4. Trial Procedure

4.1 Legislation

[Last reviewed: September 2024]

Criminal Practice Rules 1999

Criminal Code

Jury Act 1995

4.2 Commentary and Suggested Directions

[Last reviewed: September 2024]

This part sets out the usual procedure for the commencement of a criminal trial.

It rests on the proposition that the brochures and video material provided to and shown to jurors will, together with the judge's opening remarks, sufficiently inform jurors about the nature of their role and what they can and cannot do.

However, there may be cases where, because of publicity, media interest, concern about jury interference or the like, a judge may consider giving the jury a document to be referred to during the judge's opening remarks which deals with some of the following:

- The respective role of judge and juror.
- The nature of a criminal trial.
- The onus and standard of proof.
- The importance of not discussing the trial with any person outside the jury.
- That jurors should discuss the case only in the jury room, and with all jurors.
- The duty of jurors to bring irregularities in the conduct of the trial to the judge's attention.
- Reporting any jury/juror's misconduct to the judge.
- The prohibition against independent enquiry and investigation, with particular emphasis upon the use of the internet.
- The need to ignore media reporting.
- The principal issues in the case.
- Details about the charge, the crown particulars and the elements of the offence.

It is a matter of discretion and practice for individual judges and it may depend on the nature of the charges and the complexity and scope of the case but some judges also like to provide the jury with a separate document that contains the fundamental

principles which apply to a criminal trial together with details of the charge, particulars (obtained from the Crown) and the elements of a defence at the outset of the trial. Others prefer to wait until their summing up to do this. Some do not provide any document at all.

Even if there are no particular concerns about the misunderstanding of the jury's role or jury interference, a judge may consider it appropriate to give the jury a document to accompany their opening remarks which might include all or some of the above points.

From July 2023, a pamphlet entitled "Your Primary Responsibilities as a Juror" which contains a number of the points set out above, was distributed to all registries in Queensland. A copy of this document is available to judges to provide to empanelled jurors.

If a judge wishes to give a jury a document during their opening remarks (or at any time during the trial), it is prudent for the judge to provide the document to counsel beforehand and to invite submissions on it before it is given to the jury. Any documents provided to the jury will need to be marked for identification in the trial.

Pre-Arraignment – pre-trial review: potential matters to raise with the parties

Again, individual practices vary but ordinarily it assists in the efficient running of the trial for the trial judge to review the trial (in open court) weeks or days prior to the listing and even again on day one of the trial (prior to the panel being brought into court), for the purpose of ascertaining from counsel some or all of the following matters (or any other matters the judge might consider relevant):

- Are there any preliminary issues or pre-trial matters that need to be dealt with in the absence of the jury.
- Is it a re-trial? And if it is, is it necessary to tell the jury panel/jury that it is a re-trial in accordance with **Direction 22 – Retrial Warnings** (it may not always be necessary to do so – in some cases it might be considered information that could be perceived to prejudice the defendant).
- Updated time estimate for the trial.
- Special witness orders.
- Witnesses giving evidence remotely or by telephone.
- Crown particulars.
- Any issues with documents earlier provided to the parties the judge proposes to hand out during the opening remarks.
- Is it possible (and often it is not) to identify the real issue in the trial.
- Bail orders.
- Whether the defence intends to give a reply to the crown opening: see the further reference to this issue under the heading "Prosecution and defence openings at the outset of the trial".
- Any covid/health protocols.

- Raise with Crown that when names of witnesses are being read out to the jury that they mention names of any others who may be involved or are mentioned in evidence but may not be witnesses. This can be most important in regional centres.
- When it is convenient to take the first break (i.e. after introductory remarks, part way through those remarks – varies on the availability of witnesses, nature of the trial and the judge).

Once all this is done and the parties are ready to proceed have the bailiff bring in the jury panel. Around this time or earlier, the judge or associate should ascertain from the bailiff whether (after the jury selection process) the remainder of the panel will be required in another courtroom or if they are no longer required that day.

Opening the court

The Bailiff opens court (if it is not already open).

The practice for dealing with applications for excusal and for fining jurors who do not attend varies and depends on the individual judge and individual registry practice.

Sometimes a judge deals with any renewed applications for excusal:

- The associate hands the juror's card to the judge and the affected panellist comes to the bench to discuss the matter.
- The court microphone should be muted whilst the issue is discussed with the juror.
- If excused, the associate writes the name, number and period of excusal in the notebook and on the jury form and removes the panellist's card.

Some judges (again this depends on the judge and registry practice) also deal with jurors who have failed to attend court in response to a summons. See s 28(2) of the *Jury Act*. If a judge chooses to do so, see as an example of such an order **Appendix A.**

Prosecution and defence counsel announce their appearances (again), as they may have already done this during the earlier review. It is important that they do so in the presence of the jury panel.

The interpreter is sworn, if necessary. Provisions in relation to interpreters have now been incorporated into the *Criminal Practice Rules 1999* (Chapter 11, part 2 - commencing at rule 54AA, and Schedule 5A - code of conduct for interpreters. These new rules commenced on 24 May 2024. See **Direction 21 – Interpreters and Translators**).

