

Alternative Charges¹

Commentary

In *R v Bickell* [2020] QCA 37, Morrison JA (in dissent as to the outcome, but alone in considering this ground) summarised the principles relevant to leaving alternative charges to the jury as follows –

- a) the duty of a trial judge with respect to alternative verdicts does not require an alternative verdict to be left to a jury in every case; rather, the question is whether an instruction on an alternative verdict is necessary to secure the fair trial of the accused, according to the circumstances of the particular case;²
- b) the rationale for directing a jury about alternative verdicts comes from a broader perspective than a consideration of the interests of the accused; public interest in the administration of justice is best served if a trial judge leaves to the jury, subject to any appropriate caution or warning, that irrespective of the wishes of trial Counsel, any obvious alternative offence which there is evidence to support;³
- c) the conduct of a fair trial may require an alternative verdict to be left although it is not requested by Counsel for the accused;⁴
- d) it would not be conducive to a fair trial to leave an alternative verdict where the defence case may have been differently conducted had the possibility of that verdict been one which was raised at the outset of the trial;⁵
- e) the need to advise a jury about an alternative lesser offence comes from the risk, in the particular case, that a defendant who has committed only the lesser offence will either be wrongly convicted of the more serious offence or acquitted altogether;⁶ and

¹ As to the obligation to direct on lesser offences open on the evidence, see *R v MBX* [2014] 1 Qd R 438; *R v Chan* [2001] 2 Qd R 662; *Gilbert v The Queen* (2000) 201 CLR 414; *R v Willersdorf* [2001] QCA 183 at [17]-[20]; *R v Le Doan* (2001) 3 VR 349 at 355-361; *R v Kane* (2001) 3 VR 542; *Harwood v The Queen* (2002) 188 ALR 296; [2002] HCA 20 at [17]- [19] but see *R v Stevens* [2004] QCA 99 at [79], [99], those paragraphs being a useful caution against complicating a summing-up unnecessarily by directing on alternatives that are not realistically indicated by the evidence; *R v Perdikiyiannis* (2003) 86 SASR 262 at 268.

² *James v The Queen* (2014) 253 CLR 475; [2014] HCA 6, at 491 [38]

³ *James v The Queen* at 487 [27], adopting *R v Coutts* [2006] 1 WLR 2154, 2167 at [23]

⁴ *James v The Queen* at 491 [38].

⁵ *R v Holzinger* [2016] QCA 160 at [31].

⁶ *R v Holzinger* at [31].

- f) the facts and circumstances of the particular case need to be considered and the essential inquiry is on the fairness of the trial.⁷

Sample direction where alternative charges are before the jury

Charges 1 and 2 (shortly describing them) are alternatives. You may not therefore find the defendant guilty of both.

You may consider the possible verdicts in whatever order you wish but keep in mind that when you finish your deliberations you will be required to give your verdict first on the count of (describe more serious charge). It will be only if you reach a verdict of not guilty of that count that you will be asked to return another verdict.⁸

I suggest that you may first wish to consider (describe more serious charge), which is the more serious. If you find the defendant guilty of that offence, you do not need to consider the other(s). But, if you find the defendant not guilty of (describe more serious offence), then consider the alternative charge of (describe it). If your verdict is guilty of (describe more serious charge), you will not be asked to return a verdict in respect to the other charge. If, however, your verdict in respect of (the more serious event) is not guilty, then proceed to consider the other charge. Any verdict, whatever it is on any count, must be unanimous.⁹

Special direction where the alternative counts are stealing and receiving¹⁰

If you are not satisfied beyond reasonable doubt that the defendant is guilty of stealing, and are not satisfied beyond reasonable doubt that the defendant is guilty of receiving, but are satisfied beyond reasonable doubt that the defendant either stole the property or received it knowing it to be stolen, you should return as your verdict: guilty of stealing or receiving the property [or part of it] but unable to say which.¹¹

⁷ *R v Holzinger* at [29].

⁸ See *Stanton v R* (2003) 198 ALR 41 at [38], [69]. A judge may make a suggestion as to what the jury might find a convenient approach to their deliberations, but must not mandate the order in which to deliberate on the charges.

⁹ See *Stanton v R* (2003) 198 ALR 41 at [22] – [25] – ‘...if the jury were unable to agree...on...a verdict of not guilty of ...murder, the proper course was to discharge the jury’ – *Stanton* at [22].

¹⁰ When such a verdict is returned, the judge is required by s 568(8) to enter a conviction for the offence for which the least or lesser punishment is provided.

¹¹ See *Williams* (2000) 116 A Crim R 552; *Gilson v The Queen* (1991) 172 CLR 353; *R v Marijancevic* (2001) 3 VR 611. For an alternative formulation: **You are entitled to deliver any one of the following verdicts:**

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- 1. Not guilty; or**
 - 2. Guilty of stealing; or**
 - 3. Guilty of receiving; or**
 - 4. Guilty of stealing or receiving but we are unable to say which.**