are not

evidence either. The purpose of the opening of the case by the prosecutor was to outline the nature of the evidence intended to be put before you. [The same is true of the opening of defence counsel**]. Nor were the lawyers' final addresses evidence. They were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.**

(Sometimes it may be appropriate to add**): A thing suggested by a lawyer during a witness's cross-examination is not evidence of the fact suggested unless the witness accepted the suggestion as true. That is, the lawyer's question is not evidence. Let me give you an example. Imagine a lawyer asking a witness, 'The sky was grey, wasn't it?' The lawyer's statement in the question that the sky was grey is not evidence that the sky was grey. The evidence is instead to be found in the answer of the witness.**

Primary facts and inferences

Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. The [documents, photographs and other**] things put into evidence as exhibits may also tend directly to prove facts. But in addition to facts directly proved by the evidence, you may also draw inferences – that is, deductions or conclusions – from facts which you find to be established by the evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else occurred. That will be the process of drawing an inference from facts. For example, suppose that when you went to sleep it had not been raining, and when you woke up you saw rainwater around. The inference – the deduction, the conclusion – would be that it had rained while you were asleep. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by the evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.**

(In a circumstantial case, consider adding the following paragraph. Reference may also be made to **Chapter 48 – Circumstantial Evidence): Importantly, if there is an inference reasonably open which is adverse to the Defendant (i.e. one pointing to [**his/her**] guilt) and an inference in [**his/her**] favour (i.e. one consistent with innocence), you may only draw an inference of guilt if it so overcomes any other possible inference as to leave no reasonable doubt in your minds.**

(Where a particular intent is an element of the offence or otherwise indispensable to a conclusion of guilt, and there are no admissions of it, the jury might be told that**): The Defendant's intent is a central issue. No one can look inside [**his/her**] head. So, you will need to examine the evidence and ask yourselves whether it is proved beyond reasonable doubt that the Defendant intended to [**…**].**

Burden of proof

The burden rests on the prosecution to prove the guilt of the Defendant. There is no burden on a Defendant to establish any fact, let alone [his/her**] innocence. Nor is the Defendant obliged to give evidence or call other people to give evidence on [**his/her**] behalf, or otherwise produce evidence.**

(Note that a case where the outcome of the trial depends on the resolution by the jury of a conflict between Crown witnesses, the evidence of one pointing to innocence and the evidence of the other pointing to guilt, the jury should be directed that if they are in doubt as to which version is correct, they should acquit (see *R v Johnson & Honeysett* [2013] QCA 91, [19]-[21])**).**

The Defendant is presumed to be innocent. [He/She**] may be convicted only if the prosecution establishes that [**he/she**] is guilty of the offence charged [**or some other offence of which he/she may be convicted on the indictment: You will be directed later on as to this**].**

(This will require modification where the onus is borne by the defendant: eg. insanity, diminished responsibility, and s 129(1)(c) of the *Drugs Misuse Act 1986*. In such instances, the jury might be directed that**): Where the burden of proof of an issue rests on a Defendant, as with [**describe issue**], [**he/she**] is not required to establish it beyond reasonable doubt. The standard of proof required of [**him/her**] is lower. Where [**he/she**] is required to prove something, [**he/she**] need only satisfy you that what [**he/she**] contends for is more probable than not.**

Standard of proof

For the prosecution to discharge its burden of proving the guilt of the Defendant, it is required to prove beyond reasonable doubt that [he/she**] is guilty. This means that in order to convict you must be satisfied beyond reasonable doubt of every element that goes to make up the offence charged. I will explain these elements later. [**The prosecution must also satisfy you beyond reasonable doubt of any other matter which I indicate you must be satisfied about in order to find the Defendant guilty, e.g. self-defence**].**

It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offence [and the other matters of which you must be satisfied in order to find the Defendant guilty**]. If you are left with a reasonable doubt about guilt, your duty is to acquit: that is, to find the Defendant not guilty. If you are not left with any such doubt, your duty is to convict: that is, to find the Defendant guilty. (**In an essentially circumstantial case, add the appropriate circumstantial case direction. See **Chapter 48 – Circumstantial Evidence.** Consider adding, for example**): Importantly, if there is an inference reasonably open which is adverse to the Defendant [**i.e. one pointing to his/her guilt**] and an inference in [**his/her**] favour [**i.e. one consistent with innocence**], you**

may only draw an inference of guilt if it so overcomes any other possible inference as to leave no reasonable doubt in your minds.

Proof beyond reasonable doubt is the highest standard of proof known to the law. It can be contrasted with the lower standard of proof that is required in a civil case where matters need only be proved on what is called the 'balance of probabilities.' That is, the case must be proved to be more likely than not.

In a criminal trial, the standard of satisfaction is much higher; the prosecution must prove the guilt of the Defendant beyond reasonable doubt.

(See also Benchbook **Chapter 60 – Reasonable Doubt).**

(Where the locality of the offence is in issue, the standard of proof is on the balance of probabilities**).**

No evidence by a Defendant/evidence by a Defendant

(Having discussed the burden and standard of proof, direct the jury on the use to which they might put evidence given by the Defendant; the Defendant's silence at trial; or the Defendant's silence before trial, as applicable. Reference may be had to the Benchbook Chapters on the Defendant giving evidence**).**

No sympathy or prejudice influential

You should dismiss all feelings of sympathy or prejudice, whether it be sympathy for or prejudice against the Defendant or anyone else. No such emotion has any part to play in your decision [nor should you allow public opinion to influence you**]. You must approach your duty dispassionately, deciding the facts upon the whole of the evidence.**

Evidence may be accepted in whole or in part

Matters which will concern you are the credibility of the witnesses, and the reliability of their evidence. It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and correctly recalls the facts about which he or she has testified.