The prosecutor mentions indictment – either by presenting it or advising that it is already before the court (or, by asking for its return for the purposes of amendment).

The associate hands indictment to judge for perusal.

Early identification of impartiality and jury attendance issues

Note: in exceptional cases (i.e. trials that are factually and exceptionally confronting or graphic, a lengthy trial, or some re-trials), a judge might consider it appropriate to raise issues of impartiality (as set out under the heading "Additional matters regarding the trial and impartiality") at this point. If this course is proposed it should be raised with the parties first (perhaps as part of the pre-arraignment, pre-commencement of trial issues).

If this exceptional course is adopted the trial judge might consider it appropriate to say something along the following lines:

> **"The trial relates to [**insert**] (**for example, the death of [X] at [X] on [X date]**).**
>
> **The defendant is charged with [**X**].**
>
> **[**He/she**] will shortly be called on to formally plead to that charge on the indictment. A jury of [**insert**] will then be empaneled.**
>
> **As you are in the panel here in the Court room your name and number may be called. Before we do that, I want to ensure that you are able to serve on this jury if called."**

The judge would then address all or some of the matters set out under the heading "Additional matters regarding the trial/impartiality" or any other matters the judge determines are relevant to the particular case.

If after this process the panellist is excused, the associate writes the name, number and period of excusal in the notebook and on the jury form and removes the panellist's card.

The judge then says we will now proceed with the trial, or with the arraignment of the defendant(s).

Arraignment

The associate hands the indictment to the judge for perusal.

The Judge says: **"arraign the defendant"** and hands the indictment to the associate, who arraigns in accordance with s 597C of the *Criminal Code* and r 46 of the *Criminal Practice Rules* 1999.

Section 597C(2) permits a plea to any number of counts to be taken, with consent, at one and the same time on the basis that the plea to one will be treated as a plea to

any number of similar counts on the same indictment. Subject to that, the associate adopts the following procedure (for a single defendant):

Associate: **"[**Name**], you are charged that on [**date**] at [**place**], you … [**continue from indictment**]."**

"[Name**], how do you plead, guilty or not guilty?"**

Defendant: **"Not guilty." (**Or otherwise as the case may be, for example, a plea of double jeopardy or which challenges the jurisdiction**).**

The associate turns to the judge and repeats the plea given by the defendant, for example:

"Not guilty, Your Honour".

If there is more than one count, the associate will continue with:

"You further stand charged, that … [continue from indictment**]".**

"[Name**], how do you plead, guilty or not guilty?"**

If there are alternative charges, after reading the first charge and taking the plea to that charge, state:

"In the alternative you are charged that … [continue from indictment**]."**

"[Name**], how do you plead, guilty or not guilty?"**

If there is more than one alternative charge, continue with:

"Further in the alternative, you are charged that … [continue from indictment**]"**

Where the prosecution refuses to accept a plea to a lesser or alternative offence, the court may either:

1. stand down the count the subject of the plea, with the prosecution proceeding only on the principal count, and if an acquittal results, then accept the plea on the lesser charge; or
2. leave both counts to the jury, directing on the use which may be made of the guilty plea as an admission: see *R v Rogers* [2013] QCA 52 and *Collins v The Queen; ex parte A-G* [1996] 1 Qd R 631 at 640.

If there is more than one defendant, the associate goes through the whole indictment for each (taking counts individually) in turn.

Where on arraignment a defendant fails to plead to the indictment, [his/her] silence usually operates as a plea of not guilty: s 605 *Criminal Code*.

Jury empanelment

The judge directs the associate to empanel the jury and inform the defendant of [his/her] right to challenge.

The associate addresses the defendant in accordance with r 47 of the *Criminal Practice Rules* 1999:

> **"[**Name/s**], these representatives of the community whom you will now hear called may become the jurors who are to decide between the Prosecution and you on your trial.**
>
> **If you wish to challenge them, or any of them, you, or your representative, must do so before the bailiff begins to recite the words of the oath or affirmation."**

The associate addresses panel members:

> **"Members of the jury, please answer to your names".**

The associate draws cards in accordance with the following procedure:

- The associate places the jury cards of eligible jurors into the barrel.
- After spinning the barrel, the associate takes out a card.
- The associate calls the number, pauses, then calls the name.
- If a juror is challenged or stood by (*see below*), the associate puts the card for the juror aside in the appropriate pile.
- If a juror is sworn, the associate notes the number in [his/her] notebook and gives the card to the judge.
- When 12 jurors are empanelled, the associate sits down and leaves the cards alone.

Challenges to jury members

In a criminal trial, the prosecution and defence are entitled to eight peremptory challenges.

If there are two or more defendants, each defendant is entitled to the number of peremptory challenges allowed to the defence (i.e. 8 each – if 2 defendants – 16 in total). The prosecution is entitled to an equal number of peremptory challenges as are available to all defendants (i.e. 16 for 2 defendants) (s 42(5)) of the *Jury Act*).

