Unrepresented Defendant

Legislation

Criminal Code s 619
Criminal Practice Rules 1999 r 50

Commentary

A self-represented defendant must be given sufficient information to enable them to have a fair trial: *MacPherson v The Queen* (1981) 147 CLR 512.

This can extend to advising a defendant of their right to a voir dire, and the advantages and disadvantages: *Foster v The Queen* (1982) 38 ALR 599. There is authority that it may also extend to advising the defendant of any fundamental procedure, or right, which could be advantageous to their defence: *Isherwood v Tasmania* (2010) 20 Tas R 375 at 391; *Andelman v The Queen* (2013) 38 VR 659 at 678.

Special care is required where a co-defendant is represented*: Bellino & Conte v The Queen* [1993] 1 Qd R 521; and see *R v Bell* [2004] QCA 219.

NB:

1. An accused cannot personally cross-examine children under 16, intellectually impaired witnesses, or the victim of a sexual or violent offence: see sections 21L to 21S of the *Evidence Act* 1977;

2. Where the accused is unrepresented and does not adduce evidence, the crown prosecutor (other than the Director) has no right to a final address*: Criminal Code* s 619; *Bellino & Conte v The Queen* [1993] 1 Qd R 521; *R v Wilkie* [1997] QCA 337.

Judge's remarks to defendant

Before jury panel brought into courtroom

> **You have been charged with … and you are here to be tried by a jury on that charge. There are essential elements to that charge which the prosecution must prove beyond reasonable doubt** [detail elements of offence]**.**
>
> **In a criminal trial the burden of proving that you are guilty is placed squarely on the prosecution. That burden rests upon the prosecution in respect of every essential fact that makes up the offence with which you have been charged. There is no obligation whatsoever upon you to prove any fact or issue that is in dispute. You do not have any obligation to call any evidence, or to prove anything.**
>
> **In a criminal trial the judge and the jury have different roles. The jury is the sole judge of the facts; all disputes and differences about matters of fact in the case will be decided by the jury, and not me. Generally, that means that it is entirely up to the jury to decide what evidence they accept, and what they do not accept. I am**

not involved in making decisions about the facts; I am here to be the judge of the law which means that, during the trial, I am required to ensure that all the rules of procedure and evidence are followed and to explain, to the jury, the legal principles which apply to the case. I will give them directions about those principles, and how they should be applied to the issues of fact they have to decide, at the end of the case before they retire to consider their verdict.

My role overseeing the legal aspects of the case may mean that I have to decide a question of law during the trial; for example, if an argument arises about whether particular evidence should be admitted. I may need to hear submissions from the prosecutor, and from you. If that arises it may be necessary to do that in the absence of the jury. That is to prevent the minds of the jurors from being distracted by matters which are irrelevant to their role as the judges of the facts; and you will hear me explain that to the jury later today.

I am now going to bring into court the group of citizens from whom the jury for this trial will be selected. As soon as they are in the court, I will tell you some more things about the way the jury is chosen, and the procedure during the trial including what you may do in your own defence.

After jury panel brought into courtroom

[Name of defendant] **you are to be tried by a jury of twelve chosen from those members of the public who are now here in court in response to jury summonses.**

The name of each person is on a card. The cards will be placed in a barrel and drawn out at random, one by one. As each card is drawn out, the name will be called out, and that person will come forward to the bailiff to be sworn as a juror. Being sworn means that the bailiff will recite the words of the oath, to which the juror says "so help me God", or the juror will read an affirmation.

You may challenge as many as 8 prospective jurors without giving any reason for your challenge. Those are the standard challenges which both the defence and the prosecution have as their right in every trial. If you wish to challenge any particular person, then you should say the word "challenge" before the bailiff begins to recite the oath or the juror commences to read the affirmation.

In addition to those challenges, there is another form of challenge, called "challenge for cause". That is a challenge which can be made only on the grounds that a prospective juror is not qualified by law to act as a juror, or is not impartial.

If you wish to challenge for cause you should do so by saying "challenge for cause" before the individual juror commences to recite the terms of the oath or affirmation. I will then determine the challenge in the absence of the jury panel. You will be required to inform me of the reasons for the challenge and to produce any information or materials you have to support it.

If you wish to challenge the entire jury panel, you must tell me so, and also tell me of your reasons for the objection before any juror is sworn.

Do you understand?

After jury empanelled, but in the absence of the jury

The prosecutor will, when the jury is brought back into court, explain to the jury the nature of the charge(s) and the prosecution case alleged against you. He will then call witnesses, and perhaps produce documents or other material, to seek to prove the charge(s).

You have a right to cross-examine any witness: that is, to ask questions which you think may help to weaken the case against you or to advance your case.[1] They must be questions, not statements or comments. You may, in asking those questions, suggest answers to the witness.

