Views and Demonstrations

Legislation – *Jury Act 1995*

> **52 Inspections and views**
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> (1) If, on a trial, the judge considers it desirable for the jury to have a view of a particular place or object, the judge may give the necessary directions.
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> (2) The view must be held in the presence of the judge, and the parties and their lawyers or other representatives are entitled to be present.
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> (3) The validity of proceedings is not affected by contravention of a direction but, if the contravention is discovered before the verdict is given, the judge may discharge the jury if the judge considers the contravention appears likely to prejudice a fair trial.

Commentary

Section 52 *Jury Act* 1995 permits a trial judge to direct that the jury have a view of a particular place or object if considered desirable.

The question of a view is a matter for the exercise of the judge's discretion – see *R v Boxshall* [1956] QWN 45; *R v Lawless* [1974] VR 398; *R v Alexander* [1979] VR 615; *R v Delon* (1992) 29 NSWLR 29 at 34 and *Denver v Cosgrove* [1972] 3 SASR 130. The discretion is a wide one.

In *Alexander,* the Full Court of Victoria held that the following matters should be taken into account:

- Is the request for a mere view, or a demonstration?
- Is it shown that conditions are the same? If not, the exercise might be unhelpful, or misleading.
- If there is to be a demonstration, reconstruction or experiment, can care be taken to ensure that the jurors do not become detectives?

While section 52(1) gives the judge power to give "necessary directions", that power is limited by the proper purposes of a view or demonstration. The directions cannot ignore the adversarial process of the criminal trial. They cannot be used to frame orders for an investigation and demonstration outside the proceedings. That is particularly so when one of the parties objects – see *Knowles v Haritos* (Supreme Court of Victoria, Hampel J, 6734 of 1997, 29/4/98, unreported).

Procedure

There is a distinction between a mere view and a demonstration – see *Cross on Evidence* [1290]; *R v Lawless* [1974] VR 398 at 421.

This distinction is summarised in *R v Alexander* [1979] VR 615 at 631, which was referred to by Wilson J in *Kozul v The Queen* (1981) 147 CLR 221. In *Alexander* McInerney and Murphy JJ in a joint judgment said:

> " … in our opinion it is of vital importance to ensure, particularly when the tribunal of fact is a jury, that a clear distinction be drawn between a view properly so called, and the taking of evidence, whether it be by visual observation, experiment, demonstration or reconstruction.
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> …
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> Once the jurors are asked to make assessments for themselves, to conduct experiments, to use aids such as binoculars, to watch demonstrations or reconstructions, what is occurring is no longer a view as such, but the leading of evidence. When once this takes place, the strictest care must be taken to ensure that judicial procedures are followed and that no miscarriage occurs. There is a much greater risk in our experience that a miscarriage may occur if the jurors are to become sleuths."

The jury must attend together – see *R v Gurney* [1976] Crim LR 567; *Way v Way: Heazelwood* (1928) 28 SR(NSW) 345.

View

A view is an inspection of scenes or objects outside the court - see *Cross on Evidence* [1290]. The nature of a view is explained by the High Court in *Scott v Numurkah Corporation* (1954) 91 CLR 300.

A view must be handled with caution. There must be no conversation between jurors and witnesses, between jurors and an accompanying police officer or bailiff, or between jurors and legal representatives.

A witness who has given evidence at the trial may attend at the view but should make no communication to the jury apart from demonstrating – see *Karamat v R* [1956] AC 256. The better practice is to ensure that witnesses, especially for the prosecution, do not accompany the jury at the view. That practice will prevent the risk of the defendant being affected by unsworn statements out of court – see *R v Ashton* (1944) 61 WN (NSW) 134.

While s 52(2) does not compel the presence of the defendant, the defendant's is entitled to be present – see *R v Crossman* [2011] 2 Qd R 435. The defendant might be able to point out something about which his or her legal advisers are unaware, or note that others are mistaken about something – see *R v Ely Justices*, *ex parte Burgess* [1992] Crim LR 888; *Milat* SC (NSW) Hunt CJ at CL 12-4-96 (unreported). The usual rule is that no view is allowed after the retirement of the jury. However, justice may require exceptions to that usual approach – see *R v Lawrence* (1968) 52 Cr App R 163; *R v Nixon* (1968) 52 Cr App R 218; *Dryburgh v The Queen* (1961) 105 CLR 532; *R v Hamitov* (1979) 21 SASR 596; *R v Paul* [1942] QWN 41.

Demonstration

A demonstration or reconstruction is real evidence. The judge, or jury, can only consider it as real evidence if the parties specifically admit that it should be treated as

a reproduction, or if it is proved by evidence to the satisfaction of the tribunal, that it really did reproduce what the witnesses had attempted to describe – see Fullagar J in *Scott; Quinn & Bloom* [1962] 2 QB 245 at 257; and *Cross on Evidence* [1290]. A demonstration was allowed in *R v Fernandes* (1996) 133 FLR 477.