If reserve jurors are required, the prosecution and defence are entitled to:

a) for 1 or 2 reserve jurors: 1 additional peremptory challenge;
b) for 3 reserve jurors: 2 additional peremptory challenges.

For the rules governing challenges for cause, see ss 43, 47 of the *Jury Act*.

It is necessary for an effective challenge (whether by the defendant or by [his/her] counsel) that the challenge be audible to the court: *R v Shambayati* [2016] QCA 100 at [16]. See also ss 39, 41 of the *Jury Act*.

Jury impartiality: judge's remarks to the jury after empanelling

After the jury is empanelled, and before the balance of the panel is released, the judge usually says:

> **"Jury members, and those of you who have not been selected, may I please have your attention.**
>
> **The defendant in this case is [**name of defendant**]. [**He/she**] is charged with [**Describe offence, including name of complainant**].**
>
> **This trial is likely to run for [**insert**], maybe [**insert**] days. Sometimes trials go faster, sometimes they take longer.**
>
> **The Crown prosecutor will now read out the names of all the prosecution witnesses and any other names of people who might be involved in this matter. Please listen carefully to see if you recognise any of them."**

After names have been read out by Crown prosecutor:

> **(**Even if the judge has already done this earlier before the empanelment process, it remains necessary to raise the issue of impartiality again at this point**)**.
>
> **"You will appreciate how important it is that all members of a jury are impartial and that our community sees that you are impartial. You may know something about the defendant, or a witness, or somebody connected with them and feel that your knowledge means that you could not be completely impartial or that others might suspect that you are not impartial.**
>
> **Or, there may be some other reason why you feel you could not be completely impartial."**
>
> **(**Note: the nature of the alleged offence might affect a juror's ability to be completely impartial – an obvious example is alleged sexual offences committed upon children. In such a case, a trial judge may specifically refer to the nature of the offence in the course of this inquiry, or depending on the case, any relevant matters under the heading "additional matters regarding the trial and impartiality" if they were not covered earlier**)**.
>
> **"It is important that anything which might adversely reflect on the fairness of this trial is cleared away before the trial starts. If you are concerned about anything like this – or, even if you are uncertain about something that you know or feel which might affect your impartiality – please raise**

your hand now and in turn I will ask you to come forward to the bench and I will speak to you privately with my microphone muted before I decide what to do."

Additional matters regarding trial and impartiality

Depending on the nature of the trial, some judges might consider expanding on the above and addressing some or all of the following issues about the trial and impartiality at this point (or as stated above, in exceptional cases, at the pre-empanelment stage).

Re-trial

If it is a re-trial and the judge has raised the issue with both sides in the absence of the jury panel (as part of the pre-trial issues as discussed above) and the parties agree or the judge determines after hearing from them it is necessary to say something about that fact, the judge may find it appropriate at this point to also say:

"This is a retrial. Retrials occur for a number of reasons and you should not speculate as to why that occurred. It has no ongoing relevance."

See **Direction 22 – Retrial Warnings**. If relevant, this direction should also be repeated as part of the summing up:

"It is vitally important that any potential juror is able to bring a completely independent mind to bear on this case. If you have formed a view about [X**] because of any press reports you may have read or if you know anything about this case because of something said by a neighbour, friend or a potential witness you may feel that you cannot bring an independent mind to bear on this case."**

"In addition, there <u>may be personal reasons</u> which may cause you to wonder if you can perform all of the duties of a juror in a case like this."

For example, some or all of the following might be relevant to mention:

- If the evidence is graphic: give some detail.
- If it is a long trial: "**This trial will last for [**estimate of time**] - it may not end therefore until around [**date**] or for some unseen reason it may take longer than expected. As a juror, you will be required to attend every day, Monday to Friday without interruption."**
- Except for emergencies we cannot adjourn to allow you to attend a medical appointment or a school concert.
- You will have to have the ability to listen for hours on end to evidence and to concentrate for long periods.
- You may have a disability or a limitation due to education or personal background which may make you feel you cannot perform your functions as a juror.

- You will have to be able to work with others in a group and you may feel concerned by the closeness of the arrangements over an extended period of time.

Discharge of Juror

The judge may discharge a juror if there is reason to doubt their impartiality. The procedure is as follows:

- A juror who signifies that they may have a problem should be invited to approach the bench. The associate hands the juror's card to the judge and the affected juror or panellist comes to the bench to discuss the matter with the judge in private (remembering to have the microphone muted).
- The court microphone is muted for the conversation between judge and juror because the reason may be private and embarrassing to the juror (e.g. as a victim of a sexual offence). As such it should not be discussed with counsel.
- The judge will decide whether the juror should be discharged.
- Depending on the issue the judge will determine if the issue should be raised with counsel in court and should do so at the first available opportunity in the absence of the jury and the jury panel.
- For example, if the juror discloses that [he/she] knows a witness or party, submissions should be sought from counsel as to whether the juror should be discharged.
- If a substitute juror is sworn, that juror should be asked if they heard and understood the enquiry concerning impartiality.