If you have in mind contradicting the evidence of a witness, or later suggesting that the witness is telling lies, you should put your allegations to the witness in the form of questions to give the witness the opportunity to answer your suggestions. If you fail to do so, I may comment on such failure in my summing-up or else permit the prosecution to call further evidence later in the trial.[2]

You are entitled to object to any question asked by the prosecutor if it may be objectionable in law. If you wish to object, for example on some such ground as that the question relates to an irrelevant matter or invites hearsay, you should stand up and say, as soon as it is asked, "I object". I will then hear whatever you want to say about that question. I may, indeed probably will, do so in the absence of the jury. It is not a proper ground of objection that you disagree with the

[1] NB: An unrepresented defendant is not entitled to cross-examine a protected witness; s 21M *Evidence Act* 1977. If the section applies, the judge should inform the defendant of its effect at this stage of the trial: see "Protected Witness".

[2] Cross on Evidence, Australian Ed. at [17460].

evidence. You may object only on legal grounds. If you are in doubt as to your right to object to a question on legal grounds, you may seek clarification from me.

You may also object to the reception into evidence of things tendered by the prosecutor such as documents, photographs, and other things. Here again, if you wish me to rule that such material should not be received, you should stand and say "I object". I will then hear any argument to support your objection. Again, I may do so in the absence of the jury.

After the prosecution has called all the evidence for the prosecution, you may submit that the case should be taken away from the jury on the ground that there is insufficient evidence to justify the defence being called upon to answer the case. If you do not make such an application, or you make the application and it is rejected, you will have the opportunity to present any evidence you wish in answer to the prosecution case. For at the end of the prosecution case, you will be asked by my Associate whether you wish to adduce evidence in your defence.

You may, if you wish, choose not to give or to call evidence.

Alternatively, you may, if you wish, enter the witness box and give evidence, just as the prosecution's witnesses will have done. If you do that, you will be liable to cross-examination by the prosecutor.

You will understand that these are matters you must decide for yourself; they are not matters about which I can give you legal advice.

Whether or not you go into the witness box yourself and testify, you may, if you wish, call witnesses to give relevant evidence. If you do call witnesses, you may ask them questions which do not directly suggest the answer. All such witnesses are liable to cross-examination. At the conclusion of any such cross-examination, you may ask each witness any further questions in order to explain matters touched upon in that cross-examination.

You may also tender for reception into evidence documents or other things which are relevant.

If you will be giving or calling evidence you may, if you wish, first address the jury, outlining the case you intend to present.

When all of the evidence has been presented, you may address the jury, presenting arguments as to why the case against you should not be accepted, or as to why you should otherwise be found not guilty. You may discuss the law and also the evidence already given; but you cannot then introduce new evidence.

If, but only if, you have not adduced evidence, the prosecutor will not address the jury after your address concludes.

If at any stage you want guidance concerning the trial, stand and say "there is a matter I wish to raise in the absence of the jury". I will send the jury out while I deal with it.

If you would like time to think about what I have said, I will allow that. If you would like me to repeat anything I have told you, I will do so if you ask. If you would like me to explain further anything I have said or any other matter concerning the trial, I will do so if you ask.

Do you have any questions?

Special remarks

Admissions

There are other matters I should mention now.

If the prosecution alleges that you have made any admission, that alleged admission is not admissible in evidence unless you made it voluntarily. It is for me, not for the jury, to decide whether any such alleged admission was made voluntarily. If you wish that issue to be canvassed, you should indicate that to me by saying that you wish to raise a matter in the absence of the jury. I will send the jury out and hear you. Similarly, if you wish to suggest that the alleged admissions should not be admitted against you for some such reason as that it would be unfair to do so, or indeed for any other reason, you should say that there is a matter you wish to raise with me. I will send the jury out before hearing you.

Good character

If you contend that you are a person of good character, you are entitled to raise that good character for consideration by the jury. You may do so either by asking appropriate questions of prosecution witnesses or by giving evidence yourself to that effect, or by calling witnesses to give such evidence. However, if you question a witness with a view to establishing that you are of good character, or if you give

evidence of your good character, the prosecution may become entitled to lead evidence that you are not of good character. This might include any criminal record you may have. The same result may ensue if the nature or conduct of your defence is such as to involve imputations on the character of the prosecutor or of any witness for the prosecution [or of any other person charged]**.**

Alibi

If you wish to rely on an alibi – that is, to suggest in evidence that you were not at a relevant place – unless proper notice of the alibi has already been given to the prosecution, you may not rely upon it unless you first obtain my permission to do so. If you want that, you should say so at the end of these remarks.

At end of prosecution case; in absence of jury

[Name of defendant]**, do you remember what I told you at the beginning of the trial concerning your rights now that the prosecution case has been presented? If not, I will repeat what I then told you. If there is any other matter on which you now seek guidance, now is the time to say so.**

…

The jury will now be brought back in. The law requires that I must formally inform you, in the jury's presence, about these matters.

Next step; in presence of jury

NB: Thereafter, in the presence of the jury, the defendant should be addressed in the manner required by rule 50 of the *Criminal Practice Rules* 1999:

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 witnesses, or produce evidence. You may do all of these things, or none of them.