(The jury might also be informed**): Credibility concerns honesty. Reliability may be different. A witness may be honest enough but have a poor memory or otherwise be mistaken.**

Testimony accuracy indicators

Many factors may be considered in deciding what evidence you accept. I will mention some general considerations that may assist you.

You have seen how the witnesses presented in the witness box when answering questions. Bear in mind that many witnesses are not used to giving evidence and may find the different environment distracting. Consider also the likelihood of the witness's account. Does the evidence of a particular witness seem reliable when compared with other evidence you accept? Did the witness seem to have a good memory?

You may also consider the ability, and the opportunity, the witness had to see, hear, or know the things that the witness testified about. Another point may be: has the witness said something different at an earlier time? (Where a prior inconsistent statement assumes importance, elaboration may be helpful**): For example, a matter to be considered in assessing testimony is whether it differs from what has been said by the witness on another occasion. Obviously, the reliability of a witness who says one thing one moment and something different the next about the same matter is called into question. In weighing the effect of such an inconsistency or discrepancy, consider whether there is satisfactory explanation for it. For example, might it result from an innocent error such as faulty recollection; or else could there be an intentional falsehood. Be aware of such discrepancies or inconsistencies and, where you find them, carefully evaluate the testimony in the light of other evidence. (**See also **Chapter 46 – Prior Inconsistent Statements).**

These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony or to an exhibit.

(Where warnings are required regarding a particular witness**): I will, however, be mentioning some special warnings that you must take into account in assessing particular parts of the evidence.**

(In cases involving Indigenous witnesses or those who speak Aboriginal English or Torres Strait Creole (including a Defendant; and including a Defendant who does not give evidence, but whose out-of-court statements, such as to police during an interview, have been tendered), see page 194 of the 2nd edition of the *Equal Treatment Bench Book* (available on JVL under 'Bench Books') for directions about the way in which a jury is to approach their evidence**).**

Body of the summing-up

(Here give those directions appropriate to assisting the jury to apply the law to the facts and which are otherwise necessary to avoid a perceptible risk of a miscarriage of justice**.** The Judge's duty to instruct the jury as to the law applicable to the case requires an identification of the real issues in the case, the facts that are relevant to these issues and an explanation as to how the facts are relevant to them (see *Fingleton v The Queen* (2005) 227 CLR 166, 196-197; [2005] HCA 34, [77]-[80]; *R v Baker* [2014] QCA 5, [9], [86]-[89])**).**

Rival contentions

This brings me to a summary of the rival contentions. (As to inviting the jury to consider alternatives, see **Chapter 33 – Alternative Charges**. And as to the judge's responsibility to leave a possible defence for the jury's consideration even against the wishes of defence, see *Van Den Hoek* (1986) 161 CLR 158, [161]-[162], [169]; *R v Murphy* (1988) 52 SASR 186, [195]-[197]; *Hawkins v The Queen* (1994) 179 CLR 500, 517**).**

Further assistance

If you find that you need further direction on the law, please send a written message through the Bailiff. Likewise, if you wish to be reminded of evidence, let the Bailiff know, and make a note of what you want. When you return to the courtroom, I will provide such further assistance on the law as I can or arrange for the relevant part of the transcript to be read out to you; or given to you if I consider it appropriate to do so. As I mentioned at the start of the trial, you must not disclose in any communication to me the voting numbers (on this point, see *Smith v The Queen* (2015) 255 CLR 161; [2015] HCA 27, [32], [53]**).**

Delivering the verdict

When you return after having reached your verdict[s**], my Associate will ask:**

'Have you agreed upon a verdict?'

You will all then say, '*Yes*' to show that you have.

My Associate will then ask: '*Do you find the Defendant [**naming him/her****], guilty or not guilty of [****specifying the offence****]?*'**

Your speaker will then state your verdict: That is, whether guilty or not guilty.

My Associate will then ask you all: '*So says your speaker, so say you all?'* – which is the time-honoured method for inviting the whole jury to signify that the verdict announced by the speaker is indeed the verdict of all. So, you will collectively confirm that the verdict is unanimous by saying '*yes*'.

(Note that where a circumstance of aggravation is charged, it is usually convenient initially to take a single verdict in respect of both the offence and that circumstance. If the jury is not satisfied that the circumstance of aggravation has been proved to the requisite standard, a verdict can then be taken in respect of the offence simpliciter, without mention of the circumstance of aggravation**).**

This procedure is repeated for each offence.

I ask you to retire now to consider your verdict[s**].**

Alternative verdict

If the verdict on the offence of [*specifying offence***] is guilty, no further verdict will be taken. However, if the verdict is not guilty, my Associate will then ask*, ***'How do you find the Defendant, guilty or not guilty of [****the alternative offence****]?'* Your speaker will answer. Then you will again collectively confirm that the verdict is unanimous in the manner just mentioned.**

Majority Verdict

(See Benchbook **Chapter 55 – Majority Verdict**. In respect of a charge where a judge has given directions to the jury that a majority verdict may be returned, the speaker, after indicating that a verdict has been reached, should be asked whether the verdict is unanimous or not. The remainder of the jury should be asked to confirm what the speaker has stated. Disclosure of the jury's interim votes is irrelevant to the discretion to take a majority verdict under s 59A(2) of the *Jury Act***).**

Discharge of reserve jurors

Now, the following remarks are directed to the reserve jurors. As I mentioned at the start of the trial, because there has been no need to replace any member of the jury your participation in this trial is no longer required and I discharge you from further participation. However, I thank you for your careful attention throughout the trial, and for the dedication with which you have approached your task. I understand that you may feel disappointed that you are to play no further part in this trial and I again acknowledge the very considerable service that you have performed over the last weeks. You are free to leave or to stay at the back of the Court as you wish.