Replacing a juror during the empanelment process

Where one or more reserve jurors has been selected and one of the first 12 is excused during the empanelment process and another juror is selected from the panel, that replacement juror takes the place of the excused juror: see s 46(3) of the Jury Act and *R v MacGowan* [2014] QSC 277.

Post-Empanelment

Having ascertained from the bailiff whether the rest of the panel is required elsewhere, the judge either directs them to go with the bailiff to another court or informs them that the panel is no longer required that day. Further, the judge reminds the panelists that they should keep themselves informed as to when next they are required to attend.

Note: some judges also take the opportunity to thank the panel and remind them that jury service is a vital function performed by members of the community and that it is integral to the administration of criminal justice in this State; and that the court very much appreciates their preparedness to serve the community in this way.

Defendant placed in the charge of the jury

After jury selection is completed, the judge tells the jury that the trial will now proceed and the judge then says to the associate:

> **"Place the defendant in the charge of the jury"**.
>
> **(**The associate then says to the jury**)**:
>
> **"Members of the jury, please answer to your names. [**Read out the jurors' names in the order sworn in**].**
>
> **Members of the jury, [**name/s**] is/are charged that on [**date**] at [**place**] [**he/she/they**] [**read the short form of the charge from the coversheet**].**
>
> **To [**this/these**] charge/s [**he/she/they**] say/s that [**he/she/they**] is/are not guilty. You are the jurors appointed according to law to say whether [**he/she/they**] is/are guilty or not guilty of the charge. It is your duty to pay attention to the evidence and say whether [**he/she/they**] is/are guilty or not guilty. Members of the jury, as early as is convenient, you must choose a person to speak on your behalf. You may change the speaker during the trial and any of you is free to speak."**

The Judge asks the bailiff to make the proclamation as to witnesses.

The Judge asks the associate to swear the bailiff.

Note: some judges might consider it appropriate to give their remarks to jury about selecting a speaker (as follows) at this point. Many others chose to incorporate this spiel as part of their opening remarks. See **Direction 4A – Judge's Opening Remarks**.

Selecting a speaker/foreperson:

> **"Although you have just heard my Associate say that you should select a jury speaker 'as soon as convenient' that does not have to happen immediately. You will find a brochure about jury service in the jury room and in it there are some notes about the speaker's (sometimes called 'the foreperson's') role.**
>
> **Their job will include communicating with me about any questions or concerns you may have during the trial and, at the end of the trial, telling the court what your verdict is. As the brochure mentions, your speaker may also play a useful part in guiding your discussions in the jury room.**
>
> **The choice of speaker you make early in the trial is not final. You can, as a jury, change your speaker at any time. And your speaker is not your leader,**

or boss, and has no more rights or powers than any of you. You are all equal; it is just that your speaker is given some extra tasks."

Depending on the case, some judges consider it appropriate to have a short adjournment after empanelling and if so, they say words along the following lines (note: other judges take a short break after the opening remarks or at a convenient point during the opening remarks):

> **"Before the trial starts, we will have a short break of about 10 minutes. You may let family or work associates know that you have been selected for this jury and the duration of the trial. As I have already told you although we cannot give any guarantees, the trial is expected to last about [**expected duration of the trial**]. During this break, you'll be taken to your jury room where you can meet your fellow jurors, and settle in.**
>
> **When you return, I will tell you some things about your role in this trial as jurors, and explain the trial procedure."**

Judge's opening remarks

For the relevant statutory requirements and a sample body of opening remarks, see **Direction 4A - Judge's Opening Remarks**.

Media relations

Media enquiries

The SDLCS Principal Information Officer (PIO) manages media enquiries about individual court matters.

The PIO's contact details are: 3738 7640, Level 10, QE II Courts of Law; or MediaSDC@justice.qld.gov.au.

The PIO may consult with judges and their associates for assistance with media enquiries about specific court matters, where the information is not available in the QWIC database or further clarification is sought, e.g. non-publication orders, request to record and broadcast judgments and judicial photo requests.

Journalists should not contact judges and associates directly with their enquiries. If contact is made, journalists are to be referred to the PIO in the first instance.

Associates should notify the PIO of any non-publication orders to ensure timely, same-day dissemination to court reporters and their chiefs of staff.

Media reporting of court matters

Journalists are guided by the following Queensland Court media resources available on the courts' website: www.courts.qld.gov.au/court-users/media. These include:

- media court identification cards for use in Brisbane CBD court buildings;
- practice directions about the use of electronic devices in the courtroom, and filming outside the QEII Courts of Law:
    - Supreme Court 2014/08 Electronic devices in courtrooms
    - District Court 2014/10 Electronic devices in courtrooms
    - Supreme Court 2014/17 - Queen Elizabeth II Courts of Law Supreme Court, Brisbane Accessways to remain clear
- how to apply to access court files;
- how to apply to record and broadcast sentencing remarks;
- how to apply to access exhibits for publication;
- links to the Queensland Sentencing Advisory Council's Court Reporting Guide and Sentencing Guide.

A remote viewing room is located on level 10 of the QEII Courts of Law, for use by media during high-profile matters as approved by the presiding Judge.