There may be a difficulty if the jury attempts an experiment in the jury room after seeing a demonstration in the courtroom. The jury can handle the objects which are exhibits for example, to note the weight of a club, or the sharpness of a knife or the pressure needed to pull the trigger of a pistol. The jury can prefer the evidence of the material object to the oral evidence. However, when the experiments conducted by the jury go beyond a mere examination and testing of the evidence and become a means of supplying new evidence, they are impermissible – see *Kozul v The Queen* (1981) 147 CLR 221.

In *R v Koani* [2018] QCA 272, the deceased had been killed with a fatal shot at close range. The defence was that the killing was a terrible accident: the firearm had discharged without the defendant pulling the trigger. The jury were permitted to have the firearm with them during deliberations. The prosecutor invited them to look at the forearm and suggested that they would conclude that a person operating the gun was very unlikely to accidentally discharge it.

The appellant was convicted of murder.

He appealed against his conviction arguing *inter alia* that there had been a miscarriage of justice because the jury were not directed about the limits to which they might use the result of any experiment they conducted with the firearm to determine the issues at trial.

In response to that ground, Sofronoff P said (at [21] – [27]):

> The law relating to the use by a jury of exhibits is not controversial. In another case in which the central issue was the use that could be made by a jury of a gun that had been tendered as an exhibit, *Kozul v The Queen*, the High Court established the following principles:
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> 1 Exhibits are as much a part of the evidence as oral testimony;
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> 2 The jury is entitled to have the exhibits with them in the jury room, to examine them and to have regard to them in reaching a verdict;
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> 3 The jury may touch and handle exhibits;
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> 4 The jury may, "within limits that are readily understood in practice if difficult to define with precision, engage in a limited amount of simple experimentation with them".
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> In *Kozul* the trial judge had invited the jury to "feel it, test it, examine it" and to "test it for yourselves … use your commonsense, in determining whether or not, while it is uncocked some blow to the hand can cause the finger to move that distance back, and the gun to go off".
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> When the case was before the Court of Appeal of New South Wales, Street CJ said:

> "The revolver was properly in evidence. There was expert evidence regarding what was needed to make it discharge. It seems to me no less than common expectation that the jury would try out for itself the propensities of this weapon, its liability to discharge, the ease and difficulty of operating it, and do such other things in relation to it as would enable them to make up their minds as to whether or not the Crown had proved beyond reasonable doubt that this weapon was deliberately discharged by the appellant on the night in question."

Glass JA said that what the judge had asked the jury to do was "to use their own powers of observation with respect to the pistol to estimate the value of the testimony before them and not to carry out experiments of their own for the purpose of gathering additional evidence".

As Gibbs CJ observed, the line may be a difficult one to draw, but the relevant distinction is between, on one side of the line, the use of an exhibit in order to appreciate better the value of testimony, and on the other side of the line, the use of an exhibit to generate further evidence out of the hearing and view of the court.

Stephen J said that it was proper for the trial judge to tell the jury that they might experience for themselves trigger pressures of twelve and four pounds by pressing the trigger while the revolver was both cocked and uncocked. Gibbs CJ made the same point and observed that in "experimenting in this way the jury are doing no more than using their own senses to assess the weight and value of the evidence".

That was precisely the position here …

… This was nothing more than a case of a very common kind in which a jury is asked to consider oral evidence and rival theories of the case by reference to the jury's own observations and judgment about a piece of tangible evidence …

Suggested Direction

Before View

> **Arrangements have been made for you to be taken to the location where the [**relevant event**] occurred. While you are away from the court you will be under the charge of police officers/bailiffs who will supervise your journey.**
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> **You are being taken to view this location because counsel believe that it will assist you to understand the evidence in a realistic setting and, therefore, aid you in resolving the issues that will ultimately be placed before you. It can be used by you to assist in understanding and applying the evidence you have heard; but it is not itself evidence.**

While you are away from court, do not discuss the case in any circumstance where your discussion can be overheard by a person who is not a member of the jury. You will appreciate that it is best if all jury discussions take place in the privacy of the jury room.

If you have a question about the law or the evidence or need additional information about anything while we are at the location, I will attempt to assist you.

Reduce your request to writing – pass it on to the police officer/bailiff. He/she will give it to me. If necessary, if I consider the question an appropriate one, I will direct it to the relevant person at a convenient time.

After View

Earlier we attended the location where the [relevant event**] occurred.**

As I said: what you saw at [the scene/location**] was not evidence. It can be used by you to assist in understanding and applying the evidence you have heard; but it is not itself evidence.**

[Adapt the following to the circumstances of the case.**] The witnesses have described the scene to you and photographs were tendered, with [**the witness**] pointing out any differences of detail between the time of the event and the time of their taking. That is the evidence you should act on, and you should not substitute what you saw when you went to the scene for it. Instead you should use that view to assist your understanding of the evidence.**

In contrast, by agreement, the witness, (X) showed you while we were at the scene [e.g. where he/she was standing at the time he/she says he/she saw the event**]. What he demonstrated is part of the evidence. So there is a difference; seeing the location is an aid to you in understanding the evidence, but what (X) as a witness actually did and said at the scene is as much a part of the evidence as what he said here in the courtroom.**