

IN THE MATTER OF

DIRECTOR OF PUBLIC PROSECUTIONS REFERENCE  
NO. 1 OF 2017

RESPONDENT'S/ACQUITTED PERSON'S

OUTLINE OF ORAL SUBMISSIONS



10

**PART I: SUITABILITY FOR INTERNET PUBLICATION**

1. The Respondent certifies that this submission is in a form suitable for publication on the internet.

**PART II: OUTLINE OF THE PROPOSITIONS TO BE ADVANCED BY THE RESPONDENT IN ORAL ARGUMENT**

2. At common law, at any time after the close of the prosecution case, the jury has the right to return a verdict of not guilty.

- See, for example:

20

- R v Prasad (1979) 23 SASR 161, at p. 163;
- R v Pahuja (1987) 49 SASR 193, at pp. 201 & 217 – 219;
- R v Reardon & Others (2002) 186 FLR 32, at paras. [152] – [153].

3. The modern English authorities are to the same effect as the Australian authorities.

- Att-Gen's Ref. (No. 2 of 2000) [2001] 1 CrAppR 503, at para. [21];
- R v Speechley [2004] EWCA Crim 3067, at para. [51];
- R v Collins & Others [2007] EWCA Crim 854, at paras. [48] – [56];
- cf. R v H(S) [2011] 1 CrAppR 14, at paras. [49] & [51].

30

4. It necessarily follows that at common law the trial judge is empowered, in an appropriate case, to inform (or remind) the jury that this right may be exercised by the jury; see the cases cited above.

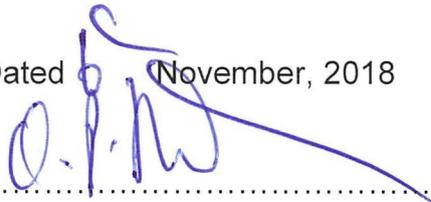
5. Such a reminder is neither a direction to acquit nor an invitation to acquit. In Australia the most appropriate language to be used to describe such an exercise of power by the trial judge is that the trial judge may, in the exercise of his/her discretion, "extend a Prasad-invitation". That is to say, the trial judge may invite the jury to consider its position; see at para. 7

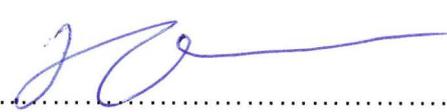
below. (And when a "Prasad – invitation" is extended, the directions will be short and simple.)

6. This power has been exercised by trial judges from time to time in Australia. The holding in Prasad has never been doubted by any intermediate appellate court in this country.
7. The key ingredients or elements of a "Prasad–invitation" can be listed:
  - (i) a direction that the jury has the right in every criminal trial, if the jury chooses to exercise that right, to bring in a verdict of not guilty upon, or subsequent to, the closing of the prosecution case;
  - 10 (ii) a direction which makes clear that the jury, and only the jury, determines or decides the facts;
  - (iii) brief directions concerning the burden and standard of proof;
  - (iv) a direction as to the element(s) of the offence charged which is/are in issue;
  - (v) a brief outline or summary of the evidence which relates to the element(s) of the offence charged which is/are in issue;
  - (vi) a direction that the jury may return and state to the judge that the jury does not wish to return a verdict of not guilty at that stage, but instead wishes to hear more in relation to the charge.
- 20 8. When a "Prasad–invitation" is expressed as described in para. 7 above:
  - (a) the jury will not perceive the trial judge to be either inviting the jury to acquit or hinting that an acquittal is the appropriate or correct verdict; and
  - (b) the function or role of the jury as the fact-finding tribunal will neither be usurped nor compromised in any way.
9. The exercise of the common law power to extend a "Prasad–invitation" is not incompatible with the function performed by a trial judge in determining a submission of no case to answer made on behalf of an accused person. The function performed by the trial judge is directed at the question  
30 whether the jury "could, as a matter of law, convict the accused person on the evidence adduced during the prosecution case". The function performed by the jury is different, namely, whether the jury "should, on the evidence adduced during the prosecution case, convict the accused person".

10. It will rarely, however, be appropriate for the trial judge to exercise his/her discretion to extend a "Prasad-invitation". It will (generally) only be appropriate to do so where the evidence adduced by the prosecution in support of the prosecution case is lacking in substance and reliability, is not cogent and is not complex, the issue(s) to be determined is/are clear, narrow, simple and straightforward and the law applicable to the determination of the issue(s) is likewise simple and straightforward.
11. In the light of the above, a trial judge would not extend a "Prasad-invitation" in a long running case or in a case which was complex, that is, a case which, for example, involved multiple accused, difficult concepts as to criminal liability and/or required the giving of complex directions concerning the limited purpose(s) to which evidence could be put.
12. The modern English authorities are to the same effect.
13. In Victoria, the common law power described above has not been abrogated or limited by statute. Indeed, the common law power to extend a "Prasad-invitation" has been preserved by statute; see at s. 213(2) of the Criminal Procedure Act, 2009 (Vic.).
14. The entitlement set out within s. 234(1) of the Criminal Procedure Act is not absolute. That entitlement has no work to do if, for example, the trial judge accedes to a submission of no case to answer; see at ss. 226(a) & 241(2)(b) of the Criminal Procedure Act.
15. Nothing contained within either the Juries Act, 2000 (Vic.) or the Jury Directions Act, 2015 (Vic.) bears on the above. Neither of those Acts constitutes a code.
16. This Appeal should be dismissed.
17. Whether or not this Appeal be dismissed, there should be an order for costs in favour of the Respondent/Acquitted Person in circumstances where the Appellant has agreed to pay the reasonable costs of the Respondent.

Dated 6 November, 2018

  
.....  
**O. P. Holdenson**  
**Counsel for the Acquitted Person**

  
.....  
**J. O'Connor**  
**Counsel for the Acquitted Person**