All major media outlets (ABC, News Corp, AAP, Nine Network, Seven Network and Network Ten) have access to office facilities located on levels 8 and 9 of the QEII Courts of Law.

Media monitoring

The PIO provides a media monitoring service to all judges and associates. The PIO can also provide copies of individual items of interest and reports on all media coverage about a specific court matter. Contact the relevant head of jurisdiction and the PIO with any concerns about courts media coverage.

Social media

Queensland Courts operate the following X (formerly Twitter) accounts:

- @SupremeCourtQLD — Supreme Court of Queensland
- @DistCourtQLD — District Court of Queensland
- @MagsCourtQLD — Magistrates Court of Queensland.

These accounts are managed by the PIO, in accordance with the Courts' social media disclaimer: www.courts.qld.gov.au/about/social-media.

Image consent

Judges should contact the PIO should they wish to provide their photograph to an external organisation for courts promotional purposes. The approved photograph, its intended use and the judicial consent will be recorded. The PIO can take judicial photos if required.

Procedure during the trial

Prosecution and defence openings at the outset of the trial

As to the Crown's right to an opening of the evidence: see *Criminal Code*, s 619(1).

As to the right of the defence to present an issues opening at the start of the trial after the Crown opening see: *R v Nona* [1997] 2 Qd R 436 and *R v Oulds* (2014) 244 A Crim R 443; [2014] QCA 223.

Prosecution and defence cases

At the conclusion of the prosecution case, the associate or the judge (if the judge prefers) addresses the defendant (or, where more than one, the first named on the indictment) as follows (see r 50 of the *Criminal Practice Rules*):

> **"The prosecution having closed its case against you, I must ask you if you intend to adduce evidence in your defence. This means you may give evidence yourself, call witness/es, or produce evidence. You may do all or any of those things, or none of them."**

If the first defendant adduces evidence, the associate calls upon the next defendant named in the indictment at the end of that defendant's case, and so on.

Note: ordinarily, the order of cross-examination follows the order of the names of the defendants on the indictment.

After all the evidence has been adduced, it may be appropriate for the judge to check if the prosecution proposes not to adduce rebuttal evidence. See *Kern v The Queen* [1986] 2 Qd R 209, 211-212; *R v Chin* (1985) 157 CLR 671; *R v Soma* [2001] QCA 263; (2001) 122 A Crim R 537.

Then discuss with the lawyers, in the absence of the jury, any special directions likely to be required in the summing-up and the nature of the cases the prosecution and the defence propose to develop in address.

The order of addresses is prescribed by s 619 of the *Criminal Code*. Where the defendant is undefended and does not adduce evidence, the prosecutor has no right of reply unless [he/she] is a Crown law officer: s 619 *Criminal Code.*

Before the jury retires to consider its verdict, the bailiff is sworn in as the jury keeper by the associate, if that has not already occurred.

Appellate Authority on the Role of a Prosecutor and the Limits of a Closing Address

Role of the prosecutor

A prosecutor's closing address may be robust and firm, but it must be fair.

A prosecutor's address does not need to be staid and the case law permits "flourishes", but they must not inflame a jury's emotion or prejudices.

The unique role of a prosecutor was summarised by McMurdo P (with whom Morrison JA and Atkinson J agreed) in *R v Gathercole* [2016] QCA 336 at [49], citations omitted:

> "It is well established that in conducting an Australian criminal trial, which is both accusatorial and adversarial, the prosecutor has a duty not to obtain a conviction at any cost but to act as a minister of justice. The prosecutor's role is to place before the jury the evidence the prosecution considers credible and to make firm and fair submissions consistent with that evidence but without any consideration for winning or losing. The central principle is that the prosecution case must be presented with fairness to the accused. Unfairness may arise from the manner in which the prosecutor addresses the jury."

A longer statement of the role of a prosecutor is set out in *R v Smith* [2007] QCA 447 at [38] by McMurdo P, with whom Keane JA and Daubney J agreed.

The limits of trial advocacy: closing address

The New South Wales Court of Criminal Appeal, in *Livermore v The Queen* [2006] NSWCCA 334; (2006) 67 NSWLR 659 (at [31]), identified a number of matters in a prosecutor's address which can lead to a miscarriage of justice:

i. A submission to the jury based on material which is not in evidence.
ii. Intemperate or inflammatory comments, tending to arouse prejudice or emotion in the jury.
iii. Comments which belittle or ridicule any part of an accused's case.
iv. Impugning the credit of a Crown witness, where the witness was not afforded the opportunity of responding to an attack upon credit.
v. Conveying to the jury the Crown Prosecutor's personal opinions.

Illustrative cases

<u>Submissions based on material not in evidence and personal opinions</u>

In *R v Callaghan* (1993) 70 A Crim R 350, 356; [1993] QCA 419; [1994] 2 Qd R 300, the Court of Appeal held that:

> "…it is not appropriate that Crown Prosecutors use the dignity of their office in order to 'tell' a jury something that is not in evidence. It should not be forgotten that whether the address is to a judge or to a jury, counsel's role is to make submissions, not express personal opinions or enter the fray as a contestant."

