

## Evidence of Defendant in Respect of a Co-Defendant

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**What the defendant (insert name) has said while giving evidence may be used not only for or against him but also for or against the other defendant(s).<sup>1</sup>**

**However, to the extent to which that evidence implicates (name of other(s)) in the (describe offences), scrutinize it carefully. There is a danger that, in implicating (name of other(s)), (defendant witness) may have been concerned to shift the blame.<sup>2</sup>**

**This warning is restricted to those parts of the evidence of (defendant witness) which inculpate (name of other(s)) in the offence: it does not apply to the evidence as it relates to (name of witness)'s own case.**

*Warning: do not give the direction in the second paragraph without giving the direction in the third.*

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<sup>1</sup> *R v Nessel* (1980) 5 A Crim R 374 at 383.

<sup>2</sup> There are difficulties in formulating a direction where an accomplice testifies in the defence case. It is contrary to *Robinson v The Queen* (1991) 180 CLR 531 to direct that a defendant's evidence may be subjected to particular scrutiny because of his interest in the outcome. To do so is to undermine the presumption of innocence. Accordingly, when a defendant who gives evidence implicates a co-defendant, the nature and extent of an accomplice warning, *if any*, cannot be answered without reference to the circumstances of the particular case: *Webb v The Queen* (1994) 181 CLR 41 at 65-66, 92-95. But if some warning is to be given, the judge must not permit the jury to believe that it might attach to the defendant's evidence in his own case: *Webb & Hay*, 165. See also *R v Skaf, Ghanem, and Hajeid* [2004] NSWCCA 74 at [159] – [168]; *R v Johnston* [2004] NSWCCA 58 at [141]; *R v Lewis & Baira* [1996] QCA 405; *R & G v The Queen* (1995) 63 SASR 417; and *R v Rezk* [1994] 2 Qd R 321 at 330.