<u>Intemperate or inflammatory language</u>

In *R v Smith* (2007) 179 A Crim R 453; [2007] QCA 447 McMurdo P (with whom Keane JA and Daubney J agreed) said (at [39]-[40]):

> "In determining whether to allow an appeal on the basis of an inflammatory jury address by a prosecutor, the critical question is not whether the prosecutor's remarks were improper but whether they may have improperly influenced the jury so as to cause a miscarriage of justice: *R v M and R v McCullough*. Central to that question is the underlying right of an accused person to a fair trial according to law…"
>
> "An intemperate and improper prosecution address can result in a miscarriage of justice and lead to the setting aside of a conviction; it is important a prosecutor's jury address does not distract from the true issues in the trial: *R v Freer and Weekes*. (Citations omitted)."

Comments which belittle or ridicule any part of the accused's case

While putting the Crown case to the jury, advocates must not ridicule an accused's case.

In *Hughes v The Queen* [2015] NSWCCA 330; (2015) 93 NSWLR 474 the New South Wales Court of Criminal Appeal considered 27 comments from the prosecutor's final address which the applicant submitted were inappropriate.

Phrases that the Court held were acceptable included:

- characterising the evidence of an accused an "inherently unreliable";
- submitting that the accused was attempting to "desperately and artificially" distance himself from the complaints;
- that he had "got away with his crimes for years";
- that his evidence was "thoroughly unsatisfactory"; and
- submitting that the evidence of the complainants was "utterly convincing" and "disturbing".

The Court held the following remarks were not appropriate:

- the use of the words "depravity", "horrible" and "haunting" – for being loaded with emotional connotations;
- submitting that a submission by the accused's counsel was "actually just there to distract you";
- describing the evidence of the accused as "a complete load of rubbish" – this was belittling of him; and
- referring to the accused being taken "off script".

Duty not to undermine the judge's ruling

Counsel must not undermine a judge's ruling in a closing address.

In *R v Lewis* [1992] QCA 223; [1994] 1 Qd R 613 Macrossan CJ said (at [627]):

> "Counsel should not suggest or endeavour to hint to a jury that the trial judge's rulings on law are wrong or that they disagree with them…"

This sentiment was also emphasised by Pincus JA (at [646]):

> "It is indeed manifest that every member of the Bar must absolutely accept the judge's directions to the jury on the law, from which it follows that there is an obligation not to put to the jury arguments against those directions."

Relevant cases where a conviction has been set aside because of a prosecutor's improper final address

R v Smith (2007) 179 A Crim R 453; [2007] QCA 447: impugning the credit of crown witnesses (security guards), where those witnesses were not afforded an opportunity to respond to the attack on their credit, amounted to a miscarriage of justice.

R v Gathercole [2016] QCA 336: the appellant had been convicted of murder. The only issue was the appellant's intention. He accepted that he had unlawfully killed the deceased. The prosecutor, in his closing address, relied upon the accused's mental health vulnerability in his arguments about his intention. The accused had not obtained treatment for his mental health issues, had stopped taking his medication and had previously attempted suicide. The prosecutor submitted to the jury that the fact that the appellant had previously attempted suicide reflected, in effect, the little value he placed on human life – suggesting that that was relevant to whether or not he formed an intention to kill.

The appellant argued (at [42]) that:

> "…There was no logical connection between the despair and depression which may have driven the appellant to attempt suicide in the past and his state of mind when he killed the deceased. It was not evidence relevant to his intention to kill or do grievous bodily harm to the deceased. The prosecutor took unfair advantage of the evidence of the appellant's vulnerable mental condition to make illegitimate and prejudicial submissions to the jury. There was a risk that the jury may have been wrongly persuaded by them."

The Court agreed (at [52]), concluding that the prosecutor's submissions in relation to the appellant's history of depression were

> "…illogical, unfair and concerning as they encouraged the jury to follow animpermissible path of reasoning."

R v PBC [2019] QCA 28: The appellant was convicted of indecent treatment and rape. At trial he argued that the alleged conduct was fabricated because there were similarities between the complainant's description of the alleged conduct and the

complainant's description of consensual sexual activity with a person other than the appellant.

In addressing the jury, the prosecutor stated that:

- the similarities were the result of the "sexualisation" of the complainant by the appellant;
- the conduct of the appellant in relation to the consensual sexual activity had a "very plausible explanation"; and
- the jury could infer that the complainant "had applied her experience of sex with the appellant in choosing "the same position'" during the consensual sexual activity. That is, the consensual sex was said to be probative of the appellant's guilt.

The Court said at [38] that "[t]he prosecutor's argument was more serious than an 'advocate's flourish'; there was a real risk that this argument wrongly influenced the verdict, resulting in a miscarriage of justice."

Adjournment of trial

As a general rule, once a jury has been empanelled and the hearing of evidence has commenced it is most undesirable that there should be any prolonged adjournment of a criminal trial: see Gibbs J in *R v Hally* [1962] Qd R 214 at 220.

However, as noted in *R v Miller* [2007] QCA 373; (2007) 177 A Crim R 528 at [3], a trial judge has power to adjourn a criminal trial at any time after the accused has been put in charge of the jury, at least up until the jury retires to consider its verdict.

There may be many causes for such an adjournment. Illness, unavailability of a witness, and weather conditions not permitting a juror to get to the court are but a few examples of why such an adjournment may become necessary.

The length of the adjournment must however not be so long as to prejudice the fair trial of the accused.

Whether an adjournment prejudices the fair trial will be a question to be answered in the context of each case. A lengthy adjournment may have the effect of altering the essential accusatory nature of a criminal trial, with its focus on oral evidence and the impression gained of the witnesses, particularly where credibility features prominently and may have the effect of disrupting the integrity of the criminal trial process so that a fair trial cannot be ensured: *R v Miller* [2007] QCA 373; (2007) 177 A Crim R 528.

Discharging a juror

Section 33 of the *Jury Act* enshrines the common law principle that conviction for an offence should be the decision of a jury of 12. However, that principle is qualified by s 56 of the *Jury Act*, pursuant to which a judge may discharge a juror without discharging

the whole jury if in the judge's opinion the juror becomes incapable of continuing to act as a juror.

The circumstances calling for the exercise of the discretion may vary. For a discussion of the procedures to be followed see: *R v Roberts* [2005] 1 Qd R 408 and *R v PAR* [2015] 1 Qd R 15. Disclosure of the jury's interim votes or voting pattern is not necessary to enable a judge to reach a view on whether to discharge the jury under s 60(1) of the *Jury Act*. See also *Smith v The Queen* (2015) 255 CLR 161;[2015] HCA 27 at [49].

The judge has a discretion under s 57 of the *Jury Act* to direct (where there is no reserve juror) that the trial continue with the remaining 11 jurors where a juror was discharged under s 56. Nevertheless, the exercise of that power has to be balanced against the fundamental right of an accused person to a trial by a jury of 12 persons: *R v Hutchings* [2007] 1 Qd R 25; *R v Shaw* [2007] QCA 231; (2007) 48 MVR 245.

It is plainly desirable that a judge exercising the powers to discharge a juror and the power to proceed with a jury of less than 12 members does so in unmistakeable terms: *Wu v The Queen* [1999] HCA 52; (1999) 199 CLR 99 at [103]. Ordinarily that will be made by the judge making two separate orders.

The exercise of the discretion to proceed with less than 12 jurors is to be approached consistently with the principles enunciated in *Wu* with the reasons for the exercise of the discretion clearly identified. Guiding considerations are the fair and lawful trial of the defendant, with relevant considerations including the primary right to be tried by a jury of 12, the burden on the defendant of delay in the trial, the consequences of delay to others, including witnesses, the expense to the community and the nature of the charge. See also *R v Hutchings* [2007] 1 Qd R 25; *R v Shaw* [2007] QCA 231; (2007) 48 MVR 245 and *R v Walters* [2007] QCA 140.

Replacing discharged juror with reserve juror

If a juror has been discharged, then that juror is to be replaced with one of the reserve jurors (if there is more than 1). See s 34(4) of the Jury Act, which provides that the reserve juror (of 2 or more) to take the place of the discharged juror on the jury "must be decided by lot or in another way decided by the judge". See also the discussion in *R v RBK* [2023] QCA 185 at [62] to [70].

Jury Notes and Aids

Any jury notes should be marked for identification for the purposes of the record.

In *R v Lorraway* [2007] QCA 142, the Court of Appeal stated that trial judges who receive a jury's written request for redirection should ordinarily read it into the trial record and then mark it for identification, directing that it be placed on and remain on the court file until the expiry of the appeal period or the determination of any appeal.

Similarly, a copy of any jury aids or documents given to the jury to assist them should be marked for identification and directed to be placed on and remain on the court file: see *R v Beattie* [2008] QCA 299; (2008) 188 A Crim R 542 at [31].

Where a juror's note raises an issue or issues that could be material to or affect the jury's consideration of the case, the judge should reconvene the court in the presence of the defendant and the prosecutor, initially in the absence of the jury. The judge should then read into the record the note or that part of the note that was material to or related to the jury's consideration of the case.

If it concerns information confidential to the jury room, such as voting figures, that part of the note should not be disclosed in open court. See *R v Millar (no 2)* [2013] QCA 29 at [27]. The judge should mark the note as an exhibit for identification purposes and place it on the court file. If it contains confidential information such as voting figures, it should be placed in a sealed envelope and marked not to be opened without an order from a judge before being placed on the court file. The judge should then invite the parties to make submissions as to the appropriate course to be taken. Having informed the parties of the judge's decision as to the appropriate course to take the judge should have the jury return to the court room. The judge should then read the pertinent part of the juror's note to the jury and offer immediate assistance on the particular topic of concern. See *R v Kashani-Malaki* [2010] QCA 222.

An individual juror may ask a question of the judge directly.

Separation of Jury

Pursuant to s 53(7)(a) of the *Jury Act*, after the jury has retired to consider its verdict, the judge may allow the jury to separate or an individual juror to separate from the jury, if the judge considers that allowing the jury or juror to separate would not prejudice a fair trial.

Section 53(7)(b) provides that the judge may impose conditions to be complied with by the jurors or juror. Suggested directions are:

> **"You are now in the process of deliberating on your verdict. I am going to allow you to separate at this point. (**Consideration might be given to imposing the following conditions**):**
>
> 1. **Do not discuss the trial with anyone outside the jury.**
> 2. **Do not conduct any inquiries or independent research about the matters the subject of the trial.**
> 3. **Ignore any press reports or anything else you might hear about the trial.**
> 4. **Report to the judge through the Bailiff any approaches by others outside the jury in relation to the trial.**
> 5. **Do not conduct any further deliberations on your verdict until you are all reconvened together."**

If a juror is permitted to separate for any significant period, the judge should consider whether or not the jury's deliberations should be suspended until that juror returns: *R v Walters* [2007] QCA 140.

Verdict

The amendments to the *Jury Act 1995* make provision for the taking of majority verdicts in certain cases and circumstances. See **Benchbook Chapter 55 – Majority Verdict**.

The judge, having ascertained from the bailiff in open court that there is a verdict, invites the bailiff to bring in the jury. The jury lines up in front of the jury box, usually with the speaker at the end nearest the jury room door.

After the bailiff reports to the judge that the jury is all present, the associate takes the verdict from the jury.

> The associate asks: **"Members of the jury, are you agreed upon your verdict/s".**
>
> Answer: **"[**Yes/No**]."**
>
> The associate then asks: **"Do you find the defendant [**naming him or her where there is more than one**] guilty or not guilty of [**describe the offence**] (**this should be done for each count**)."**
>
> The speaker will say: **"[**guilty/not guilty**]".**
>
> The associate, for each count, repeats the verdict to the judge. After each verdict is reported to the judge, the associate will say to the jury: **"So says your speaker, so say you all?"**.

This occurs for each count and all members of the jury answer in the affirmative to signify that the verdict announced by the speaker is the verdict of all. See further **Benchbook Chapter 23 - General** under the section titled 'Delivering the verdict'. The judge's associate should have regard to the Associates' Manual on taking a verdict.

The judge will then thank and discharge the jury, usually inviting the jurors to remain in court if they so wish or, if they prefer, to disperse.

Conviction and sentence

If the verdict is guilty, the judge tells the associate to: **"Call on [**him/her**] (**this is the allocutus**)."**

Note: to call on "the prisoner" has some potential to seem to prejudge the punishment; cf *R v Williams* [2001] 1 Qd R 212 at 218.

The associate calls upon the defendant by saying: (see *Criminal Practice Rules* 1999 r 51):

> **"[**Full name**], you have been convicted of [**state the offence charged and the words of the indictment or by stating the heading of the schedule form for the offence**]. Do you have anything to say as to why sentence should not be passed on you?" (**When represented the defendant will usually say "No". In such circumstances, the judge may care to add, addressing the defendant**): "I will hear from your counsel".**

For sentence procedure, see Sentencing Benchbook.

The procedure for a change to a plea of guilty during the trial may be adapted accordingly; and see s 631A *Criminal Code*.

Procedure after an acquittal

The judge will say to the defendant:

> **"[**Name**] you have been found not guilty of the [**charge(s)**] of … [**here summarily describe the charges**]. You are discharged."**

The judge also takes the time to thank the jury for their dedicated service as members of the community in a role that is integral to the administration of criminal justice in this State.

Orders for return of exhibits

The judge should make any orders appropriate for the custody or disposal of any exhibits tendered during the trial. See r 55 of the *Criminal Practice Rules* 1999. For example, an order for the return of the exhibit to the party who produced it at the conclusion of the appeal period, if no appeal is lodged.

A Court giving its final decision on an appeal may make the orders it considers appropriate about the return of an exhibit used in the appeal. See r 100 of the *Criminal Practice Rules* 1999.

4.3 Appendix A

[Last reviewed: September 2024]

"Jurors [insert**] have failed to attend as instructed and not communicated a reasonable excuse to the court for their failure to attend. I make the following finding and orders in respect of each juror."**

(1) Pursuant to s 28(2) of the *Jury Act* and subject to the following orders, I find the juror is in contempt and fine the juror [$...**], to be paid no later than the deadline of 4 pm on [**date**].**

(2) Order (1) is vacated in the event that prior to the deadline the juror satisfies the Sheriff the juror has given reasonable excuse to the sheriff for the juror's failure to attend.

(3) If the juror fails to pay the fine by the deadline and has not earlier satisfied the Sheriff per order (2), I by this order vacate order (1) and direct the Sheriff to forthwith refer the juror's apparent breach of s 28(1) of the *Jury Act* to the Commissioner of Police for criminal prosecution.

(4) The Registrar will notify the juror forthwith of these orders by email to the juror's nominated email address, or, if none has been nominated, by post.